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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.*

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RECORD NO. 022023

OLD DOMINION ELECTRIC COOPERATIVE, et al.,

*Appellants,*

v.

VIRGINIA STATE CORPORATION COMMISSION, et al.,

*Appellees.*

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**JOINT APPENDIX**  
**Volume II**

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W. Bradford Stallard  
Eric R. Thiessen  
PENNSTUART  
Post Office Box 2288  
Abingdon, VA 24212-2288  
(276) 628-5151  
*Counsel for Appellant*  
*Northern Virginia Electric Cooperative*

Michael L. Hern  
John A. Pirko  
James Patrick Guy, II  
T. Borden Ellis  
LeCLAIR RYAN, P.C.  
4201 Dominion Boulevard, Suite 200  
Glen Allen, VA 23060  
(804) 968-2984  
*Counsel for Appellants*  
*Old Dominion Electric Cooperative, et al.*

E. Duncan Getchell, Jr.  
James C. Dimitri  
Shannon O. Pierce  
McGUIREWOODS LLP  
901 East Cary Street  
Richmond, VA 23219  
(804) 775-1000  
*Counsel for Appellee*  
*Virginia Electric and Power Company*

John F. Dudley  
William H. Chambliss  
Sherry H. Bridewell  
Wayne N. Smith  
Office of the General Counsel  
State Corporation Commission  
Post Office Box 1197  
Richmond, VA 23218  
(804) 371-9671  
*Counsel for Appellee*  
*Virginia State Corporation Commission*

---

Continuation of Counsel on Inside Cover

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John D. Sharer  
Managing Counsel  
Law Department - PH-1  
Dominion Resources Services, Inc.  
Post Office Box 26532  
Richmond, VA 23261-6532  
(804) 819-2271  
*Counsel for Appellee*  
*Virginia Electric and Power Company*

Steven E. Gordon  
Assistant U.S. Attorney  
2100 Jamieson Avenue  
Alexandria, Virginia 22314  
(703) 299-3817  
*Counsel for Appellees*  
*Smithsonian Institution*  
*and U.S. General Services Administration*



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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.

For a Petition for Declaratory Judgment  
And Motion for Injunction

The complete transcript of the testimony and  
other incidents of the above-captioned matter when heard  
on October 25, 2001, before the Honorable Deborah V.  
Ellenberg, Chief Hearing Examiner for the State  
Corporation Commission, Richmond, Virginia.

Reported and transcribed  
by: Susan E. Moser

## APPEARANCES:

Honorable Deborah V. Ellenberg,  
Chief Hearing Examiner

Sherry H. Bridewell, Esquire,  
and  
Wayne N. Smith, Esquire,  
Counsel to the Commission

William Bradford Stallard, Esquire,  
and  
JoAnne L. Nolte, Esquire,  
Counsel to Northern Virginia  
Electric Cooperative

E. Duncan Getchell, Jr., Esquire,  
Kodwo Ghartey-Tagoe, Esquire,  
and  
John D. Sharer, Esquire,  
Counsel to Virginia Electric  
and Power Company, d/b/a  
Dominion Virginia Power

James Patrick Guy, II, Esquire,  
and  
John A. Pirko, Esquire,  
Counsel to Old Dominion Electric  
Cooperative and the Virginia,  
Maryland and Delaware Association  
of Electric Cooperatives

Steven E. Gordon, Esquire,  
Counsel to the U. S. Government,  
Smithsonian Institution, and  
U. S. General Services Administration



I N D E X

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1                   NOTE: The matter is called to be  
2                   heard at 10:00 o'clock a.m., October 25, 2001,  
3                   and begins as follows, viz:

4  
5                   THE BAILIFF: Today's docket consists  
6                   of PUE010512, Commonwealth of Virginia, ex rel.  
7                   Northern Virginia Electric Cooperative v.  
8                   Virginia Electric and Power Company, d/b/a  
9                   Dominion Virginia Power, Smithsonian Institute,  
10                  and U. S. General Services Administration.

11                  William Bradford Stallard and JoAnne  
12                  L. Nolte, counsel for Petitioner.

13                  Sherry H. Bridewell and Wayne N.  
14                  Smith, counsel for the Commission.

15                  John D. Sharer, Duncan Getchell and  
16                  Kodwo Ghartey-Tagoe, counsel for Virginia  
17                  Electric and Power.

18                  Steven E. Gordon, counsel for United  
19                  States Government, Smithsonian and General  
20                  Services Administration.

21                  John A. Pirko and James Patrick Guy,  
22                  II, counsel for Old Dominion Electric  
23                  Cooperative and the Virginia, Maryland and  
24                  Delaware Association of Electric Cooperatives.

25                  The Honorable Deborah V. Ellenberg,



1 Chief Hearing Examiner, presiding.

2 HEARING EXAMINER Thank you, and good  
3 morning everyone.

4 COUNSEL IN UNISON: Good morning.

5 HEARING EXAMINER: I had quite a bit  
6 of reading to do this morning before court  
7 convened, but I think I have caught up with all  
8 of you, and we're ready to proceed.

9 On September 17, 2001, Northern  
10 Virginia Electric Cooperative filed a Petition  
11 for Declaratory Judgment and a Motion for  
12 Injunction. Therein, NOVEC petitioned the  
13 Commission to declare that the proposed sale of  
14 electric energy by Virginia Electric and Power  
15 Company to the Smithsonian Institution and/or  
16 the U. S. General Services Administration for  
17 consumption at a facility to be located in  
18 Fairfax County, Virginia violates Virginia law  
19 and the property rights of NOVEC under the  
20 certificate of public convenience and necessity  
21 granted to it by the Commission pursuant to the  
22 Utility Facilities Act. The Smithsonian is  
23 building the Steven F. Udvar-Hazy Center,  
24 National Air and Space Museum in Dulles,  
25 Virginia. The Petition alleges that the

1 "footprint" of the facility, and thus the bulk  
2 of the load to be consumed, would be located in  
3 the service territory of NOVEC, but that  
4 Virginia Power intends to serve all of the  
5 electric needs of the facility. The Petition  
6 names Virginia Power, the Smithsonian and the  
7 GSA as Respondents.

8 NOVEC also petitioned the Commission  
9 to temporarily and permanently enjoin Virginia  
10 Power from selling and delivering directly or  
11 indirectly any power to the Smithsonian. NOVEC  
12 had previously agreed to permit Virginia Power  
13 to construct facilities to provide temporary  
14 power to the facility during construction, but  
15 NOVEC seeks the Commission to enjoin Virginia  
16 Power from construction of any permanent  
17 infrastructure. NOVEC asserts in the Petition  
18 that if Virginia Power performs permanent  
19 construction, ratepayers and the respective  
20 public service corporations may suffer higher  
21 costs. Thus, NOVEC seeks an injunction pendente  
22 lite to maintain the status quo while the  
23 Commission considers the evidence and rules on  
24 the merits of this dispute and the propriety of  
25 a permanent injunction.



1                   On October 2, 2001, the Commission  
2                   issued a Preliminary Order in this case.  
3                   Therein, the Commission assigned this matter to  
4                   a hearing examiner, directed several pleadings  
5                   to be filed, including a joint stipulation of  
6                   facts and issues upon which NOVEC and Virginia  
7                   Power could agree and those facts and issues  
8                   upon which they disagree. The Commission also  
9                   scheduled this oral argument on the request for  
10                  the temporary injunction.

11                 Earlier this week, I also granted a  
12                 Motion filed by Old Dominion Electric  
13                 Cooperative and the Association of Virginia,  
14                 Maryland and Delaware Cooperatives for leave to  
15                 participate in this case. And I understand and  
16                 see that they are represented here today.

17                 There appeared to be some confusion as  
18                 to the scope of the request for a temporary  
19                 injunction, but after reviewing NOVEC's  
20                 Memorandum filed this morning, it's clear to me  
21                 that NOVEC does not seek to have the temporary  
22                 power currently provided to the Smithsonian  
23                 interrupted, but rather seeks to enjoin Virginia  
24                 Power from constructing permanent facilities.  
25                 If that understanding is wrong, I expect you to

1 correct, correct it.

2 MR. STALLARD: Your Honor, that is  
3 absolutely correct.

4 HEARING EXAMINER: All right. Thank  
5 you.

6 There is also some disagreement over  
7 the legal standard that the Commission must  
8 apply in considering the request for temporary  
9 injunction. And I expect counsel to address  
10 that standard in your arguments today and to  
11 very clearly and specifically state how both  
12 standards are met or not met.

13 I have an order of presentation which  
14 has been provided and I understand agreed upon.  
15 So -- but before we get started, are there any  
16 preliminary matters that we need to address?

17 Ms. Bridewell.

18 MS. BRIDEWELL: Yes, Your Honor, I  
19 have a very minor preliminary matter.

20 I have handed to the bailiff a package  
21 of the proof of service of process of the  
22 Commission's preliminary order in this matter,  
23 and I would ask that that proof of process be  
24 identified and accepted as an exhibit in this  
25 proceeding.

1 HEARING EXAMINER: We will mark it as  
2 Exhibit A and admit it into the record.

3 Thank you, Ms. Bridewell.

4 MR. GETCHELL: Your Honor, as a matter  
5 of procedure, we did not receive this latest  
6 filing until this morning, and we'd like to have  
7 a right to reply in writing to this latest  
8 submission. Could we have until November 1st?

9 HEARING EXAMINER: First of all, can  
10 you introduce yourself to me. I have a lot of  
11 new faces here, and, you know, I expect you-all  
12 to --

13 MR. GETCHELL: I'm sorry, I'm Duncan  
14 Getchell, for Dominion Virginia Power.

15 HEARING EXAMINER: All right.  
16 November 1st is a little long, given the time-  
17 sensitivity of this request. Today is Thursday.  
18 You have already filed a Memorandum, so I would  
19 expect your response would just be to supplement  
20 your --

21 MR. GETCHELL: Well, they have, they  
22 have, in fact, raised new issues of law, and  
23 they have also filed affidavits and discovery  
24 responses. Purportedly, some of it was filed  
25 last night, but we didn't get it until this



1 morning, and some of it was filed this morning.  
2 There are new matters addressed. But we can do  
3 whatever the Commission obviously wants us to do  
4 in terms of timing.

5 HEARING EXAMINER: All right. I  
6 expect at the conclusion of the argument today  
7 that everyone may want to file one last round in  
8 writing, and we can discuss that after oral  
9 argument. But I certainly will give everyone a  
10 chance to file a simultaneous Memorandum, you  
11 know, after we conclude today, and we can  
12 discuss the timing of that when we're finished.

13 MR. GETCHELL: That's very acceptable  
14 to us. Thank you.

15 HEARING EXAMINER: All right. Thank  
16 you.

17 Any other preliminary matters?

18 All right. Ms. Bridewell.

19 MS. BRIDEWELL: Thank you, Your Honor.

20 May it please the Hearing Examiner, my  
21 name is Sherry Bridewell, and I'm appearing  
22 today with Wayne N. Smith on behalf of the Staff  
23 of the State Corporation Commission.

24 The proceeding before you comes as a  
25 result of a Petition and Motion filed on

1           September 17th by NOVEC, requesting the  
2           Commission to declare that the proposed sales of  
3           electricity by Virginia Power to a museum being  
4           constructed for the Smithsonian Institute  
5           violates NOVEC's property rights under the  
6           certificate of public convenience and necessity  
7           granted by the Commission under the Utility  
8           Facilities Act. That's found at Chapter 10.1 of  
9           Title 56 of the Code of Virginia. NOVEC holds  
10          certificate of public convenience and necessity  
11          No. E-51, which authorizes it to provide  
12          electric service in Loudoun and Fairfax  
13          Counties. NOVEC contends that the "footprint"  
14          of the National Air & Space Museum and the  
15          Steven F. Udvar-Hazy Center, located in Dulles,  
16          Virginia, that the Smithsonian is constructing  
17          is within the Cooperative's service territory.  
18          However, NOVEC concedes at page 6 of its  
19          Petition, paragraph 14, that two-thirds of the  
20          site on which this museum is being constructed  
21          is in Virginia Power's service territory. NOVEC  
22          alleges that it, through Old Dominion Electric  
23          Cooperative, NOVEC's wholesale service power  
24          supplier, requested a new delivery point  
25          pursuant to a Network Operating Agreement

1           between ODEC and Virginia Power. And,  
2           thereafter, NOVEC was advised that Virginia  
3           Power intended to provide electrical service to  
4           the new museum under construction.

5                       According to the Petition, on April 6,  
6           2001 (page 7, paragraph 17 of the Petition),  
7           NOVEC received a letter addressed to ODEC from  
8           Dominion denying the requested delivery point.  
9           The reason for the denial, according to NOVEC,  
10          included the assertion that the Smithsonian had  
11          requested that Dominion provide electric service  
12          and that the Smithsonian facility was largely in  
13          Virginia Power's territory. NOVEC alleges that  
14          Dominion's infringement on NOVEC's certificated  
15          service territory constitutes an actual  
16          controversy, which is solely within the  
17          jurisdiction of the Commission to adjudicate.  
18          NOVEC requests the Commission to enjoin Dominion  
19          from any permanent construction at the  
20          Smithsonian facility. NOVEC states at page 9,  
21          paragraph 30 of its Petition that it has  
22          permitted Dominion to construct temporary power  
23          to the facility. And as you've cleared up this  
24          morning, the temporary power issue is no longer  
25          on the table as far as for purposes of the

1 injunction requested. NOVEC requests, among  
2 other things, an injunction pendente lite to  
3 maintain the status quo and respective positions  
4 of the parties. NOVEC seeks a permanent  
5 prohibitory injunction to prevent Dominion  
6 Virginia Power from constructing facilities and  
7 providing electric service to the Smithsonian.

8 Assistant U. S. Attorney Steven E.  
9 Gordon has prepared the United States' response  
10 to the Commission's October 1, 2001 preliminary  
11 order. And in that response, he notes that the  
12 United States is not subject to suit by a state  
13 regulatory agency. It is my understanding that  
14 the State Corporation Commission is not trying  
15 to exercise jurisdiction over the United States  
16 Government. However, to assist the Commission  
17 in its determination concerning the correct  
18 provider of electricity at issue in this case,  
19 the Smithsonian has filed a response to NOVEC's  
20 Petition. It notes that the center opens in  
21 December 2003 - the centennial of the first  
22 powered flight by the Wright Brothers on  
23 December 17, 1903. The Smithsonian, by counsel,  
24 observes that meeting that date is important to  
25 the industrial and corporate donors who have



1 provided funding for the center's construction;  
2 that the project's critical path for completion  
3 of various phases of construction could be  
4 endangered by scheduling changes; and that the  
5 museum plans to take advantage of the unique  
6 educational opportunities associated with the  
7 centennial of the Wright Brothers' first flight.  
8 The Smithsonian apparently fears that  
9 infrastructure installed in anticipation of  
10 Virginia Power providing service could be  
11 disrupted if the Commission were to issue an  
12 injunction pendente lite that disrupts electric  
13 service or if the Commission holds that NOVEC  
14 should be the exclusive provider of service.

15 Among the milestones for construction  
16 identified in the Smithsonian's response is that  
17 the construction schedule is based, in part,  
18 upon the planned delivery and installation of  
19 the first transformer by November 2001, to make  
20 permanent power available to the Smithsonian's  
21 construction contractor, Hensel Phelps  
22 Construction Co. To permit construction and  
23 start-up of mechanical and electrical equipment  
24 necessary for the construction of the center's  
25 buildings, Hensel Phelps must have the

1 additional power at the latest, according to the  
2 Government, by April 1, 2002. According to the  
3 Smithsonian, Virginia Power has sized its  
4 transformers for the Smithsonian building loads,  
5 and the concrete pads for these transformers  
6 have been designed and installed in accordance  
7 with Virginia Power's requirements. The  
8 Smithsonian contends that should the Commission  
9 conclude that NOVEC is the proper service  
10 provider, it must confirm the calculation or re-  
11 size its transformers, and it may need to  
12 redesign the concrete pads for the transformers.  
13 This, according to the Smithsonian, could  
14 threaten construction completion dates.  
15 Similarly, the ductbank for carrying service  
16 conductors has been designed and installed with  
17 Virginia Power's requirements in mind. NOVEC  
18 must also confirm that the ductbank meets its  
19 requirements. The Smithsonian observes that if  
20 the ductbank does not meet the Cooperative's  
21 requirements, time-consuming and potentially  
22 costly changes to the ductbank may have to be  
23 made, further jeopardizing the construction time  
24 line.

25 Virginia Power has filed an Answer and

1 Counter Petition in this matter. It maintains  
2 that the parcel to be served lies primarily in  
3 its service territory. It contends that the  
4 points of use are wholly or partially in  
5 Virginia Power's territory, and that the  
6 principal structure on the parcel lies partly in  
7 the territory of Dominion Virginia Power and  
8 partly in that of NOVEC. Dominion further  
9 asserts that the customer, the Smithsonian,  
10 desires service from Virginia Power, and that  
11 Virginia Power is better equipped with existing  
12 facilities to serve the customer. Virginia  
13 Power denies that the Commission has  
14 jurisdiction to enter an order declaring that  
15 Dominion has wrongfully and tortuously  
16 interfered with NOVEC's contractual rights. It  
17 also denies that the Commission has jurisdiction  
18 to declare that Virginia Power must pay damages  
19 sustained by NOVEC because of Virginia Power's  
20 conduct. Virginia Power further denies that the  
21 Commission has jurisdiction to resolve NOVEC's  
22 delivery point claim and asserts that that claim  
23 lies within the jurisdiction of the Federal  
24 Energy Regulatory Commission.

25 Virginia Power includes a Counter

1           Petition and Affidavit that maintains, among  
2           other things, that the Smithsonian will be  
3           constructing several points of use in its  
4           territory, a hangar building partially located  
5           in Virginia Power's territory, a parking lot in  
6           Virginia Power's territory, and an IMAX theater  
7           that, according to Virginia Power, lies wholly  
8           or mostly within Virginia Power's territory. It  
9           maintains that the Smithsonian has not  
10          manipulated its land holdings or point of  
11          delivery to change service territories, that the  
12          customer desires service from Dominion, and that  
13          Virginia Power's facilities are closer than  
14          NOVEC's. It asks the Commission to declare that  
15          it has the legal and statutory right and  
16          obligation to provide electric service to the  
17          entire Smithsonian facility and that Virginia  
18          Power may honor the Smithsonian's request for  
19          permanent electric service.

20                 To assist the Commission and you, Ms.  
21          Ellenberg, in its resolution of this matter, we  
22          would offer the following analytical framework.  
23          Like you, we got a flurry of affidavits and  
24          legal documents close to as 9:00 o'clock this  
25          morning before the hearing, so while this does



1 not represent a complete body of research, it  
2 may be helpful to you as you try to parse  
3 together where we go from here in delineating  
4 resolution to this complaint.

5 When a statute empowers a court to  
6 grant injunctive relief, the party seeking an  
7 injunction doesn't need to necessarily -- does  
8 not have to establish traditional prerequisites.  
9 All they need to show is proof that the statute  
10 has been violated. That case law is from  
11 Carbaugh v. Solem, 225 Va. 310 (1983), as well  
12 as the Virginia Beach SPCA v. South Hampton  
13 Roads case, 229 Va. 349 (1985), cited in the  
14 brief that arrived this morning on behalf of  
15 NOVEC.

16 Let's look at what you've got before  
17 you. Virginia Power admits that it is a public  
18 service corporation. Virginia Code Section  
19 12.1-13 grants the Commission power to issue  
20 temporary and permanent injunctions. The  
21 Commission has the authority -- jurisdiction by  
22 injunction to restrain a public service  
23 corporation's violation of the law as provided  
24 in Virginia Code Section 56-6.

25 Now, here is where the rubber meets

1 the road. Has there been shown a clear  
2 violation of law? In the analysis that I went  
3 through at the speed of sound this morning filed  
4 by NOVEC, at that point in the argument, NOVEC  
5 goes to the cases the Commission has recently  
6 decided, particularly Prince George Electric  
7 Cooperative for a declaratory judgment, the case  
8 decided June 25, 1999 -- excuse me -- '98, in  
9 Case No. PUE960295, as well as Kentucky  
10 Utilities Company d/b/a Old Dominion Power  
11 Company. That was a Petition filed -- the  
12 Commission's final order came out on March 31,  
13 1999. The case number is PUE960303. Because of  
14 the importance of these cases to the disposition  
15 of this particular complaint, we would ask that  
16 you take judicial notice of these cases. I have  
17 hard copies available for counsel. They're also  
18 recited in the SCC's official publication,  
19 specifically, Prince George's was cited and  
20 printed in the 1998 SCC Annual Report at 344,  
21 and the Kentucky Utilities case may be found at  
22 the 1999 SCC Annual Report at page 368.

23 HEARING EXAMINER: We certainly will  
24 take judicial notice of those cases, and I  
25 already have copies, but I appreciate --

1 MS. BRIDEWELL: These are available  
2 for counsel if they would like to refer to them.

3 So the question is, has there been  
4 shown a violation of the law? Well, the  
5 Commission has issued certificates of public  
6 convenience and necessity to both Virginia Power  
7 and NOVEC. In this instance, the whole site at  
8 issue straddles both of those certificates of  
9 public convenience and necessity. From a 50,000  
10 mile high treetop level, on that point alone,  
11 there has been no showing of a violation of law.  
12 Here is a huge site which crosses both service  
13 territories. Both of these utilities will claim  
14 under these cases they have the right to serve  
15 the, the customer, because that site is in -- is  
16 within their service territory.

17 More specifically, if you are to find  
18 though -- and, again, on the cases we were just  
19 talking about, one of which I know is very  
20 familiar to you, because you were the examiner  
21 in that case, Prince George -- if we were to  
22 find that the point of use is in one or the  
23 other's, that would be, that would be a factor  
24 to, to tip, I guess, the scales for one or the  
25 other to be entitled to serve or not to serve.

1 But that isn't the end of the story. As the  
2 Commission has recognized in the 1999 case, the  
3 Kentucky Utilities, it's going to look at the  
4 practical realities of what, what is, what is  
5 brought forward. In Petition of Kentucky  
6 Utilities Company, d/b/a Old Dominion Power  
7 Company, Case number PUE960303, at the 1999 SCC  
8 Annual Report at 376, the Commission found that,  
9 "The relevant provisions of the Virginia Code,  
10 Sections 56-265.3 and 56.265.4, provide for  
11 exclusive service territories that should be  
12 afforded significant protection." The  
13 Commission, citing the Prince George case,  
14 determined that, "If customers are allowed to  
15 manipulate delivery points to avoid the electric  
16 supplier for their area, the utility would be  
17 left with an obligation to serve its entire  
18 service territory, but with no assurance it  
19 would be allowed to do so." The Commission,  
20 again relying on Prince George, opined that,  
21 "Such circumstances make planning for and  
22 serving the remaining customers more difficult  
23 and can increase costs for both the utility and  
24 its remaining ratepayers," taken at the 1999 SCC  
25 Annual Report at 376. The Commission followed



1           that statement by saying it was not adopting an  
2           absolute test and would consider the practical  
3           realities of each situation.

4                    You could find that there are  
5           distinctions among the Prince George case, the  
6           Kentucky Utilities case, and the case now before  
7           you. There has been no allegation as in Prince  
8           George that the customer, the Smithsonian, has  
9           selectively manipulated its site to receive  
10          service from one utility rather than another.  
11          The thrust of the argument made by NOVEC is that  
12          Virginia Power has somehow manipulated its  
13          delivery points to, to establish the right to  
14          serve. Again, that is a factual issue that  
15          remains in dispute and will have to be  
16          determined. Both NOVEC and Virginia Power agree  
17          that the Smithsonian site overlaps their service  
18          territories, for which both utilities hold  
19          certificates of public convenience and  
20          necessity. Nor is there an allegation that  
21          Virginia Power's facilities duplicate those  
22          already in place by NOVEC, as there was in the  
23          Kentucky Utilities case. Those are distinctions  
24          that occur to me right off the bat, Your Honor.

25                   Now, let's assume for the sake of

1 argument that you determine that you want to use  
2 the traditional equity -- equities kind of test  
3 here. The, the case law in Virginia is such  
4 that since the Commission is sitting as a court  
5 of record in determining this complaint, you  
6 could, could determine that the same standard as  
7 the Circuit Courts should be applied under these  
8 circumstances. And, indeed, NOVEC makes the  
9 argument that, well, even if you don't agree  
10 with us that this absolute right to injunction  
11 exists, we win under the balancing of equities  
12 test. That test is articulated in Virginia Code  
13 Section 8.1-628, which says you look at the  
14 equities before you grant an injunction.

15 The Virginia Circuit Courts who have  
16 interpreted that particular statute have tended  
17 to apply essentially the same standard for  
18 issuing preliminary injunctive relief as is used  
19 in the federal standard. And that standard  
20 requires a balancing of the following four  
21 factors. They are: likelihood of success on  
22 the merits; irreparable injury to the plaintiff  
23 should the relief be denied; the absence of  
24 substantial harm to other interested parties in  
25 the proceedings; and absence of significant harm

1 to the public interest. An article I would  
2 commend to you on this issue is T. Folk and J.  
3 Sabourin, Jr., "Preliminary Injunctions, Getting  
4 There the First with the Most," February 1995,  
5 article found at Volume 43, Virginia Lawyer, at  
6 16. The same standard was also used by a  
7 Virginia Circuit Court in Reynolds v. Mitchell,  
8 found at 1999 Westlaw 970326 No. HK-1726.

9 The two most important factors when  
10 you're applying that test, Your Honor, are  
11 probable irreparable injury to the plaintiff  
12 without the entry of an injunction and the  
13 likely harm to the defendant if an injunction is  
14 entered. And the way the Court has analyzed  
15 these is that those two scales slide inversely  
16 to one another. If you have a clear irreparable  
17 harm to the plaintiff, you have to show, I  
18 guess, less likely -- less harm to the defendant  
19 if the injunction is entered.

20 Let's take a look under what we know  
21 about this case thus far as to what, what, if  
22 anything, we can show about irreparable harm  
23 here. One of the potential harms identified by  
24 the NOVEC is that there's ratepayer harm. When  
25 we first got the Petition, Staff first got it,

1           there was no quantification of that harm. On  
2           October 24th at 4:46, we received a number of  
3           affidavits, and among them one from Mr. Gilbert  
4           Jaramillo, an affidavit, Manager of Account  
5           Services for NOVEC, where he estimates that the  
6           Smithsonian load would be approximately five  
7           megawatts based on a load factor of 70 percent,  
8           and at paragraph 8, estimates that the providing  
9           electricity to the Smithsonian facility would  
10          result in gross revenue to NOVEC of  
11          approximately \$1.4 million, based on similar  
12          applicable rate schedules. Here's what's  
13          missing, Your Honor. What that doesn't tell you  
14          is which rate schedules were used to develop  
15          those numbers.

16                 NOVEC goes on to say that NOVEC would  
17          expect to make a net profit from supply and  
18          distribution of energy to the Smithsonian in  
19          excess of \$100,000. Again, this particular  
20          affidavit does not state whether the net profit  
21          is based on the assumption that it gets the  
22          delivery point which it has been denied or not.  
23          The underlying cost rolled into that net profit  
24          has not been identified in that particular  
25          affidavit. And that could be important in

1 deciding the credibility or not of, of those  
2 numbers.

3 A potential harm -- and, additionally,  
4 one thing we need to, I guess, acknowledge right  
5 off the bat, the Smithsonian is an arm of the  
6 federal government, and rates and service  
7 contracts between utilities like NOVEC and  
8 Virginia Power are not subject to the  
9 Commission's jurisdiction pursuant to statute  
10 under Virginia Code Section 56-234. If NOVEC  
11 were to come to the Commission in a rate case,  
12 the revenues from this contract would not be  
13 considered for making rates because they would  
14 be considered nonjurisdictional, beyond the  
15 control of the Commission.

16 A potential harm has been identified  
17 by both Virginia Power and the Smithsonian if  
18 the injunction is granted; that is, disruption  
19 of the construction schedule for the museum with  
20 the attendant opportunities for increased costs  
21 for contractor claims. And, I guess, sort of  
22 the bottom line, Your Honor, is in both the  
23 Prince George case and the Kentucky Utilities  
24 case, no injunctions were issued. Those cases  
25 went to trial. We heard evidence. We made our



1           determinations. And in the Prince George case,  
2           when a determination was made that the wrong  
3           person was about to offer service, the  
4           Commission directed a transfer of the  
5           facilities. And there's been no showing or  
6           address as to why a transfer of facilities could  
7           not later be done as we've done in the Prince  
8           George case. And that's a factor we may want to  
9           consider as you consider the need for an  
10          injunction.

11                       Finally, NOVEC's Petition contains a  
12          number of other requests for relief. That is,  
13          that, you know, we decide that Dominion may not  
14          unreasonably deny the requested delivery point  
15          to ODEC, the wholesale supplier of NOVEC; that  
16          the Commission declare any contracts between  
17          Virginia Power and the Smithsonian unlawful; and  
18          that the Commission enter an order declaring  
19          that Dominion has wrongfully and tortuously  
20          interfered with NOVEC's contractual rights; and  
21          there's a request for damages.

22                       ODEC is a wholesale supplier of  
23          electric service for NOVEC, and there has been  
24          no jurisdictional basis laid by either ODEC or  
25          NOVEC thus far as for the Commission's ability

1 to resolve the delivery point claim. It's  
2 posited that it is part of its Network Operating  
3 Agreement. No allegation has been made that  
4 that agreement was filed here, that it is  
5 subject to the Commission's jurisdiction, or  
6 that it is enforceable by the Commission. And  
7 those are important things to consider as to  
8 that claim.

9 In addition, with regard to the  
10 tortuous interference request for damages, the  
11 Commission's jurisdiction does not extend to  
12 matters relating to private property rights.  
13 And the case on that is much older than I am,  
14 it's Newport News Light & Water Co. v. Peninsula  
15 Pure Water Co., 107 Va. 695 (1908), an oldie,  
16 but a goodie. Indeed, the Virginia Supreme  
17 Court has held that while the Commission has  
18 broad legislative powers, it does not have an  
19 attendant power to adjudicate a common law  
20 contract claim which affects rates. The APCO v.  
21 John Stewart Walker case, 214 Va. 524 (1974).  
22 In that case, the Supreme Court said, no, you  
23 may not adjudicate a common law contract  
24 involving an individual who was seeking to have  
25 underground electric service installed. The

1 issue of damages was tried before a Circuit  
2 Court, not before the Commission.

3 Finally, NOVEC indicates that it wants  
4 us to -- wants the Commission to declare that  
5 any transactions or contracts between Virginia  
6 Power and the Smithsonian are unlawful under the  
7 Utility Facilities Act, and are, therefore,  
8 unenforceable or void. The Utility Facilities  
9 Act deals specifically with the allocation of  
10 service territories. There are no provisions in  
11 that Act allowing the Commission to award  
12 damages as a result of abuse by one utility of  
13 the other. There may be common law or civil  
14 remedies for, for those actions, such as loss of  
15 revenues and so forth. That doesn't belong to  
16 the State Corporation Commission specifically  
17 under the Utility Facilities Act.

18 This, this sort of summarizes my  
19 presentation, Your Honor. I'm sorry it was so  
20 sporadic, but I was trying to respond to some of  
21 the pleadings and affidavits we received very  
22 late in the day. And I'm hoping that this will  
23 be of some value to you as you make your  
24 decision.

25 HEARING EXAMINER: Thank you, Ms.

1           Bridewell.

2                   MS. BRIDEWELL: Thank you.

3                   HEARING EXAMINER: All right. Mr.  
4           Stallard.

5                   MR. STALLARD: Your Honor, thank you.  
6           My name is Brad Stallard, and I'm here to  
7           represent NOVEC today, along with JoAnne Nolte.

8                   Your Honor, I apologize to the  
9           Commission, Staff counsel, and the parties in  
10          this case about the lateness of our submissions.  
11          We had hoped to get that filed and served  
12          yesterday afternoon, and we ended up hunting fax  
13          machines down everywhere. We were faxing things  
14          to our Abingdon office to have faxed to the  
15          folks. And a machine broke, and we had a lot of  
16          trouble. And so I apologize to everyone for the  
17          late, late receipt of those items. It certainly  
18          wasn't intended, and we had every intention of  
19          getting those filed yesterday.

20                   HEARING EXAMINER: Well, it was, it  
21          was helpful to just get them before the hearing  
22          this morning. And everyone, including yourself,  
23          will have a chance to respond in writing. And -  
24          - so, thank you.

25                   MR. STALLARD: Thank you, Your Honor.

1                   Your Honor, it's my pleasure today to  
2                   represent Northern Virginia Electric  
3                   Cooperative, known as NOVEC. As Your Honor  
4                   highlighted during your preliminary remarks, we  
5                   are here on NOVEC's Motion for a Preliminary  
6                   Injunction only to maintain the status quo  
7                   pending the Commission's resolution of our  
8                   Petition for Declaratory Judgment. We're simply  
9                   asking that the current state of affairs be  
10                  maintained until this dispute can be resolved.

11                 And, certainly, there are important  
12                 principles at stake here, principles that may  
13                 transcend this dispute. An issue is the  
14                 integrity of NOVEC's certificated territory, and  
15                 whether NOVEC's rights should be protected or  
16                 whether an adjoining electric utility can serve  
17                 a customer that we believe is within NOVEC's  
18                 territory. Based on the facts, the point of use  
19                 doctrine that the Commission has adopted in the  
20                 RGC Mineral Sands case and the Kentucky  
21                 Utilities decision, and Virginia -- Dominion  
22                 Electric Power's violation of the Virginia Code  
23                 annotated Sections 56-265.3 and .4, we believe  
24                 that today, NOVEC has made a showing, based upon  
25                 the submissions to Your Honor, that it is

1           entitled to a preliminary injunction at this  
2           stage to maintain the status quo until you can  
3           take up the dispute in total.

4                     Your Honor, if I may just very briefly  
5           go through the basic facts. And I want to make  
6           one sort of qualification to Staff counsel's  
7           presentation. We pled in paragraph 14 facts  
8           that were contained -- in paragraph 14 of our  
9           Petition, facts that were contained in  
10          Dominion's letter concerning the parcel of land  
11          on which this facility is being constructed.  
12          And I would not deem it an admission, I would  
13          deem it a representation of what was contained  
14          in that letter. We do admit that the boundary  
15          line between certificated territories does  
16          transect that parcel. I can't represent that  
17          it's exactly two-thirds. That was Dominion's  
18          representation.

19                    HEARING EXAMINER: And you have a map  
20          contained in your Petition that clearly  
21          identifies the property, that the territorial  
22          boundary is affecting the property.

23                    MR. STALLARD: Yes, Your Honor, that's  
24          correct.

25                    Your Honor, we have submitted

1 affidavits of Mr. Jim Moxley, who is a NOVEC  
2 Vice President, Mr. Peter G. Moore, who is a  
3 Certified Land Surveyor, and Gilbert D. -- and I  
4 apologize -- Jaramillo, I think, who is an  
5 Account Service Manager for NOVEC. And in Mr.  
6 Moxley's affidavit, he adopts, upon knowledge,  
7 information and belief, the Joint Stipulation of  
8 Facts that we have submitted to Your Honor. And  
9 that Joint Stipulation actually is an exhibit to  
10 his affidavit.

11 Your Honor, in 1996, NOVEC first  
12 learned that there were plans by the Smithsonian  
13 to construct this museum-hangar facility located  
14 near Dulles Airport in Northern Virginia. And,  
15 initially, in August of 1996, NOVEC first  
16 inquired of the Smithsonian about the  
17 specifications it would need to provide electric  
18 service to that facility. And, of course, I  
19 believe it began the process that it usually  
20 begins, the normal course of dealing with  
21 prospective customers, communicating with them,  
22 asking for information. And it's the give-and-  
23 take process that I'm sure everyone in this room  
24 is familiar with when a utility begins the  
25 process of providing a large commercial customer



1 with electricity. Certainly, I think it's clear  
2 that NOVEC advised the Smithsonian that it had  
3 an obligation to provide electricity because it  
4 was within NOVEC's territory, and that it really  
5 intended and wanted to serve the Smithsonian.  
6 And I think this process, as the record shows,  
7 continued on for several years, because  
8 construction was really not scheduled to begin  
9 for several years.

10 In 1999, I believe, NOVEC learned for  
11 the first time of Dominion's interest in serving  
12 the Smithsonian. In November of 2000, NOVEC,  
13 through ODEC -- Old Dominion Electric  
14 Cooperative -- sent to Dominion a request for a  
15 delivery point. And we believe, Your Honor,  
16 this is very important, because there is a  
17 Network Operating Agreement which is mentioned  
18 in Mr. Moxley's affidavit, and it's also  
19 mentioned in an affidavit submitted by ODEC, of  
20 Mr., I believe, Richard Bean. There's a Network  
21 Operating Agreement between Virginia Power and  
22 ODEC, which requires a delivery point be  
23 provided when requested.

24 HEARING EXAMINER: Mr. Stallard, this  
25 may be a question for ODEC's counsel, but can

1           you tell me if the Network Operating Agreement  
2           with Virginia Power is subject to FERC  
3           jurisdiction or Commission jurisdiction?

4           MR. STALLARD: Your Honor, I will be  
5           happy to try to answer that question, but I  
6           don't think I can give you a definitive answer.

7           HEARING EXAMINER: I had intended to  
8           ask ODEC as well, so if you know --

9           MR. STALLARD: Your Honor, I suspect  
10          that they may tell you that while it is somewhat  
11          a FERC matter, FERC may say that it's ultimately  
12          up to the parties to go to court to enforce  
13          their contractual obligations, but I would allow  
14          them to speak --

15          MR. PIRKO: Your Honor, John Pirko on  
16          behalf of Old Dominion.

17          Yes, the Network Operating Agreement  
18          is an agreement that is designed under -- I  
19          believe it's under FERC's Order 888, where they  
20          set up specific design tariffs, so the format of  
21          the agreement and -- is a jurisdictional FERC  
22          matter. However, whether or not argument over  
23          the contract terms would be specifically  
24          exclusively a FERC matter, I don't think that's  
25          the case.

1 HEARING EXAMINER: Okay. We can get  
2 into it a little more -- I have several  
3 questions about it, you know, that I intend to  
4 direct specifically to, to counsel for ODEC.  
5 So, I appreciate that clarification. We'll  
6 discuss it a little more when you present your  
7 argument.

8 MR. STALLARD: Your Honor, as Mr.  
9 Moxley's affidavit attests, this is not an  
10 uncommon condition or occurrence. Because of  
11 the way the power grid is situated and  
12 constructed, in certain situations, NOVEC  
13 requests delivery points from Dominion Virginia  
14 Power. And there are obvious efficiencies  
15 involved in doing that, and that's why this  
16 agreement is in place, so waste won't have to be  
17 committed to construct lines where they can get  
18 service directly off of the Virginia Power  
19 system.

20 But in any event, Your Honor, as you  
21 know, ODEC has taken the position that we were  
22 entitled to that delivery point, and they  
23 rejected Dominion's attempt. And so, the  
24 evidence that we presented to Your Honor today  
25 at least suggests that we've requested a

1 delivery point, and we believe we were entitled  
2 to a delivery point, and that delivery point was  
3 denied. And as a matter of fact, earlier this  
4 year, in April, NOVEC received a letter which  
5 was addressed to ODEC, who had made the request  
6 for the delivery point because of the  
7 contractual relationships, denying the delivery  
8 point.

9 It's also worth noting, Your Honor,  
10 that throughout the course of these events,  
11 NOVEC has tried to get plans and specifications  
12 so it would be able to design the systems  
13 necessary to deliver electricity to the  
14 Smithsonian site. And one of the Joint  
15 Stipulations, one of the two that we agreed to,  
16 was that the Smithsonian has refused to provide  
17 that information for whatever reason the  
18 Smithsonian may have.

19 Your Honor, as you know, earlier this  
20 year, in the summer, NOVEC tried to resolve this  
21 dispute, as a matter of fact, had meetings with  
22 Dominion and Staff counsel. And, ultimately, an  
23 agreement, I believe, was entered into this  
24 summer that Dominion could provide temporary  
25 power to serve the Smithsonian, to allow

1 construction to begin to proceed. And as we  
2 have represented, we're certainly not interested  
3 in any way interfering with the construction  
4 path of the Smithsonian.

5 But, in any event, we filed this  
6 action in September, shortly after the dispute  
7 came to a head. And Your Honor scheduled this  
8 matter for hearing.

9 As far as the salient facts that we  
10 believe are important to resolution of the issue  
11 before Your Honor today, particularly the  
12 question of where this site is located, I would  
13 like to refer Your Honor and everyone to Exhibit  
14 3 to our Petition. And perhaps it might be  
15 easier to put this up on the board. I believe  
16 someone has already put one map up there, but --

17 HEARING EXAMINER: That would be  
18 helpful. I don't have a copy of that map. I  
19 had to get it from the DCC original file because  
20 of the size, it was microfilmed, and the copies  
21 that were distributed, so I don't have it in  
22 front of me.

23 MR. STALLARD: Well, I'll be happy to  
24 leave this with Your Honor. If we could put  
25 this up there.

1 MR. PIRKO: For your convenience  
2 (handing copy of the map to the Hearing  
3 Examiner).

4 HEARING EXAMINER: It's a little  
5 easier to read. Thank you.

6 MR. STALLARD: Your Honor, obviously,  
7 we're dealing here with the question of where  
8 the territory line is and where the facility is  
9 to be located. I can tell Your Honor, and I  
10 think Your Honor can glean from the allegations  
11 in our Petition, this map, our answers to  
12 interrogatories and the affidavits submitted,  
13 that Mr. Moxley, whose job it is to do these  
14 sorts of things for NOVEC, essentially prepared  
15 this document by overlaying the map it had of  
16 the physical plant. He overlaid that on the  
17 territory map and came up with this map. He  
18 also explained in his interrogatory answers that  
19 we originally thought 85 percent of the facility  
20 was in their territory, and then we got, we got  
21 more recent maps, and, in fact, we now believe  
22 95 percent of this facility is within NOVEC's  
23 territory.

24 Your Honor can see that the facility  
25 in yellow is the facility that is being

1 constructed. In front of that facility, as you  
2 can probably tell, is something that looks like  
3 a parking lot that's --

4 HEARING EXAMINER: Mr. Stallard, the  
5 map that's in -- that was filed with the  
6 Commission is just slightly different. I may be  
7 looking at the wrong exhibit. Which exhibit is  
8 --

9 MR. STALLARD: Your Honor, it says  
10 National Air and Space Museum, Sully District,  
11 Fairfax, Virginia, and it has a date of 9/26/00.  
12 It's Patton, Harris, Rust & Associates, are the  
13 engineers preparing the map. It's Exhibit 3 to  
14 our Petition, Your Honor. It's, it's about this  
15 size (indicating).

16 HEARING EXAMINER: Oh, I was looking  
17 at Exhibit 2. Okay. I was looking at Exhibit  
18 2.

19 MR. STALLARD: Your Honor, bear with  
20 me. The map shows NOVEC's territory and  
21 Dominion Power's territory. This was prepared  
22 by Mr. Moxley, who explained in the  
23 interrogatory answers that he basically took the  
24 drawings of Patton, Harris, Rust & Associates,  
25 did an overlay with the territory map, and this



1 is what he came up with. The building that's  
2 yellow there is the project being built. That's  
3 the facility. I believe if you're looking at  
4 the map below the yellow structure is the  
5 parking lot, and I understand it, the circular  
6 figure there, which is very near the boundary  
7 line, is part of the IMAX theater complex. But  
8 that -- this is the map showing the area in  
9 dispute.

10 Mr. Pete Moore, who is a registered  
11 and licensed land surveyor, went out to the  
12 site, and we submitted his affidavit. He's  
13 reviewed the information available. And based  
14 upon his review of all the information, and as  
15 his affidavit attests, it's his opinion that 95  
16 percent of this facility is within NOVEC's  
17 certificated territory.

18 Now, I'm not going to ascribe to  
19 Dominion Virginia Power something that it hasn't  
20 said to Your Honor or to the Commission, but I  
21 would suggest that Dominion has not rebutted  
22 these assertions. They have submitted an  
23 affidavit of Mr. Caskey, and Mr. Caskey says  
24 that he's gone out and he's tried to determine  
25 where the lines are and so forth, but he

1           couldn't. But, anyway, for purposes of today,  
2           Your Honor, and the state of the evidence and  
3           state of the record is such that, as far as I  
4           know, Dominion has not represented or attested  
5           that what we're saying is incorrect. It says  
6           that it couldn't calculate this and -- but it  
7           acknowledges it located three sides of the  
8           building, but could not locate the eastern side  
9           of the building.

10                   HEARING EXAMINER: Mr. Stallard, would  
11           you also pull out your Exhibit No. 2. My  
12           recollection is that when I reviewed the file,  
13           that that showed the IMAX theater in a different  
14           location than, than you're pointing out here.  
15           It also showed part of this main facility as on  
16           the other line of the boundary.

17                   MR. STALLARD: Yes, Your Honor, and I  
18           understand that's correct. And it was -- this  
19           was done in 1994. Is this the exhibit Your  
20           Honor is referring to?

21                   HEARING EXAMINER: No. Exhibit 2  
22           looks a lot like this (showing document).

23                   MR. STALLARD: Yes, Your Honor. This  
24           was a document prepared in 1994, and we  
25           acknowledge the change from 85 to 95 percent.

1 And I think the drawings changed, the  
2 Smithsonian's drawings changed. I don't want to  
3 tell Your Honor something that's --

4 HEARING EXAMINER: So this is the more  
5 current?

6 MR. STALLARD: That's my  
7 understanding, Your Honor. I think that's  
8 accurate.

9 So it's a function of getting more  
10 updated plans from Patton, Harris, Rust &  
11 Associates that existed in 1994 when things were  
12 still very preliminary.

13 But in any event, Your Honor, as far  
14 as the evidence is concerned today, we don't  
15 believe that there's anything contrary to our  
16 assertions. No other percentages are being  
17 offered. And while ultimately they may contest  
18 our -- the evidence that we submitted, Your  
19 Honor, we believe that based on the record  
20 today, that is unrebutted.

21 Your Honor, the -- Dominion is urging  
22 the Commission to either disregard or in some  
23 way distinguish its decisions in Mineral Sands  
24 and Kentucky Utilities. While no two cases are  
25 exactly factually identical, we believe these

1           two cases are very similar factually and are  
2           dispositive of the issue in this case. And  
3           while the Commission did say in Kentucky  
4           Utilities, there may be practical reasons why we  
5           should do something else on some occasions, I  
6           don't believe the Commission was signaling that  
7           we should disregard certificated territories, we  
8           should find some reason for allowing a utility  
9           to reach across a boundary line and poach a  
10          customer from another utility. Certainly, in  
11          this case, there's clearly an effort to create a  
12          sense of urgency that construction deadlines are  
13          going to be met and construction is in jeopardy,  
14          and we have this museum that's due to open in  
15          December of 2003, and if NOVEC is allowed to  
16          provide the service, then somehow all of this  
17          would be jeopardized. The sky is falling, if  
18          you will. And, candidly, as we have attested,  
19          we have a certificate that allows us to provide  
20          utility service. If the point of use of this  
21          facility is within our territory, then we, we  
22          should be the provider of service. Our evidence  
23          shows that we're ready, willing and able to  
24          provide service. We've requested a delivery  
25          point which we believe and ODEC believes we're

1           entitled to. So we don't believe that Dominion  
2           should be able to exploit the situation,  
3           manipulate -- deny the delivery point, and then  
4           say that we weren't able to provide service --  
5           NOVEC is unable to provide service.

6                     If I may, Your Honor, I want to go  
7           through the issue Your Honor raised in your  
8           opening remarks about preliminary injunctions  
9           and why, if we satisfy Your Honor that there is  
10          a violation of the statute, that we're entitled  
11          to a preliminary injunction. As Staff counsel  
12          has already outlined for Your Honor, it's a  
13          clear principle of Virginia law, that if the  
14          statute grants a court -- in this case, the  
15          Commission -- the authority to grant an  
16          injunction, and that injunction is violated upon  
17          -- is premised upon violation of the statute,  
18          which is what we have in this instance, because  
19          clearly 56-265.3 and .4 say, if you're going to  
20          provide electricity to somebody, you've got to  
21          have a certificate to do it within that  
22          territory. .4 obviously recognizes there may be  
23          situations where a utility, for whatever reason,  
24          is unable to provide electricity to someone  
25          within its territory. But what happens is,

1           there has to be a showing that it's unable to do  
2           that, and it has to be given an opportunity to  
3           cure. Clearly, that's what the statute says.  
4           And the Commission has recognized that in its  
5           opinions. We don't have that situation here,  
6           because we have expressed an interest, we want  
7           to serve the Smithsonian. We have expressed our  
8           intent to serve them. We've asked for a  
9           delivery point. We've asked for the plans and  
10          specifications. We've been denied this  
11          information. Essentially, NOVEC has been shut  
12          out. So, that exception is not applicable here.

13                 So, essentially, if Your Honor finds  
14          from the evidence today that it's more likely  
15          than not that under the applicable law and the  
16          facts as presented to Your Honor, the  
17          Smithsonian is within NOVEC's territory, then we  
18          believe we're entitled to an injunction under  
19          Virginia law. We cite, obviously, the cases  
20          that Staff counsel mentioned. We believe those  
21          are clear authority and they're clearly  
22          applicable in this situation.

23                 Now, the real question factually is,  
24          are we likely to succeed on the merits? I would  
25          suggest to Your Honor that the evidence in the

1 record at the moment and that we ultimately  
2 expect to be presented on final hearing  
3 establishes very clearly and very strongly a  
4 likelihood of success on the merits. We have  
5 these drawings and plans. We have the opinion  
6 of the licensed and certified land surveyor.  
7 And, clearly, Your Honor, if I may say, it's  
8 fairly telling, Dominion with its sophistication  
9 and resources, surely, if it could say that the  
10 point of use, the facility is on its territory,  
11 it would be telling Your Honor that, but it's  
12 not. What it's telling Your Honor is, we want  
13 you to look at these other factors. We want you  
14 to look -- we're there, we're ready to serve, we  
15 have electricity available. If you don't let us  
16 do it, you're going to endanger this  
17 construction time line. So I don't think  
18 Dominion is telling you that it wins, it's  
19 telling you disregard Kentucky Utilities and  
20 Mineral Sands and look at the practicalities of  
21 the situation.

22 So, if I may, Your Honor, I think  
23 under this test, we prevail, and we're entitled  
24 to a preliminary injunction to maintain the  
25 status quo.



1                   Now, we believe we prevail under a  
2                   traditional equity analysis as well.  
3                   Blackwelder is a 4th Circuit case. Virginia  
4                   Circuit Courts rely on that. It's essentially a  
5                   case where four factors are evaluated: balance  
6                   of harm, irreparable harm to us; balance of harm  
7                   to Dominion; public interest; and very  
8                   importantly, likelihood of success on the  
9                   merits. As I've highlighted during the  
10                  preliminary part of this discussion, we believe  
11                  there's a very good likelihood of success on the  
12                  merits today.

13                  HEARING EXAMINER: Mr. Stallard, in  
14                  the Memorandum that you filed this morning, you  
15                  attempted to more specifically than in the  
16                  Petition identify how NOVEC would be irreparably  
17                  harmed. It would seem to me in skimming through  
18                  those that most of those went to harm if  
19                  ultimately the Commission found against you.  
20                  Can you be more specific about how you're  
21                  irreparably harmed, or how NOVEC is irreparably  
22                  harmed if the temporary injunction is not  
23                  issued?

24                  MR. STALLARD: Okay, I'll be very  
25                  happy to.

1 I think there are four aspects to  
2 consider about the harm here. And we're  
3 assuming, ultimately, the Commission finds in  
4 our favor. Clearly, there's a financial harm.  
5 The affidavit we submitted details that.  
6 There's a loss of revenue from not being able to  
7 serve this customer, and that's a loss that we  
8 believe may never be recoverable. So, clearly,  
9 there are financial harms until we're able,  
10 we're able and allowed to provide service that  
11 we believe we're entitled to provide at this  
12 date.

13 But there's clearly a very, very  
14 important non-financial element here as well,  
15 and that is that our franchise is being  
16 endangered and damaged. And I think, clearly,  
17 we have cited cases in our Memorandum which show  
18 that if you have an exclusive franchise or  
19 territory, and someone infringes upon it, then  
20 that is irreparable harm.

21 HEARING EXAMINER: If, ultimately, the  
22 Commission finds in NOVEC's favor though, then  
23 doesn't that -- that argument is not valid.

24 MR. STALLARD: I understand your  
25 point, Your Honor.

1                   Let me then turn to the next reason,  
2                   which I think from a policy standpoint, this is  
3                   an important one. And it's truly a global  
4                   reason. Your Honor has seen the map that shows  
5                   NOVEC's substantial territory, and, obviously,  
6                   Dominion and NOVEC share a boundary line in a  
7                   lot of locations. If Dominion is allowed to  
8                   court customers, develop relations with them in  
9                   situations like this, gain their confidence,  
10                  shut out another utility like NOVEC has been  
11                  shut out, and, basically, take the position that  
12                  we're going to serve this customer, we're going  
13                  to deny you a delivery point, and then, if you  
14                  want to do anything about it, you're going to  
15                  have to take us before the Commission, the long-  
16                  term result of this is that they will be  
17                  rewarded for poaching or invading other people's  
18                  territories. Because sometimes, people aren't  
19                  going to challenge them, or they're going to  
20                  compromise, or they're going to get their way,  
21                  or the utility is not going to make an issue out  
22                  of it, because they don't want to fight about  
23                  it. So, as a policy matter, to allow this sort  
24                  of behavior seems to me --

25                   HEARING EXAMINER: Well, when, when is

1 NOVEC planning on implementing retail choice?

2 MR. STALLARD: Your Honor, I can't  
3 answer that question.

4 HEARING EXAMINER: 2004?

5 MR. STALLARD: July of 2002.

6 HEARING EXAMINER: July of 2002?

7 MR. STALLARD: Yes, Your Honor.

8 HEARING EXAMINER: After NOVEC  
9 implements retail choice, aren't you subject to,  
10 not only from Virginia Power, but from many  
11 other providers, just what you're saying is a  
12 long-term risk?

13 MR. STALLARD: Correct, Your Honor,  
14 but there is the distribution facilities that we  
15 would have in place and the tariffs from those,  
16 and that certainly is an important right at this  
17 point. I mean, if it was, if it was of no  
18 event, if what was occurring today was totally  
19 irrelevant, I suspect we would not be here,  
20 because it is important as a matter of policy  
21 and a matter of principle.

22 HEARING EXAMINER: This can't be the  
23 first time that a co-op and NOVEC -- a co-op and  
24 Virginia Power have had a customer whose  
25 property was straddled by the boundary. It may

1           be the first time that a customer of this  
2           magnitude has been in that position, but it  
3           can't be the first time that this kind of  
4           situation has occurred. Do you, do you know  
5           what has been done in the past?

6                   MR. STALLARD: No, Your Honor, I do  
7           not. I would be speculating.

8                   HEARING EXAMINER: I'll ask Virginia  
9           Power or ODEC when, when they argue.

10                  MR. STALLARD: Clearly, Your Honor,  
11           though, we believe that there is irreparable  
12           harm. As I explained from -- what we've, what  
13           we've outlined in Virginia law, I don't think  
14           there's any question that we can meet the test  
15           of irreparable harm for the reasons outlined in  
16           our Memorandum. I know Dominion is arguing  
17           about how it believes it will suffer harm, but,  
18           again, we don't believe that simply keeping the  
19           temporary service in place until the Commission  
20           rules will harm them in the same way. As far as  
21           the likelihood of assessing the merits, as I  
22           explained, we believe under the point of use  
23           test, the way it's going to be consumed within  
24           NOVEC's territory.

25                   And, finally, the public interest.

1           You know, these case laws like the Kentucky  
2           Utilities and Mineral Sands case recognize the  
3           values of these service territories. And, as I  
4           explained, it is this policy issue, if these  
5           situations occur and are allowed to occur, then  
6           the aggressor is rewarded and I think they'll  
7           happen more often.

8                       So, we believe the equitable factors  
9           clearly tilt in favor of, of NOVEC, Your Honor.

10                      HEARING EXAMINER: Mr. Stallard, you  
11           talk -- you have talked a lot about the  
12           similarities between this case and the Prince  
13           George and Kentucky Utilities case. In neither  
14           of those cases, the Commission issued a  
15           temporary injunction, but, ultimately, the  
16           Petitioner prevailed, and the Commission was  
17           able to effect a remedy. Why does that remedy  
18           not work here?

19                      MR. STALLARD: Are you talking about a  
20           transfer of service?

21                      HEARING EXAMINER: Um-hum.

22                      MR. STALLARD: Well, Your Honor, you  
23           know, I guess Dominion makes the point itself  
24           that there may be different technical aspects of  
25           providing service, and what they provide may be

1           different than what NOVEC would choose to  
2           provide. That's one important point.

3                       Secondly, if the Commission does that,  
4           then I guess we'll be having to bargain with  
5           Dominion to buy their equipment, and there could  
6           be an economic effect there.

7                       Thirdly, and most importantly, if  
8           that's what occurs, if the brakes aren't put on,  
9           if this isn't stopped, as a matter of principle,  
10          then similar to my other argument, what does  
11          Dominion have to lose doing this every time?  
12          What impact do they have? They'll go poach a  
13          customer, and the most that's going to happen to  
14          them is they're going to have to transfer  
15          service if they lose before the Commission,  
16          assuming someone wants to take it that far. Or  
17          they may force somebody into making deals  
18          because they're not willing or able to defend  
19          their territorial rights. So I think it's a  
20          long-term slippery-slope behavioral issue, and I  
21          think that's the consequence. Of course, they  
22          can say, no, we would never do that, but I think  
23          their very argument in this case is indicative  
24          of essentially what, what might happen if  
25          they're allowed to continue.

1                   And, Your Honor, this is a self-  
2                   fulfilling prophecy, their argument. The  
3                   practical issue they want the Commission to  
4                   seize upon is we're there, we have the  
5                   facilities, we're constructing it, we know the  
6                   load, we know the specifications -- of course,  
7                   we don't have that information because it's been  
8                   denied to us, so we have not been able to  
9                   compete on a level playing field. And so, if  
10                  they're allowed to proceed forward, their  
11                  argument is bolstered, assuming the Commission  
12                  accepts it, which is, we've got this  
13                  infrastructure in place, it only makes sense to  
14                  let us continue to serve the customer. We're  
15                  there, we put the stuff in, it all works. So  
16                  it's a self-fulfilling argument.

17                 If I may, as an anecdote, it's like  
18                 the boy who kills his parents, and then throws  
19                 himself on the mercy of the court because he's  
20                 an orphan. That's what we have here. It's --  
21                 the practical situation is, we should do this,  
22                 we're there, and they want to somehow suggest  
23                 that they can exploit their denial of delivery  
24                 point, and say, you guys are a mile and a half  
25                 away, you'll never get the easements, you'll



1           never be able to construct this line in time.  
2           That, to me, is a separate issue. We believe we  
3           have a right to that delivery point, and if  
4           we're given what we're contractually entitled to  
5           receive, then there's not going to be a timing  
6           issue, there's not going to be a technical  
7           issue, there's not going to be a cost issue.  
8           We'll go about doing what the certificate allows  
9           us to do, which is, install the line.

10                   But, I mean, essentially, if I may,  
11           Kentucky Utilities, the fact that Powell Valley  
12           Electric had a substation and transformer in  
13           place didn't sway the Commission to give them  
14           the customer. As a matter of fact, it was never  
15           discussed. They said the primacy of that right  
16           must be protected. The territorial right must  
17           be protected. So, you know, in my judgment,  
18           that shouldn't be an issue. But that's, that's  
19           what they want you to apply, which is, look at  
20           these other factors that are in our favor.  
21           That's why. But what they're being allowed to  
22           do is to exploit their denial of delivery point  
23           to their favor. We think that's simply  
24           incorrect. They come in with unclean hands.  
25           They shouldn't be able to exploit that and ask

1           you to let them continue to go on the path  
2           they're on. And that's exactly the problem with  
3           this argument that they're making.

4                   HEARING EXAMINER: You touched upon  
5           where NOVEC is in relation to serving this  
6           customer. And Virginia Power did represent in  
7           one of its affidavits that NOVEC -- NOVEC's  
8           facilities were just over a mile, I think 1.25  
9           miles away from the Smithsonian. Are there  
10          basically two ways that NOVEC might be able to  
11          serve this customer; one is to build, construct  
12          infrastructure from that point in to serve the  
13          customer, and then another from a delivery, a  
14          delivery point on the transmission line?

15                   MR. STALLARD: That's correct, Your  
16          Honor. But, clearly, we believe there is a  
17          delivery point on the parcel, on the land,  
18          that's six-tenths of a mile from the facility, I  
19          believe.

20                   HEARING EXAMINER: So it's not the  
21          same point on the transmission line that  
22          Virginia Power is proposing to serve this  
23          customer from?

24                   MR. STALLARD: Correct.

25                   Well, Your Honor, maybe I'm not

1 explaining this correctly. When we talk about  
2 two points, I mean, Dominion is suggesting that  
3 we should come from one of our own transmission  
4 lines. We have always been saying we're  
5 entitled to a delivery point from their  
6 transmission line. In a sense, those are two  
7 separate points. But our delivery point would  
8 not be different than Dominion's delivery point.  
9 It would be through the same ductbank. That's  
10 not different.

11 HEARING EXAMINER: Okay. So, one, one  
12 route, if you were to access this customer and  
13 provide service from your facilities a little  
14 over a mile away, and build that infrastructure  
15 in, that would take one amount of time to reach,  
16 to serve the customer. And if you were to  
17 receive a delivery point off the transmission  
18 line, that might involve going to FERC and  
19 fighting over the interpretation of the, the  
20 agreement and forcing the receipt of a delivery  
21 point, and that involves a different time line.  
22 Do you, do you have any kind of a feel for how  
23 long it would take you to be able to reach this  
24 customer to provide service to the Smithsonian  
25 under either of those?

1 MR. STALLARD: Your Honor, I would be  
2 speculating if I offered any answer. I think  
3 common sense tells you that if you have to  
4 travel 1.25 miles, it's going to take longer  
5 than .6 miles. But I suspect that should the  
6 Commission find that this facility is within  
7 NOVEC's territory, I can't speak for Dominion  
8 Power, but I would be surprised if delivery  
9 point no longer became an issue.

10 Your Honor, we essentially view this  
11 case as one in which Dominion, in an effort to  
12 serve a profitable customer, is attempting to  
13 evade and poach on NOVEC's territory. The  
14 bottom line is, they went in and courted the  
15 Smithsonian, developed a relationship, and  
16 excluded NOVEC from any chance of obtaining this  
17 entity as a customer. Assuming the Commission  
18 finds, as we believe it should, that the  
19 facility is within NOVEC's territory, then  
20 there's clearly a violation of law here, 56-  
21 265.3 and .4, and those procedures clearly,  
22 which are designed for a situation like this --  
23 they've never been followed or there was no  
24 attempt to invoke them -- if they thought we  
25 were unable to provide service, they could have

1           invoked them and tried to get this customer, but  
2           they did not. So, now, they're asking the  
3           Commission to reward them by granting them this  
4           customer by saying we're there, we have the  
5           lines, capability, we have this construction  
6           deadline, and if it's not met, that all sort of  
7           cataclysmic consequences are going to occur. I  
8           can hardly imagine a better set of facts for a  
9           situation where a temporary injunction is  
10          warranted.

11                       The evidence that we submitted  
12          candidly is not rebutted about where this  
13          facility is located. And as I indicated  
14          earlier, I suspect if they could rebut it, they  
15          would. But we believe as a matter of policy,  
16          and as a matter of fairness, and as a matter of  
17          equity, that the electricity in this facility is  
18          going to be consumed in NOVEC's territory, and  
19          the only proper result is to at this juncture  
20          maintain the status quo until this issue can  
21          fully be litigated and resolved so that they  
22          cannot further exploit and take advantage of  
23          their own actions in shutting us out, denying us  
24          a delivery point and then arguing that we're not  
25          prepared to meet the construction schedule.

1           It's just not fundamentally very fair.

2                       So, what we're asking you to do as a  
3           matter of policy is today to grant a temporary  
4           injunction only and to put this matter on  
5           expedited hearing so that we can get it resolved  
6           as soon as possible.

7                       HEARING EXAMINER: Thank you, Mr.  
8           Stallard.

9                       MR. STALLARD: Your Honor, if I may  
10          reserve five minutes for rebuttal. Is that  
11          possible?

12                      HEARING EXAMINER: Sure.

13                      MR. STALLARD: Thank you.

14                      HEARING EXAMINER: All right. Mr.  
15          Gordon. Welcome to Richmond.

16                      MR. GORDON: Thank you very much, Your  
17          Honor. The United States very much appreciates  
18          the Commission's invitation to participate in  
19          this, particularly with the enormous interest  
20          that the Smithsonian and the public has at stake  
21          in this matter.

22                      As a matter of procedure, we've  
23          already pointed out in our papers that we filed  
24          our questions about whether or not the  
25          Commission can directly regulate a federal

1           entity such as the Smithsonian or the General  
2           Services Administration. Notwithstanding that,  
3           we do appreciate the opportunity to provide the  
4           Commission with our views on some of the  
5           practical considerations that are at stake here  
6           with regard to the Federal Government. And we  
7           submitted our comments to the Commission, both  
8           through an attorney type brief, as well as a  
9           statement. And I believe it was submitted  
10          yesterday, a declaration from the project  
11          manager for the construction of the project.

12                   And our main concern is that we have  
13          both corporate and individual donors who have  
14          provided funding for the Air and Space annex out  
15          by Dulles Airport, and there's an expectation  
16          that the annex is going to be open by the  
17          centennial of the Wright Brothers' first flight.  
18          The morale of our country in some ways is at  
19          stake as air travel and transportation has such  
20          an important impact on our nation's life as our  
21          recent events have shown. And the Air and Space  
22          Museum, as the Commission may know, is the most  
23          popular part of the Smithsonian. It's a source  
24          of great pride that we all can take, that the  
25          first flight was not far from here. And, in

1 fact, the sister state to Virginia even puts it  
2 on their license plate. And it's very important  
3 that they open on time.

4 The Smithsonian, like many other  
5 construction projects, puts together what's  
6 called the critical path, which is a time line  
7 of the events that must take place. When you're  
8 building a building, you obviously have to put  
9 in certain infrastructure. And the framework of  
10 the building, as you go along, is important.  
11 Here, the critical path shows that the  
12 electricity, the permanent electricity must be  
13 in place by April of 2002, and it's early April  
14 in order to meet the centennial of the first  
15 flight.

16 I know that there have been a lot of  
17 papers filed. I should inform the Commission  
18 that this morning, only a few minutes before the  
19 hearing commenced, I received the latest round  
20 of papers from NOVEC, including discovery  
21 responses.

22 HEARING EXAMINER: You were at a bit  
23 of a disadvantage since you were traveling from  
24 Northern Virginia and didn't have that hour to  
25 review everything.



1                   MR. GORDON: That's exactly correct,  
2                   Your Honor.

3                   And I want to take an opportunity to  
4                   review that with my client to see if there's any  
5                   response that's necessary. I, unfortunately, am  
6                   going to be out of the office tomorrow, and  
7                   would request just a little bit of an  
8                   opportunity to review that, to see if there's  
9                   anything -- and I'm not sure there will be --  
10                  but anything else we'd like to provide, any  
11                  other information, to the Commission.

12                  But the bottom line here is that we  
13                  have a construction schedule. We need to meet  
14                  that construction schedule. And we'd like to  
15                  let the Commission know that paramount practical  
16                  concern that we all have in getting this very  
17                  important portion of the museum up and running,  
18                  which is by Dulles Airport. And it's going to  
19                  be able to house some of the larger exhibits  
20                  that you can't bring into downtown Washington,  
21                  along with some very important aspects of our  
22                  nation's history. And as has been cited in many  
23                  of the papers, the Smithsonian has a statutory  
24                  function, which is to inform all humankind of  
25                  information. And we'd request the Commission

1           that it respect that function as it deliberates  
2           on this matter, which raises a lot of, I must  
3           admit, very interesting legal issues that I am  
4           somewhat unfamiliar with prior to this  
5           proceeding. And we won't really dive into those  
6           issues. We'll limit our remarks to the  
7           practical issues. And I see that you have  
8           something that you need to roll up your sleeves  
9           and decide some weighty legal issues. And we'd  
10          request that you seriously consider the  
11          Smithsonian's practical concerns.

12                       Thank you, Your Honor.

13                      HEARING EXAMINER: Mr. Gordon, it's my  
14           impression that the paramount concern to the  
15           Smithsonian is that the schedule not be  
16           disrupted to preclude opening in December of  
17           2003. And, secondarily, you have -- obviously  
18           have a preference for Virginia Power providing  
19           the power. But the paramount concern would be  
20           that you can open in December of 2003, not who  
21           provides the power?

22                      MR. GORDON: That's correct, Your  
23           Honor. I would state that our project manager,  
24           who is well versed in the construction minutiae,  
25           believes, as he stated in his declaration to the

1 Commission, that at this point where the project  
2 stands, Virginia Power is in a position where it  
3 could do that, and NOVEC has presented no  
4 information and none that I've heard today that  
5 they would be able to meet that schedule. So at  
6 this point, the record as we're aware of it is  
7 that Virginia Power is the only company that  
8 would be able to do that.

9 HEARING EXAMINER: All right. Thank .  
10 you, Mr. Gordon. I appreciate you participating  
11 and offering your comments.

12 MR. GORDON: Thank you, Your Honor.

13 HEARING EXAMINER: Thank you.

14 Mr. Pirko, Mr. Guy.

15 MR. GUY: Thank you, Your Honor. My  
16 name is Jim Guy, with LeClair Ryan. I'm here  
17 with my partner, John Pirko, and we're here on  
18 behalf of two interested parties this morning,  
19 the Old Dominion Electric Cooperative, who, as  
20 you know, is the wholesale power supplier, and  
21 also provides transmission services through  
22 contracts for Northern Virginia Electric  
23 Cooperative, and for the Virginia, Maryland and  
24 Delaware Association of Electric Cooperatives,  
25 which includes all of the electric cooperatives

1           in Virginia. And those members have a great  
2           interest in this proceeding and the effects that  
3           it could have.

4                     I'd like to begin by thanking you for  
5           your quick action on our motion permitting us to  
6           participate not only in this case, but in this  
7           hearing this morning. And I'm not going to  
8           abuse your generosity by reiterating the  
9           arguments that were made by my friend, Mr.  
10          Stallard. But there are a couple of points,  
11          really three. Two of them, I think, are  
12          questions you yourself raised during Mr.  
13          Stallard's arguments, and the third one goes --  
14          is, I admit, a reiteration of an important point  
15          that goes to the Smithsonian's argument.

16                    The first, I think, significant point  
17          that's of particular concern to my clients is  
18          the delivery point question with respect to Old  
19          Dominion. And I know that you have some  
20          questions about that as well. The Network  
21          Operating Agreement is a FERC jurisdictional  
22          document. It has to do with wholesale electric  
23          transmission facilities. That said, FERC does  
24          not retain exclusive adjudicatory jurisdiction  
25          over that document or that agreement. Mr. Pirko

1           can tell you, if you'd like, in greater detail  
2           what he told me, which is that it's very common  
3           for FERC to say, while this is our agreement to  
4           the question, it is simply one of contract, and  
5           we're going to, we're going to defer that to the  
6           states; that we don't need to use our particular  
7           expertise or jurisdiction to determine what the  
8           contractual language means.

9           HEARING EXAMINER: So, Mr. Guy, if you  
10          needed to litigate the refusal of the delivery  
11          point, you would first have to go to the FERC  
12          with that dispute -- correct? -- and then they  
13          would decide whether or not --

14          MR. GUY: I think that, I think that  
15          we could -- we would have some choice of forum,  
16          depending on, depending on conversations that we  
17          might have with FERC's staff in advance. It may  
18          not be necessary to file with the FERC. It  
19          could be sufficient to discuss it with the staff  
20          and follow their guidance as to what the  
21          appropriate forum was.

22          More significantly though, I think, is  
23          that there isn't, isn't likely to be a necessity  
24          of adjudicating this. The only reason that  
25          Virginia Power asserts in its letter for denying

1 the delivery point is its intention to serve the  
2 client. If this Commission determines that the  
3 load should be served by Northern Virginia  
4 Electric Cooperative, I have no doubt,  
5 especially given Dominion Virginia Power's  
6 deeply held concern for the timely completion of  
7 the Smithsonian project, that they'll cooperate  
8 in expediting that. Because the practical  
9 implication will be that there's no longer a  
10 dispute. The only dispute that exists is about  
11 who should serve the, serve the customer. So  
12 the question of jurisdiction is not one, I  
13 think, that's critical to the determination of,  
14 of this case. I think this case will have an  
15 indirect effect on the, on the fairly simple and  
16 automatic conclusion of that dispute.

17 Its significance though, I think, is  
18 that the sort of bootstrapping implication  
19 that's pervasive in the pleadings, that somehow  
20 Old Dominion and its member NOVEC are not in a  
21 position to provide service. And the reason  
22 that we entered into this case most  
23 significantly is our concern that you were  
24 getting a story that didn't work; that on the  
25 one hand, Dominion Virginia Power told Old

1 Dominion Electric Cooperative that we couldn't  
2 have a delivery point because Dominion Virginia  
3 Power was going to serve the load, and then that  
4 Dominion Virginia Power told the Commission that  
5 they had to serve the load because Old Dominion  
6 didn't have a delivery point. If for no other  
7 reason, we felt that that clarification was  
8 significant enough for us to participate in this  
9 case. And that, I believe, is the context and  
10 the significance of the delivery point issue,  
11 not who's going to adjudicate the question  
12 whether we're entitled to a delivery point or  
13 not, but that that delivery point question is  
14 one that was generated by this dispute, not the  
15 other way around.

16 The second question that I believe you  
17 raised, Your Honor, during, during the argument  
18 of counsel for Northern Virginia Electric  
19 Cooperative was, what's the common practice in  
20 resolving these types of disputes? We have  
21 thousands and thousands of miles of borders  
22 among utilities, and there are cooperatives  
23 along most of those borders. And if we look at,  
24 if we look at the history, we have, that I know  
25 of, three cases that have come before the

1 Commission. Two of them, you've already cited,  
2 and my friend Sherry cited, and one we're trying  
3 to determine right now.

4 So, what happens in the rest of the  
5 cases? From our experience representing the  
6 Association, our belief and understanding is  
7 that, typically, these things get worked out,  
8 and they get worked out on a number of bases.  
9 Sometimes, it's what you might call practical  
10 consideration, that somebody's facilities might  
11 be closer, that somebody's costs might be less.  
12 Sometimes, they're equitable considerations.  
13 One party or the other might say, look, we've  
14 had the last four, you take this one. Or we've  
15 had -- we took the last -- we'll take this one,  
16 you take the next one. Those are the types of  
17 informal workouts that have worked really,  
18 really well for a long time. We think they  
19 ought to continue to work that way.

20 The reason that the Association is so  
21 concerned about this process and wants to  
22 participate is the implication of what can  
23 happen as a consequence of this case. If, for  
24 example, Dominion Virginia Power, in arguing  
25 that you ought to assert practical



1           considerations over legal ones, introduces into  
2           the evidence in this case some of those  
3           agreements that we've had before -- and I think  
4           one of -- I think an order implementing one of  
5           those agreements was attached to their pleading  
6           -- I can tell you that, as general counsel to  
7           the Association, my advice the next day at the  
8           conclusion of this case would be never enter  
9           into one of those agreements again, because  
10          they'll be used against you in the future.

11                   The other implication -- and counsel  
12          for NOVEC, I think, was generous in not  
13          observing that this could be the case -- but  
14          it's not only Virginia Power or AEP who could  
15          take a lesson from this case to be more  
16          aggressive in, in these border skirmishes, but  
17          there are lots of cooperatives in this state who  
18          could also take that lesson, if that's the  
19          lesson and the incentive that ultimately comes  
20          out of this. And while it's certainly not our  
21          intention, or our clients' intentions to do  
22          anything that's untoward, we can only be guided  
23          by the direction of the Commission and of its  
24          rulings and what it -- what incentives it  
25          creates.

1                   The third, the third point I want to  
2                   reiterate really speaks to the questions raised  
3                   by the Smithsonian, because I think, as you  
4                   observed in your questions of the United States,  
5                   their concerns all really have to do with the  
6                   timely completion of the project and the  
7                   feasibility of getting service from the Electric  
8                   Cooperative. Let me make it plain that our  
9                   belief and understanding is that service can be  
10                  provided on a timely basis. But that  
11                  notwithstanding that, as important as the  
12                  Smithsonian project is, it's not more important  
13                  than the utility system in Virginia. And we  
14                  would suggest that there are offsetting public  
15                  policy concerns there, and that one doesn't out  
16                  -- outweigh the other.

17                  That concludes my remarks, unless  
18                  there's anything else we can add.

19                  HEARING EXAMINER: Thank you, Mr. Guy.

20                  MR. GUY: Thank you.

21                  HEARING EXAMINER: Mr. Getchell.

22                  MR. GETCHELL: Thank you, Your Honor.

23                  I'm here with my partner, Kodwo Ghartey-Tagoe,  
24                  and John Sharer, who is Managing Counsel in the  
25                  Law Department of Dominion Resources.

1 I largely agree with the analysis of  
2 Staff counsel. There are two points of  
3 disagreement that I would like to note. The  
4 first is that I don't believe we should accept  
5 the representation of law contained in the  
6 Memorandum that was filed this morning, that  
7 where you are alleging the violation of a  
8 statute and seeking a preliminary injunction,  
9 you do not have to make the traditional  
10 equitable showing. I have not had time to go  
11 pull the two cases that are cited, Virginia  
12 Beach SPCA and WTAR Radio, but just based on my  
13 general knowledge of injunction law, it is my  
14 belief that those are not preliminary injunction  
15 cases. I suspect because they did reach the  
16 Supreme Court of Virginia, that they reached it  
17 on a permanent injunction after trial. I don't  
18 think it's the law that you can simply allege  
19 the violation of a statute and then get relief,  
20 preliminary injunction, if you can convince the  
21 tribunal that you've got a reasonable shot of  
22 winning on the merits. I think you have to make  
23 the traditional analysis.

24 Secondly, I think that the doctrine  
25 that you don't have to make the traditional

1           showing is limited to the situation where you  
2           have a remedial statute, such as the unfair  
3           business practices statute, that has as a remedy  
4           an injunction. I don't think that when you have  
5           just a general grant of power, as we have here,  
6           to the Commission to issue injunctions, that  
7           that would implicate the doctrine that the other  
8           side is relying on. I think that because this  
9           Commission is sitting as though it were a court  
10          of record of the Commonwealth, that it would  
11          need to follow the traditional analysis. And I  
12          think under the traditional analysis, it's  
13          perfectly clear that there should be no  
14          injunction. And I think that under even the  
15          rule that's being claimed by Petitioners here,  
16          that there would not be an entitlement to a  
17          preliminary injunction, because they have no  
18          clear entitlement to relief. What they are  
19          really arguing for is not any test that's been  
20          adopted by this Commission, ever, certainly not  
21          in the RGC or Kentucky decisions. What they are  
22          really arguing is that there should be a  
23          geographic load center test, and even though we  
24          have in our territory the points of use, all or  
25          part of the points of use, that somehow we can

1 be enjoined from providing power in our  
2 territory. And I think that's clearly not true.

3 HEARING EXAMINER: Let's talk about  
4 that for just a minute, Mr. Getchell. I was a  
5 little concerned that Virginia Power couldn't  
6 find the boundaries to the territory, and I had  
7 trouble understanding and reading the map that  
8 was attached to Mr. Caskey's affidavit. But  
9 even though you can't find the boundary line, in  
10 the Answer, you have asserted that just --  
11 asserted in the Answer, just as you've asserted  
12 a minute ago, that all points of use are wholly  
13 or partly in Virginia Power's territory. And in  
14 the Answer, you also said that the principal  
15 structure lies partly in Virginia Power's  
16 territory. So let's go through and be clear,  
17 because we're, we're talking different things  
18 here. We're talking use, NOVEC's focusing on  
19 usage, and you're focusing on structures. So I  
20 want to go through the structures and see what  
21 you agree is in or not in Virginia Power's  
22 territory.

23 The parking lot, clearly, the parking  
24 lot is in Virginia Power's territory even on  
25 NOVEC's map.

1 MR. GETCHELL: Yes.

2 HEARING EXAMINER: Lighting for a  
3 parking lot can be a huge electric consumption  
4 point of use; can't it?

5 MR. GETCHELL: I wouldn't think so  
6 relative to the rest of the project. But I will  
7 point out that we are entitled to construct  
8 permanent facilities to serve whatever is in our  
9 territory, and an injunction that forbids us to  
10 continue with our construction of permanent  
11 facilities would be unwarranted.

12 HEARING EXAMINER: And certainly,  
13 that's one of the possible resolutions, is, you  
14 know, is you serving what's in Virginia Power's  
15 territory, and NOVEC -- that's one of the  
16 possible ultimate resolutions.

17 The IMAX theater, what is Virginia  
18 Power's allegation with regard to that, that  
19 it's partly in, wholly in?

20 MR. GETCHELL: Here's, here's the  
21 problem: It's not that we can't find the  
22 boundary, in the sense that we've been derelict  
23 or negligent. The problem is that the maps that  
24 have been drawn -- and these maps, by the way,  
25 are not from the Commission's records, they've

1 drawn on them their own freehand lines -- the  
2 boundaries set by this Commission aren't -- were  
3 never intended to be so finely drawn that you  
4 could exactly necessarily locate on the ground  
5 where the boundaries were. And this is a case  
6 where we don't think it's possible to, to  
7 strictly and accurately translate those lines on  
8 a map onto the ground. So we don't think when  
9 they come in here and wish to represent that 85  
10 percent of the hangar is in their territory, or  
11 95 percent of the hangar is in their territory,  
12 that they can make that representation  
13 accurately.

14 HEARING EXAMINER: Well, let's talk  
15 about the hangar. Do you, do you dispute that  
16 the majority of the hangar is in NOVEC's  
17 territory, the majority?

18 And this is easy. They're saying  
19 95/85. You know, I'm just --

20 MR. GETCHELL: You know, again, with  
21 the caveat that I don't know that you can locate  
22 even within a hundred feet or so on the ground -  
23 - and I will note that the affidavit that they  
24 have filed from their surveyor -- and, by the  
25 way, we have a supplemental affidavit from

1 Timmons, which backs up what Mr. Caskey said  
2 that was done on the ground. I'll note that  
3 their affidavit says, moreover, there are  
4 certain limiting factors that preclude exact  
5 calculations. I mean, that's, that's our point.

6 I don't know, again, what's possible  
7 to demonstrate. I personally am not prepared to  
8 argue that a majority is in our district. I  
9 think, as counsel rather than as a fact witness,  
10 that probably a majority, or even a substantial  
11 majority is in their district. But our argument  
12 would be that where some of it is in our  
13 district, we have a statutory right to serve it.  
14 And under the practical considerations that were  
15 reserved in the Kentucky decision, that the  
16 Commission would not really be serving  
17 practicality if it said, where both competing  
18 suppliers have a statutory right to serve, that  
19 the Commission is going to require service from  
20 two of them because of the, you know, the fact  
21 that the building is split. So the rule we're  
22 urging is that where we have a statutory right  
23 to serve a building, which we do, because it's  
24 partly in our district, that practical  
25 considerations should govern.



1                   Now, that question raises the second  
2                   point of disagreement I had with the Staff  
3                   presentation. The Staff was relying on the  
4                   earlier documentation filed by NOVEC to say that  
5                   the "footprint" of the hangar is in their  
6                   territory. They now concede with their filings  
7                   that only part of the "footprint" of the hangar  
8                   is in their territory.

9                   Now, turning to the merits of this  
10                  case, again, I want to emphasize that it would  
11                  be wholly improper under the statutes to enjoin  
12                  us from building permanent facilities, because  
13                  we have a statutory right to serve this  
14                  customer. And it would be wholly inappropriate  
15                  to enjoin preliminarily that which we clearly  
16                  have a right to do.

17                 Now, it also would be contrary to the  
18                 public interest to treat NOVEC as though it had  
19                 demonstrated that it was ready, willing and able  
20                 to even serve this customer on a timely basis.  
21                 The -- NOVEC has not represented that it would  
22                 go forward and construct its own facilities. It  
23                 has argued it could do that. What it keeps  
24                 insisting on is that it has a right to a  
25                 connection point. But this Commission doesn't

1           have the jurisdiction to decide that, and that's  
2           been conceded. And as Staff counsel properly  
3           noted, even if FERC didn't exercise its primary  
4           jurisdiction to resolve this matter, and treated  
5           it as a contract dispute, this Commission does  
6           not have the authority to generally enforce  
7           contract -- private contract rights. And it's  
8           not true that the only ground for being able to  
9           test a future delivery point is our desire to  
10          serve the customer. We note that the agreement  
11          requires that the Network Operating Committee  
12          review a customer's plans for reasonableness and  
13          consistency with good utility practice. We  
14          don't think that it is good utility practice,  
15          because of the practical considerations we've  
16          talked about, for them to oust us from supplying  
17          this customer. Furthermore, the contract said  
18          it's the intent of the parties that the number,  
19          capacity and location of future delivery points  
20          will result from a planning process using good  
21          utility practice, not this ad hoc complaint that  
22          they have brought us.

23                 Also, there's a requirement that  
24          future delivery points will be established at  
25          115 kV or higher, except when the Network

1           Operating Committee, consistent with good  
2           utility practice, determines that service at a  
3           lower voltage level is appropriate. We don't  
4           understand that they even meet that standard.

5                       Furthermore --

6                       HEARING EXAMINER: If Virginia Power  
7           were to give ODEC and NOVEC a delivery point out  
8           of the goodness of, of your heart, could it be  
9           off of the three-phase line that is currently  
10          being used by Virginia Power to provide the  
11          temporary service?

12                      MR. GETCHELL: I have no -- I have not  
13          made that inquiry. I do not know.

14                      (Pause)

15                      The answer is yes, I'm told.

16                      HEARING EXAMINER: All right. Thank  
17          you.

18                      MR. GETCHELL: But, as I say, there is  
19          no, there is no requirement that we give them a  
20          delivery point. There is no representation or  
21          proof that they are prepared, have made  
22          preparations, or are willing to spend the money  
23          to have any alternative service, nor have they -  
24          - talking about timing and the public interest -  
25          - nor have they done anything with the Network

1           Operating Committee, even under the agreement.  
2           They simply, from '96 until they filed this  
3           proceeding, watching things develop, have done  
4           nothing to require under the law, either through  
5           a court action or through FERC, that they can  
6           test their theory that we're entitled -- that  
7           they're entitled, rather, to this connection  
8           point that we do not believe that they're  
9           entitled to. But, clearly, because this  
10          Commission can't adjudicate that they're  
11          entitled to that, there's no basis for finding  
12          that NOVEC is going to be irreparably harmed or  
13          harmed at all. It may never have the right to  
14          do this or the willingness to do it.

15                 Furthermore, there's no basis for  
16          saying we somehow have unclean hands. We don't  
17          have unclean hands if we're validly exercising  
18          our rights. And this Commission doesn't have  
19          the jurisdiction to say we're not validly  
20          exercising our rights.

21                 Now, all the claims of harm that have  
22          been made really don't tend to satisfy any basis  
23          for a preliminary injunction, as the thrust of  
24          your questions, I believe, have starkly  
25          illustrated. An ultimate decision on the

1 merits, as was done in the RGC case or the  
2 Kentucky case would provide full relief. And  
3 every single argument that NOVEC makes equally  
4 applies to us. We have this principle that  
5 we're also vindicating. We have certificates of  
6 public convenience and necessity. We have  
7 territory that is -- that we have a right to  
8 serve, in which these facilities wholly or  
9 partially lie. And so, every single argument  
10 they make for themselves is equally available to  
11 us. And, therefore, they can never win a  
12 balancing of the equities, because, at best,  
13 it's an equal poise as between the two parties,  
14 at which point we look to the public interest,  
15 which is overwhelmingly in favor of not  
16 preliminarily enjoining the permanent power that  
17 will be needed to finish the construction.

18 HEARING EXAMINER: Mr. Getchell, I  
19 think you just answered this question, but let  
20 me back up just a minute and be clear. If the  
21 Commission does not issue a preliminary  
22 injunction in this case, but ultimately finds in  
23 NOVEC's favor, do you think the remedy that,  
24 that was provided for the Prince George and  
25 Kentucky Utilities case, i.e. a transfer of

1 service and facilities, would work here?

2 MR. GETCHELL: I have no reason to  
3 believe otherwise. I do not challenge the  
4 jurisdiction of the Commission to have given the  
5 remedy it gave in those, in those cases.

6 I also point out that the financial  
7 argument that's being made, as Staff counsel  
8 correctly noted, we're not talking about  
9 jurisdictional revenue here anyway. And there's  
10 no claim that with respect to their, their  
11 supposed damages, that there's no adequate  
12 remedy at law. As a matter of fact, they have,  
13 improperly, because of jurisdictional concerns,  
14 but they have, in fact, alleged that they have a  
15 claim for damages, in which case they can, they  
16 can pursue it. There's no need for a  
17 preliminary injunction when you have an adequate  
18 remedy at law.

19 The -- I would also note that there is  
20 a stipulation of fact that's been quoted, which  
21 is that the Smithsonian refused to provide  
22 information to NOVEC. That was a qualified  
23 agreed or stipulated fact. After that was typed  
24 up, but before it was filed, I heard from the  
25 United States that the United States was not

1 prepared to agree that they had not provided any  
2 information, just that they had not provided all  
3 the information that was provided. And I  
4 negotiated with counsel for NOVEC a right to  
5 withdraw that stipulated fact, if they ever  
6 argued that it meant anything more than that  
7 they had not received everything they asked for.

8 I, again, want to make it perfectly  
9 clear on the record that all these maps are  
10 contested. We doubt that it's possible to draw  
11 the line on the ground with that degree of  
12 precision. We think that all that can be found  
13 as a matter of fact is that the parking lot is  
14 probably wholly within our territory; the IMAX  
15 theater is probably wholly, but may only be  
16 mostly in our territory; and that the hangar is  
17 partly in both territories.

18 HEARING EXAMINER: But mostly in  
19 theirs?

20 MR. GETCHELL: But mostly in theirs.

21 I think in the end, the Commission has  
22 really got two choices, because they have -- and  
23 that's on the ultimate merits -- and there's no  
24 reason why the Commission, on a preliminary  
25 injunction, should decide that ultimate issue.

1           It should be decided after a full presentation.  
2           But I think, I think what the Commission did in  
3           RGC was it did not find the point of entry test  
4           to be persuasive, at least in that -- in those  
5           cases, but it, it, on a point -- but a point of  
6           use analysis doesn't do what NOVEC wants it to  
7           do. It doesn't oust us. And, indeed, one of  
8           the cases from other jurisdictions, the Colorado  
9           case that's at 765 Pacific 2nd 1015, Public  
10          Service v. PUC, noted in dicta that the  
11          geographic load center test -- which is what  
12          they are trying to bootleg into the Commission's  
13          rulings, and so as to oust us from being able to  
14          provide this service -- the geographic load  
15          center test, according to the Colorado Supreme  
16          Court, is not available in jurisdictions like  
17          Colorado and Virginia that have statutory  
18          protection for exclusive territories.

19                 So you can't -- you shouldn't, under  
20          the -- under that decision, to the extent it's  
21          deemed persuasive, you shouldn't even entertain  
22          the idea that you would oust us. The most that  
23          the Commission could entertain, it seems to me,  
24          under the statutes, would be the very  
25          impractical, wasteful rule that wherever a



1 facility is partly in one territory and partly  
2 in another, both have to serve it. And I think  
3 that would be a rule that the Commission has  
4 never adopted, and under the reservation of  
5 practical considerations in the Kentucky case,  
6 will not and should not adopt.

7 So, if we, if we look at any standard  
8 for awarding preliminary injunctions, either a  
9 clear entitlement to relief, they don't have  
10 that. It's very unlikely that they're going to  
11 prevail on the merits to oust us. And under the  
12 traditional balancing test, they have no  
13 irreparable harm. VEPCO has at least as much --  
14 or Virginia -- Dominion Virginia Power has at  
15 least as much harm as they do if the injunction  
16 is granted. The public interest is  
17 overwhelmingly against delaying the ability of  
18 Dominion Virginia Power, which is there on the  
19 ground and ready, willing and able to serve, to,  
20 to provide that service to allow the  
21 construction to be completed on a timely basis.  
22 And if we turn out to be wrong, then relief can  
23 be granted on the, on the ultimate merits.

24 Finally, I note that in the past, to  
25 answer your question, what has been done where

1           other facilities have been divided, we have an  
2           example of an order from the Commission, dated  
3           June 3, 1991, and I will leave our copy, if  
4           that's acceptable. By agreement, they changed  
5           the boundary lines. In this case, Virginia --  
6           VEPCO was the more convenient server, and so the  
7           utility agreed to let it --

8                     HEARING EXAMINER: And that's  
9           consistent with what Mr. Guy represented.

10                    MR. GETCHELL: Right. And we have  
11           another example from 1985 where that was done.

12                    HEARING EXAMINER: I don't need  
13           specific examples, but I appreciate that.

14                    MR. GETCHELL: Okay. Well, I won't  
15           submit the copies.

16                    But I do think that rarely is a  
17           tribunal presented on a preliminary injunction  
18           application with a case less appropriate for  
19           preliminary relief. And we urge that the motion  
20           for preliminary injunction be denied.

21                    HEARING EXAMINER: Mr. Getchell,  
22           before you sit down, I have a few questions for  
23           you.

24                    One of the things that you used to  
25           support your argument in your pleadings was that

1 the Commission did not issue an injunction in  
2 either the Kentucky Utilities or Prince George  
3 case, but it's my recollection that no party  
4 asked for an injunction. Do you know if any  
5 party asked for an injunction in either of those  
6 cases?

7 MR. GHARTEY-TAGOE: Your Honor, Kodwo  
8 Gharthey-Tagoe for the Company.

9 If I may, I believe in RGC, there was  
10 an amended Petition that included a request for  
11 an injunction.

12 HEARING EXAMINER: You have a better  
13 memory than I do then. Thank you.

14 Practically -- you have raised a lot  
15 of practical concerns or considerations. So  
16 let's talk for a minute about some of those  
17 practical considerations.

18 Do you know how much longer Virginia  
19 Power can serve the Smithsonian's needs with the  
20 temporary facilities and not interrupt their  
21 construction schedule?

22 MR. GETCHELL: My -- that's really, I  
23 think, ultimately a question for the government.  
24 My, my understanding is that the absolute drop-  
25 dead date for having that permanent facility on

1 line is early April.

2 HEARING EXAMINER: Right. And, and I  
3 understand that. And I also understand from the  
4 pleadings that Virginia Power's first  
5 transformer is scheduled to be delivered in  
6 November, in a, I guess, a few days.

7 MR. GETCHELL: Right.

8 HEARING EXAMINER: So, if, if you  
9 accept that April, April 1, 2002, is the  
10 Smithsonian's need to have permanent power  
11 available to the facility, how -- what's the  
12 time frame for Virginia Power's construction for  
13 that?

14 MR. GETCHELL: I would, I would assume  
15 that the November delivery was planned in order  
16 to provide for a reasonable and reliable  
17 schedule, and, therefore, we would be not helped  
18 in being able to meet that final deadline if we  
19 couldn't go ahead in November. But I have not -  
20 - that's a deduction on my part, because I've  
21 not actually investigated that.

22 HEARING EXAMINER: All right. Do you,  
23 do you know where the ductbanks and the  
24 transformer pads are? Are they in Virginia  
25 Power's territory?

1 MR. GHARTEY-TAGOE: Your Honor, if I  
2 may, we do have a couple of people from the  
3 Company who know specific details of what's  
4 going on now, and if you would like --

5 HEARING EXAMINER: Maybe what you can  
6 do is attach an affidavit to your Memorandum  
7 that you'll file next week and address those  
8 couple of practical points for me.

9 MR. GHARTEY-TAGOE: Yes, Your Honor.

10 HEARING EXAMINER: And finally, Mr.  
11 Getchell, clearly, this dispute has been going  
12 on for a while. Do you know at what point  
13 Virginia Power realized that there was a large  
14 percentage of use in NOVEC's territory?

15 MR. GETCHELL: I don't know when the  
16 first moment would have, would have been. We do  
17 not disagree that this matter was discussed with  
18 Staff last summer. We certainly have known that  
19 they have asserted that a majority of it is in  
20 their territory all along. I think it is, it is  
21 correct that at one point, we represented that  
22 85 percent of it was in their, in their  
23 territory. I, again, don't think that was a  
24 formal admission that's binding on us, because I  
25 think now that we've looked at it, you can't

1           make those exact percentage determinations. But  
2           certainly, we have, we have known, I guess  
3           since, since we've recognized that we had a  
4           dispute, that probably most of -- or a majority  
5           or most of the hangar building is in their  
6           territory, but that some of it's in ours.

7                     HEARING EXAMINER: Okay, thank you.

8                     MR. GETCHELL: Thank you.

9                     MR. STALLARD: Thank you, Your Honor.  
10           I'll be very brief.

11                    I think Mr. Getchell has made some of  
12           the very points for us that I was trying to  
13           articulate, and he may have done it a little  
14           better. He says that the Commission cannot oust  
15           him from building permanent facilities to  
16           provide service here. Well, I believe you most  
17           certainly can. If the Commission decides that  
18           this facility is within NOVEC's territory, or  
19           the vast majority of it is within NOVEC's  
20           territory, and the point of use is there, then I  
21           certainly think the Commission can decide that,  
22           that Virginia Power does not have the right to  
23           provide it with service. So, he says they  
24           cannot be ousted. I believe that the Commission  
25           can oust them. And, in fact, if it's not within

1           their territory, then they should not be able to  
2           build those facilities.

3                   He says we haven't made preparation,  
4           and therefore, can't do it. We've asked for  
5           this information to make preparation. We've  
6           asked for a delivery point, and we've asked for  
7           the technical drawings. We've been denied  
8           those. I don't think with an April deadline  
9           that permanent installation, as I understand it,  
10          will take longer than 60 days. I know that  
11          NOVEC installed some substantial facilities for  
12          AOL in Northern Virginia, and far larger than  
13          these, in a timely manner.

14                   MR. GETCHELL: Just for the record,  
15          we'd like to note an objection to argument on  
16          facts that are not in evidence.

17                   HEARING EXAMINER: Right. And I, and  
18          I indicated that you'd have an opportunity to  
19          attach an affidavit to your Memorandum.

20                   MR. GETCHELL: Right. Right.

21                   MR. STALLARD: But, Your Honor, this  
22          is really -- this issue was raised by the U. S.  
23          Attorney's questions regarding our competence  
24          and ability to place the infrastructure in on  
25          time, and I think, clearly, we have the

1 certificate, it's in our territory, we're  
2 providing -- clearly, the import of the  
3 information we submitted is our ability and  
4 desire to provide service to, to the  
5 Smithsonian. And there's simply nothing that  
6 says we don't have the expertise or competence  
7 to, to do this. So it shouldn't be a  
8 consideration in our judgment at all. Our  
9 certificate looks just like theirs and gives us  
10 the same rights within our territory, and there  
11 are no limitations on our ability to serve our  
12 customers. So, we simply think that's an  
13 improper consideration.

14 Your Honor, I'll conclude. I think  
15 that Mr. Getchell hinted at the ultimate threat  
16 of denying a delivery point. When they denied a  
17 delivery point recently, whenever it was -- I  
18 don't know the exact date, but it's in the  
19 record -- they said it's because this is within  
20 our territory. I think I've heard Mr. Getchell  
21 concede today that a majority of the hangar,  
22 which is the largest portion of the structure,  
23 is within our territory. I think this  
24 illustrates that they want to use whatever is at  
25 their disposal to not allow us to serve this



1 customer, and if that means going further and  
2 relying on some other provision to deny a  
3 delivery point, and particularly today, at  
4 least, to probably create in your mind some  
5 doubt about this delivery point issue.

6 But I believe, as Mr. Guy said, that  
7 once this issue is resolved, I fully expect and  
8 believe that the delivery point issue will  
9 follow. Certainly, before we could even  
10 litigate the delivery point issue, as a  
11 condition precedent to that, it would seem to me  
12 we would need to establish before this  
13 Commission, because this issue is properly  
14 before the Commission and within its  
15 jurisdiction, resolution of the territorial  
16 dispute. That would be a condition precedent to  
17 resolving any delivery point issue. So, I don't  
18 think that that should play a role at this  
19 point. If it became a role later on, then  
20 that's certainly something we could address.  
21 But at least for today's proceedings, I don't  
22 think it should play a role.

23 So, with that, Your Honor, I'll  
24 conclude. Thank you.

25 HEARING EXAMINER: Your arguments this

1 morning have been very helpful, and I appreciate  
2 all the time and effort that has gone into it.  
3 Having heard all that I've listened to in the  
4 last two hours, I've reconsidered your initial  
5 request at the beginning of the hearing, Mr.  
6 Getchell, and I think November 1st, next --  
7 which is next Thursday, would be, would be very  
8 appropriate. I would like everyone who wants to  
9 file a supplemental Memorandum or comment to  
10 file simultaneously on November 1st.

11 And Mr. Getchell, I would like to have  
12 included with Virginia Power's an answer to how  
13 long it does take to install the permanent  
14 facilities. Mr. Stallard's understanding is  
15 that it would take 60 days.

16 MR. GETCHELL: We certainly, we  
17 certainly will address that. And there are some  
18 other things that we'll respond to, including  
19 the fact that we have discussed the 115 kV issue  
20 with them in the past. It's not something new  
21 here today.

22 HEARING EXAMINER: Is there anything  
23 else to come before the Commission this morning?

24 Hearing no response then, again, thank  
25 you for your considered arguments, and I'll look

1 forward to your Memorandum next week.

2 The Commission stands adjourned.

3  
4 NOTE: The hearing was concluded and  
5 adjourned at 11:57 a.m.  
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CERTIFICATE OF COURT REPORTER

I, Susan E. Moser, a court reporter with Associated Reporters, Official Court Reporters for the State Corporation Commission, Richmond, Virginia, hereby certify that I was the court reporter who took down and transcribed the matter herein, when heard on October 25, 2001, before the Honorable Deborah V. Ellenberg, Chief Hearing Examiner for the State Corporation Commission, Richmond, Virginia.

I further certify that the foregoing transcript is a true and accurate record of the testimony and other incidents of the hearing herein, taken down and transcribed by me to the best of my ability.

Given under my hand this 28th day of October, 2001.

Susan E. Moser  
Susan E. Moser  
Official Court Reporter

# COMMONWEALTH OF VIRGINIA

0111 1 0044

OFFICE OF THE GENERAL COUNSEL  
P.O. Box 1197  
Richmond, Virginia 23218-1197



Telephone Number (804) 371-9671  
Facsimile Number (804) 371-9240  
Facsimile Number (804) 371-9549

## STATE CORPORATION COMMISSION

November 1, 2001

BY HAND

Hon. Joel H. Peck, Clerk  
State Corporation Commission  
c/o Document Control Center  
Tyler Building, First Floor  
1300 East Main Street  
Richmond, Virginia 23219

RE: 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, Case No. PUE010512

Dear Mr. Peck:

Please file the original and fifteen (15) copies of the "Memorandum of Law of the Staff of the State Corporation Commission" with the other papers in the captioned matter.

Thank you for your assistance in this regard.

Sincerely yours,

*Sherry H. Bridewell*  
Sherry H. Bridewell  
Senior Counsel

SHB:neb

cc: Wayne N. Smith, Senior Counsel  
JoAnne L. Nolte, Esquire  
W. Bradford Stallard, Esquire  
E. Duncan Getchell, Jr., Esquire  
Kodwo Gharthey-Tagoe, Esquire  
John D. Sharer, Esquire  
Steven E. Gordon, Assistant U.S. Attorney  
James Patrick Guy, II, Esquire  
John A. Pirko, Esquire

2001 NOV -1 P 12:11

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IN THE  
COMMONWEALTH OF VIRGINIA  
BEFORE THE  
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

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MEMORANDUM OF LAW OF THE STAFF OF  
THE STATE CORPORATION COMMISSION

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I. INTRODUCTION

On September 17, 2001, Northern Virginia Electric Cooperative ("NOVEC" or "the Cooperative") filed a Petition with the State Corporation Commission ("Commission"). This Petition requested the Commission to declare that the proposed sale of electric energy to the Smithsonian Institution ("Smithsonian") by Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Virginia Power", "Dominion", or "the Company") for

consumption at the Steven F. Udvar-Hazy Center, National Air and Space Museum ("Museum" or "the facility") under construction in Fairfax County violated NOVEC's property rights under the certificate of public convenience and necessity granted to NOVEC by the Commission pursuant to the Utility Facilities Act, Chapter 10.1 (§ 56-265.1 et seq.) of the Code of Virginia.

Among the various types of relief sought by the Cooperative was an injunction pendente lite ("temporary injunction"), enjoining Virginia Power from providing electric service to the facility in order to maintain the status quo and respective positions of the parties to the action until the Commission ruled on the merits of the dispute and propriety of a permanent injunction.<sup>1</sup>

On October 2, 2001, the Commission entered a Preliminary Order, that, among other things, docketed the proceeding, appointed a Hearing Examiner to the matter, and set oral argument for October 25, 2001, on the request for a temporary injunction.

During the October 25, 2001 oral argument, the proper legal standard for issuance of a temporary injunction became an issue. NOVEC took the position during the oral argument (Tr. at 44) and at page 3 of its October 25, 2001 Memorandum in Support of

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<sup>1</sup> During oral argument, NOVEC clarified that it was not seeking to enjoin the provision of temporary construction power to the construction site of the facility. Transcript at 6-7 (hereinafter Tr. at \_\_").

Motion for Preliminary Injunction that it must show only that its statutory right to a franchise is threatened or has likely been violated in order for the Commission to enter a preliminary injunction.

Virginia Power advanced the argument at page 2 of its October 12, 2001 Memorandum in Opposition to Motion for Injunction that the legal standard for issuance of a preliminary injunction involves a determination that the balance of equities favors such relief. According to Dominion, 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. Virginia Power's October 12, 2001 Memorandum in Opposition to Motion for Injunction at 2.

At the conclusion of the oral argument, the Hearing Examiner invited the participants to submit a memorandum, addressing the legal standard to be employed to determine whether a temporary injunction should be issued in this proceeding. Tr. at 96.

The Staff offers the following analysis in order to assist the Examiner in her review of this legal question.



## II. ANALYSIS

### A. Preliminary Injunctions Generally

"A preliminary or temporary injunction is an order granted at the beginning of a suit to restrain the defendant from doing any act, the right to which is dispute, until adjudication of that right." Thomas R. Folk and John J. Sabourin, Jr., Preliminary Injunctions: Getting There the First with the Most, 43 Va. Lawyer 15, 16 (1995) (hereafter "Folk and Sabourin"). Issuance of a preliminary injunction generally requires a showing of reasonable cause to believe irreparable harm will occur to the movant. No such showing need be made, if a statute expressly empowers a court to grant injunctive relief against its violation. Where a statute has a specific provision for injunctive relief, no showing of irreparable harm is necessary. Id. at 16.

In Va. Beach S.P.C.A. v. S. Hampton Rds., 229 Va. 349, 350 (1985) (hereafter "Va. Beach SPCA"), the Supreme Court of Virginia considered whether an injunction was properly issued against the Virginia Beach S.P.C.A., Inc. ("SPCA") prohibiting the SPCA from operating a full-service veterinary clinic. The high court's analysis focused on § 54-786.7 of the Code of Virginia. That statute provides in pertinent part that "any person unlawfully practicing veterinary medicine may be temporarily or permanently enjoined from such unlawful practice

by the circuit court of the . . . city where . . . the unlawful practice occurred at the suit of the Board, any member of the Board or any citizen of this state." The Supreme Court opined that

once a court finds that a person is unlawfully practicing veterinary medicine, it has the discretionary power to enjoin that practice.

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.

Id., 229 Va. at 350, 354. That case, unlike the instant one, involved a permanent injunction and was issued after a hearing where ore tenus testimony was received.

In the absence of a specific remedial statute such as that found in the Va. Beach SPCA case, Virginia circuit courts have been governed by § 8.01-628 of the Code of Virginia for the issuance of a temporary injunction. Section 8.01-628 of the Code of Virginia provides that "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." In weighing the equities, under both Virginia state and federal practice, the standard for issuing preliminary injunctive relief is generally the same. Folk and Sabourin, 43 Va. Lawyer 15, 16 (1995). That standard entails a

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balancing of the following factors: (1) likelihood of success on the merits, (2) irreparable injury to the plaintiff should the relief be denied, (3) absence of substantial harm to other interested parties in the proceedings, and (4) absence of significant harm to the public interest. In balancing these factors, "[t]he two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. . . . The degree of probability of success the plaintiff must prove varies inversely with the probability of irreparable injury." Id.

B. The Commission's Issuance of  
Preliminary Injunctions

Like its state court counterparts, the Commission and its Hearing Examiners have issued preliminary injunctions in circumstances where the statute in question expressly empowered the Commission to grant injunctive relief against the statute's violation. In Commonwealth of Virginia, ex rel. State Corporation Commission v. AirCable of Roanoke, LLC, Digital Broadcast Corporation, Case Nos. SEC000069 and SEC000072, for example, Hearing Examiner Skirpan granted the Division of Securities and Retail Franchising Division's ("Division's") request for a temporary injunction for a period of one hundred and twenty days against AirCable of Roanoke, LLC ("AirCable") and Digital Broadcast Corporation ("Digital"). In support of

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its request the Division filed an affidavit of its senior investigator describing information that indicated Digital and AirCable were continuing to offer and sell unregistered securities in the Commonwealth of Virginia.

The Hearing Examiner noted in his Report that § 13.1-519 of the Virginia Securities Act vested the Commission with "all the power and authority of a court of record as provided in Article IX, Section 3 of the Constitution of Virginia to issue a temporary or permanent injunction against any violation or attempted violation of any provision of this chapter. . . ." Relying on Carbaugh v. Solem, 225 Va. 310 (1983) and Va. Beach SPCA, 229 Va. 349 (1985), the Hearing Examiner noted that the investigator's affidavit supporting the Motion for Temporary Injunction reported on purchases of securities from Digital and AirCable by Virginia residents, including the purchase of securities from AirCable as late as September 9, 2000, subsequent to the issuance of the Commission's subpoena in the proceeding.<sup>2</sup> The Hearing Examiner found that the Division had met its burden and established that Digital and AirCable had violated provisions of the Virginia Securities Act. He determined that the issuance of a temporary injunction to

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<sup>2</sup> Commonwealth of Virginia, ex rel. State Corporation Commission v. AirCable of Roanoke, LLC, Digital Broadcast Corporation, Case Nos. SEC000069 and SEC000072, Doc. Con. Cen. No. 001230046 at 8-9 (Report of Alexander F. Skirpan, Jr., Hearing Examiner, Dec. 19, 2000).

maintain the status quo and prevent further violation of the Virginia Securities Act was appropriate.<sup>3</sup>

The Examiner concluded that the argument by the companies that a temporary injunction was unnecessary because the Virginia Securities Act contained other legal remedies was contrary to the scheme devised by the General Assembly. He observed that under the reasoning offered by Digital and AirCable, because the Virginia Securities Act contained other legal remedies, injunctive relief would never be available. The Examiner reasoned that the General Assembly explicitly provided for injunctive relief in the Virginia Securities Act presumably for situations where action must be taken to protect the public from unlawful acts.<sup>4</sup>

Although the Hearing Examiner primarily relied upon a "violation of the statute" standard in his analysis, he also considered the Division's likelihood of success on the merits. He noted that Digital and AirCable failed to present evidence to contest the investigator's affidavit and that the companies acknowledged they may have failed to file certain forms with the Commission.<sup>5</sup> The Examiner further concluded that the Division

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<sup>3</sup> Id., at 9.

<sup>4</sup> Id.

<sup>5</sup> Id.

was likely to succeed in an enforcement action against Digital and AirCable.<sup>6</sup>

In its January 25, 2001, Final Order and Judgment, the Commission granted the Motion for Temporary Injunction pursuant to § 13.1-519 of the Code of Virginia, after considering the Hearing Examiner's December 19, 2000 Report.<sup>7</sup>

Unlike the Virginia Securities Act, the Utility Facilities Act, Chapter 10.1 (§ 56-265.1 et seq.) of Title 56 ("the Facilities Act" or "Act") does not contain a specific statute providing for the imposition of a preliminary injunction for a violation of its provisions. Instead, in situations involving the Facilities Act, preliminary injunctions have been issued pursuant to § 12.1-13 of the Code of Virginia, or § 56-6 of the Code of Virginia for public service corporations.

Section 12.1-13 of the Code of Virginia provides in pertinent part that:

[i]n the administration and enforcement of all laws within its jurisdiction, the Commission shall have the power to promulgate rules and regulations, to impose and collect such fines or other penalties as are provided by law, to enter appropriate orders, and to issue temporary and permanent injunctions. . . .

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<sup>6</sup> Id.

<sup>7</sup> Commonwealth of Virginia, ex rel. State Corporation Commission v. AirCable of Roanoke, LLC, Digital Broadcast Corporation, Case Nos. SEC000069 and SEC000072, Doc. Con. Cen. No. 010140079, slip. op. at 13 (Jan. 25, 2001 Final Order and Judgment).

In applying § 12.1-13 of the Code of Virginia when considering the issue of abandonment of facilities under § 56-265.1(b)(1) of the Facilities Act, the Commission employed a balancing of the equities test, acting upon an affidavit of a Senior Utility Engineer alleging harm, economic loss, and discharge of raw sewage into local waters.<sup>8</sup> The Commission observed that Ruby and Sam Donaldson were planning to abandon sewer service to their customers in violation of § 56-265.1(b)(1) and found that such an abandonment would result in irreparable harm to the public if not immediately enjoined. The Commission found it to be in the public interest and proper that prior written notice be waived and a temporary injunction issued forthwith upon the motion for temporary injunction and the affidavit. See Commonwealth of Virginia, ex. rel. State Corporation Commission v. Ruby Donaldson and Sam Donaldson, Jr., t/a Donaldson Sewer System, Case No. PUE8880084, Doc. Con. Cen. No. 880920046, slip op. (Sept. 9, 1988 Order Granting Temporary Injunction).

Section 56-6 of the Code of Virginia authorizes the Commission to issue injunctions and provides in pertinent part:

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<sup>8</sup> Commonwealth of Virginia, ex rel. State Corporation Commission v. Ruby and Sam Donaldson, Jr., t/a Donaldson Sewer System, Case No. PUE8880084, Doc. Con. Cen. No. 880920046 (Motion for Issuance of Temporary Injunction Sept. 9, 1988). A copy of the Motion and accompanying affidavit is attached to this memorandum as Attachment A.

Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this or any other chapter under this title, by any public service corporation chartered or doing business in this Commonwealth, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this law, . . .

Section 56-6 of the Code of Virginia is broader in scope than § 13.1-519, a statute specifically addressing violations of the Virginia Securities Act. Section 56-6 by its plain terms contemplates that the Commission will sit as a court of record and receive proof of the elements of the grievance made as to violations of Chapter 1 or other chapters of Title 56. More than a simple assertion of a violation of the statutes in Title 56 appears to be contemplated before § 56-6 would permit an injunction to be entered. The articulation of the injunctive power in § 56-6 of the Code of Virginia invites a balancing of equities to determine whether the grievance complained of has in fact been established.



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C.    Application of the Commission's Practice  
      Regarding Preliminary Injunctions  
      to the Facts Pled in Affidavits

Based on the affidavits submitted by NOVEC and Virginia Power, it is apparent that some of the Museum's load will be located in NOVEC's service territory. NOVEC's Affidavit of Peter G. Moore estimates that approximately 95% of the Museum structures are located within NOVEC's certificated service territory. Affidavit of Peter G. Moore at 2. See also Virginia Power's Affidavit of John Caskey at 3 (front of the hanger building, the IMAX theater and the entire parking lot are in Dominion's territory, and part of the hanger and the chiller plant are in NOVEC's territory).

Both Virginia Power and NOVEC have certificates of public convenience and necessity authorizing these utilities to provide electric service in Fairfax County. Both certificates of public convenience and necessity represent valuable rights entitled to protection by the courts. See Town of Culpeper v. VEPCO, 215 Va. 189, 193-194 (1974). As the Supreme Court of Virginia has observed "utilities not only have a right to provide services to the area covered by their franchise, but are charged with a duty to furnish such services." Id. at 196. There are no allegations supported by affidavit or otherwise that Virginia Power has extended service lines inside NOVEC's certificated service territory.

Moreover, there has been no allegation that the Smithsonian has manipulated its property to select its service provider as was the case 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 No. PUE960295, 1998 S.C.C. Ann. Rept. 344 (hereafter "Prince George"). In that case, RGC (USA) Mineral Sands, Inc. ("RGC") purchased a 4,000 foot strip of land in order to be served by Virginia Power. Id., 1998 S.C.C. Ann. Rept. at 349. The Commission determined that it could not countenance RGC's desire to receive service from Virginia Power 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." Id. The Commission rejected the point of delivery test, Id., 1998 S.C.C. Ann. Rept. at 348-49, finding the cases adopting the point of use test persuasive. Under this test, the location of the facilities consuming electricity is the primary factor. Id., 1998 S.C.C. Ann. Rept. at 345.

In the instant case, the property on which the Museum and its associated facilities will be constructed crosses both NOVEC's and Virginia Power's service territories. Tr. at 19, 31. Some of the facilities constituting points of use appear to be located in both utilities' service territories. Tr. at 75-76, 85, and a dispute exists as to the physical location of some

of the facilities in relation to the utilities' service territory boundaries. Tr. at 75-77. Under these circumstances, no prima facie violation of the Act appears to have been established.

Moreover, if a balancing of the equities test is performed, NOVEC does not appear to be irreparably harmed if no preliminary injunction is issued. Indeed, the Smithsonian may be at risk for keeping the construction of the Museum on schedule, at risk for potential contractor claims, and at risk of missing the opportunity to celebrate the centennial of the Wright Brother's first flight, if an injunction is issued. Tr. at 63-65.

October 12, 2001 United States' Response to the Commission's October 1, 2001 Order at 3-4. In fact, it appears that any prejudice to NOVEC may be avoided by a prompt hearing on the merits of the Petition.

As noted in oral argument (Tr. at 83-84), in Prince George, 1998 S.C.C. Ann Rept. 344, 349-350, the Commission ordered a transfer of facilities after taking and considering the evidence in the case. Significantly, a permanent rather than a preliminary injunction was requested in an amended petition filed in the case. Id., 1998 S.C.C. Ann. Rept. at 345. Since the Commission granted Prince George's Petition, it did not rule on the requested permanent injunction. Id., 1998 S.C.C. Ann. Rept. at 349.

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### III. CONCLUSION

The statutes that would permit the Commission to issue a preliminary injunction (§§ 12.1-13 and 56-6 of the Code of Virginia) do not appear to empower the Commission to grant injunctive relief specifically for a violation of the Utility Facilities Act. Consequently, the balancing of equities and likelihood of success on the merits test appears to be the proper standard to be used in this case.

However, if the Hearing Examiner determines that a violation of the Act is all that must be demonstrated before a preliminary injunction issued, no such violation appears to have been demonstrated by the affidavits received thus far. Further, if a balancing test is employed, NOVEC has not demonstrated probable irreparable harm. Any potential harm to NOVEC could be mitigated by a prompt hearing on the merits of its Petition.

Respectfully submitted,

The Staff of the  
State Corporation Commission

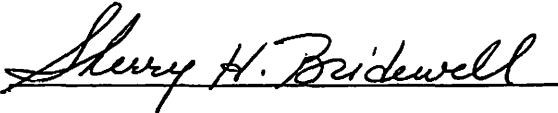
By: Sherry H. Bridewell  
Counsel

Sherry H. Bridewell, Senior Counsel  
Wayne N. Smith, Senior Counsel  
Office of General Counsel  
State Corporation Commission  
P.O. Box 1197  
Richmond, Virginia 23218  
Phone: (804) 371-9671  
Fax: (804) 371-9240  
e-mail: sbridewell@scc.state.va.us  
e-mail: wsmith@scc.state.va.us

November 1, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have hand-delivered a copy of the foregoing "Memorandum of Law of the Staff of the State Corporation Commission" to: Hon. Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, Tyler Building, First Floor, 1300 East Main Street, Richmond, Virginia 23219, this 1st day of November, 2001, and have on this 1st day of November, 2001, mailed by first-class mail, postage prepaid, a copy of the foregoing "Memorandum of Law of the Staff of the State Corporation Commission" to: JoAnne L. Nolte, Esquire, PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617; W. Bradford Stallard, Esquire, PennStuart, P.O. Box 2288, Abingdon, Virginia 24212; Steven E. Gordon, Assistant United States Attorney, U.S. Department of Justice, 2100 Jamieson Avenue, Alexandria, Virginia 22314; E. Duncan Getchell, Jr., Esquire, and Kodwo Gharthey-Tagoe, Esquire, McGuireWoods LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219; John D. Sharer, Managing Counsel, Law Department-PH-1, Dominion Resources Services, Inc., P.O. Box 26532, Richmond, Virginia 23261-6532; James Patrick Guy, II, Esquire, and John A. Pirko, Esquire, LeClair Ryan, P.C., 4201 Dominion Boulevard, Suite 200, Innsbrook Corporate Center, Glen Allen, Virginia 23060.



COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

1983 SEP -9 AM 11:16  
COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v.

CASE NO. PUE880084

RUBY DONALDSON and  
SAM DONALDSON, JR.  
t/a Donaldson Sewer System  
P.O. Box 264  
Hot Springs, Virginia 24445,  
Defendants

MOTION FOR ISSUANCE OF TEMPORARY INJUNCTION

Comes now the Staff of the State Corporation Commission, by its counsel, and respectfully moves the Commission to issue a temporary injunction against the imminent and likely violation of Va. Code § 56-265.1(b)(1) by Ruby Donaldson and Sam Donaldson, Jr. In support of its Motion, the Staff has appended hereto and incorporates herein by reference the affidavit of Ryland Y. Bailey, and, in addition, alleges:

- (1) That Defendants will abandon their sewer system currently serving approximately 17 customers in Bath County, Virginia at 8:00 a.m. on September 10, 1988 if not immediately enjoined from doing so by this Commission.
- (2) That in addition to the harm and economic loss likely to result to Defendants' customers, such abandonment will result in irreparable injury to all citizens of this Commonwealth from the discharge of raw sewage into local waters.
- (3) An order of temporary injunction without prior written notice to the defendants is required by reason of the irreparable injury likely to result to the public from any delay in issuing the temporary injunction.

WHEREFORE, the Staff, by counsel, prays that the Commission issue an order without prior written notice to the defendants, enjoining the defendants from violating § 56-265.1(b)(1) of the Code of Virginia (1958) for a period of sixty (60) days, or until such time as the defendants may be heard.

Respectfully submitted,

Commission's Staff

By

M. Brook / y

September 9, 1988



AFFIDAVIT OF RYLAND Y. BAILEY

CITY OF RICHMOND                    )  
  )    SS:  
COMMONWEALTH OF VIRGINIA        )

The affiant, Ryland Y. Bailey, having been duly sworn,  
states as follows:

1. I am employed by the Commonwealth of Virginia, State Corporation Commission, as Senior Utility Engineer in the Commission's Division of Energy Regulation ("Division"). I have been employed by the Commission since 1968.
2. This affidavit has been prepared in connection with the Division's investigation of Ruby Donaldson and Sam Donaldson, Jr., t/a Donaldson Sewer System. The information set forth below was obtained in the course of this investigation and is true to the best of my knowledge.
3. Ruby and Sam Donaldson currently own and operate a sewer system (the "Donaldson system") serving approximately 17 customers in the "Switchback" area of Bath County near Hot Springs, Virginia.
4. On September 7, 1988, Alan Baird, Associate Utility Specialist, who works under my direct supervision, received a telephone call from W. K. Marion who identified himself as the Bath County Administrator, informing the Division that the Donaldson Sewer System planned to abandon service effective 8:00 a.m., September 10, 1988.
5. Upon receiving this information Mr. Baird immediately telephoned Ms. Melanie Donnahue at the State Water Control Board to obtain whatever information she could furnish regarding the Donaldson system.
6. Ms. Donnahue stated that the Donaldson system was currently being operated in violation of federal effluent standards and without a permit from the Board. She said it would cost thousands of dollars to upgrade the plant to meet federal and state standards.

7. On September 7 and 8, 1988, I had several telephone conversations with Mr. Jeff Strasser, Vice-Chairman of the Bath County Service Authority (the "Authority"). Mr. Strasser informed me that the Authority was ready, willing and able to provide service to the customers of the Donaldson system, if the system were donated to the Authority.
8. On September 7, 1988 I spoke to the Donaldson's attorney, Peter Judah, who informed me that his clients felt the Authority should pay them a reasonable amount for any portion of the system that might be used by the Authority.
9. On September 8, 1988, I received from W. K. Marion, Bath County Administrator, a copy of the September 1 notice sent by Ruby and Sam Donaldson to their customers expressing intent to abandon service effective 8:00 a.m., September 10, 1988. (Exhibit A) Mr. Marion also sent copies of correspondence related to prior negotiations for the sale of the Donaldson system to the Authority (Exhibit B).
10. Based on information and belief, negotiations between the Authority and Ruby and Sam Donaldson for the purchase and/or operation of the Donaldson system by the Authority are at an impasse.
11. Virginia Code § 56-265.1(b)(1) provides in relevant part:

Any company furnishing water or sewer service to ten or more customers and excluded by this subdivision from the definition of "public utility" for the purposes of this chapter shall nevertheless not abandon the water or sewer services unless and until approval is granted by the [State Corporation] Commission or all the customers receiving such services agree to accept ownership of the company.
12. The State Corporation Commission has not approved the abandonment of sewer services by Ruby and Sam Donaldson.
13. Based on information and belief, the customers of the Donaldson system have not agreed to accept ownership of the company.
14. Based on information and belief, Ruby and Sam Donaldson will abandon and effectively close down the Donaldson system at 8:00 a.m., September 10, 1988 thereby resulting in the discharge of raw sewage into local waters.

15. Peter Judah, the Donaldson's attorney, has been advised by telephone of the Division's intention to seek a temporary injunction from the Commission enjoining abandonment of the Donaldson system.

Any further the affiant sayeth not.

Ryland Y. Bailey  
Ryland Y. Bailey

Sworn and subscribed before me this 9th day of September, 1988:

Nancy H. Hood  
Notary Public

My commission expires: May 28, 1991

I was commissioned as Nancy E. Green.

EXHIBIT A

September 1, 1988

Dear Customer:

As you may know, the State Water Control Board (SWCB) notified me sometime ago that the septic plant which serves you is out of compliance with certain Federal Regulations. The effluent from the plant does not meet the required standards. I estimate that it would cost many thousands of dollars to bring the plant into compliance. Those costs would produce an excessive and burdensome rate for you to pay. The rate would far exceed the rate paid by all others in Bath County who now receive a service from the PSA.

In an effort to secure a service for you at the best possible rate, I offered to transfer all of my customers to the PSA and I requested (by letter dated May 17, 1988) only that I be paid a reasonable price for that portion of my equipment which the PSA would use in serving you. I have received no response from the PSA and the SWCB has increased the pressure on me to bring the plant into compliance.

As a direct result of the SWCB's pressure and the PSA's unwarranted refusal to respond to my office, I have been left with no alternative, but to close down the sewage plant with effect from 8:00 A.M. Saturday, September 10, 1988. I had hoped that this matter could have been worked out without any disruption of service, but that is not to be. Perhaps you should contact your member of the Board of Supervisors, Mr. Ed Dickerson, to inquire about this matter. I am sure he has been working hard to protect your interest and mine!

Sincerely,

Original signed: *Ruby Donaldson*  
by *Sam Donaldson, Jr.*

Ruby Donaldson

EXHIBIT B, Page 1

LAW OFFICES

**PARKS & VAUGHT, P.C.**

WILLIAM A. PARKS, JR.

ATTORNEYS AT LAW

RONALD W. VAUGHT

P.O. Drawer D

Hot Springs, Virginia 24445

703-839-2811

703-839-2911

August 30, 1988

Mr. William K. Manion, Administrator  
Bath County Service Authority  
Warm Springs, Virginia 24484

Re: Donaldson System

Dear Bill:

Please find enclosed a letter received today from Peter Judah and also a copy of my response thereto.

Please note with interest that Ms. Donaldson indicates that she will discontinue service on September 10th. I should be curious as to the regulatory agency's view of that termination of operation.

With kindest regards, I am

Sincerely,



Ronald W. Vaught

RWV:kfc  
Enclosure

PETER J. JUDAH  
ATTORNEY AT LAW  
BOX 774  
HOT SPRINGS, VIRGINIA 24445  
(703) 839-5777

August 25, 1988

Ronald Vaught, Esq.  
Attorney at Law  
Drawer D  
Hot Springs, Virginia 24445

Dear Ron:

Re: PSA/Donaldson (file D-30)

As you will recall, I wrote to you on May 17th, asking that you let me know whether the PSA would be willing to purchase any portion of Mrs. Donaldson's piping and/or equipment.

Since there has been no response to that request, I have advised Mrs. Donaldson that it is not unreasonable to assume that the PSA is unwilling to take over her customers and purchase any of her equipment, which would be used in serving those customers. After considering all of the relevant factors, Mrs. Donaldson decided to write to her customers to advise them that her service to them will be discontinued with effect from 8:00 A.M., September 10, 1988. She very much regrets that the PSA was unwilling to be sensitive to the problems of the people in the Switchback area.

Sincerely,



Peter J. Judah

PJ/jh

LAW OFFICES

PARKS & VAUGHT, P.C.

WILLIAM A. PARKS, JR.

ATTORNEYS AT LAW  
P.O. Drawer D  
Hot Springs, Virginia 24445  
703-639-2811  
703-639-2911

RONALD W. VAUGHT

August 30, 1988

Mr. Peter J. Judah, Esquire  
Attorney at Law  
Box 774  
Hot Springs, Virginia 24445

Re: Bath County Service Authority/Donaldson

Dear Peter:

I am in receipt of your letter of August 25, 1988, and am forwarding a copy of same to the Authority.

I would note that subsequent to your initial correspondence, that we did discuss what, if any, portions of the Donaldson system might be of some utility to the Authority. Basically, the Donaldson line paralleling the existing Authority line would be of no actual use to the Authority. It might be of some "value" so as to avoid additional hook-ups on the part of the individuals, or some of them, on the existing Donaldson system. The only actual line of use to the Authority would be the line running along the road. None of the plant facility would be of any use to the Authority, it being the understanding of the Authority that the system was nonfunctional and/or not in compliance with applicable regulations.

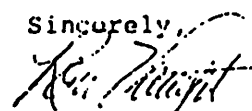
I had anticipated some purchase price for the one piece of line from Ms. Donaldson. If she still desires to quote a price, I shall be glad to take that to the Authority. As indicated previously, the Authority does view the line, being the line along the road, as having some value, especially from the standpoint of servicing some of the existing Donaldson customers at such time as the Donaldsons determine to cease operations. Do be well aware that the existing line has some draw backs from the Authority's standpoint with same being not only the age of line but also the possibility that the line is a smaller line than that which would be constructed new.

The Authority is in no manner being insensitive to the needs of the community but is trying to balance those needs with fiscal responsibility.

Please advise should your clients desire to proceed any further.

With kindest regards, I am

Sincerely,



Ronald W. Vaught

RWV:kfc  
cc: Bill Manion

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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.	)	

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF**  
**MOTION FOR PRELIMINARY INJUNCTION**

Northern Virginia Electric Cooperative ("NOVEC"), by counsel, submits this supplemental memorandum pursuant to the Commission's request at the hearing on October 25, 2001.

**I. INTRODUCTION**

At the heart of this dispute are the issues of whether the Commission should issue preliminary injunctive relief to protect the certificated territories of utilities such as NOVEC, and whether the Commission should use its statutory authority to enjoin encroachments by other utilities. It is difficult to imagine that a more compelling case could be shown. NOVEC has submitted essentially un rebutted evidence showing that 95 percent of the facility currently being constructed by the Smithsonian is within NOVEC's territory. Dominion Virginia Power simply suggests that the boundary line passes somewhere through the building but concedes that the majority of the building is within NOVEC's territory. Using this fuzzy approach to the facts in an attempt to create doubt, Dominion Virginia Power urges the Commission to disregard the certificated territories and



boundaries. Dominion Virginia Power further argues that the Commission should disregard its prior decisions, rendered during similar territorial disputes, and ignore the evidence concerning the location of the facility and the point of use. Dominion contends that the Commission should instead focus upon the fact that if service is interrupted, construction of the facility in a timely manner may be endangered. After preventing NOVEC from providing service by denying a delivery point and presumably encouraging the customer to not provide the technical information necessary to deliver service, Dominion says that it is uniquely in a position to provide service in a timely manner. Dominion wants to write the rules, act as referee, and control the outcome. Dominion Virginia Power's arguments and approach should and must be rejected.

NOVEC is filing with this memorandum the affidavit of James C. Moxley, Senior Vice President of NOVEC. As Mr. Moxley previously testified by affidavit, NOVEC is ready, willing and able to provide electrical service to the Smithsonian, and it has the ability to satisfy the Smithsonian's April, 2002 need for permanent electrical service. Mr. Moxley opines that this service can be provided within a twenty-one day window, provided that it is properly given a delivery point. Certainly, the provision of service should not be endangered at any time during this process. Consequently, this factor should play no role whatsoever in the Commission's decision either on the question of whether to issue a preliminary injunction or whether ultimately to declare that NOVEC is the rightful provider of electric service to the Smithsonian because the Smithsonian is located within its territory.

NOVEC urges the Commission to grant its motion for a temporary injunction and to maintain the status quo for the reasons stated in its earlier memorandum, at oral argument, and reiterated in this memorandum.

**II. THE COMMISSION IS EMPOWERED TO ISSUE THE PRELIMINARY INJUNCTION TO ENFORCE THE UTILITIES FRANCHISE ACT.**

Virginia Code Ann. §§ 12.1-13, 56-6, 56-265.3 and 56-265.4 authorize this Commission to issue a preliminary injunction if the Commission finds that NOVEC is likely to succeed on the merits in this proceeding. Va. Code Ann. § 12.1-13 expressly grants the Commission authority to issue a preliminary injunction. Va. Code Ann. § 56-6 gives an aggrieved party a right to seek such an injunction. "When a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites . . . before the injunction can issue." Virginia Beach S.P.C.A. v. South Hampton Roads Veterinary Assoc., 229 Va. 349, 354, 329 S.E.2d 10, 12 (1985). At the hearing, Dominion attempted to distinguish this Virginia Supreme Court authority by arguing that it did not apply to temporary injunctions. NOVEC is aware of no authority from the Virginia Supreme Court that makes any exception to the above-cited rule for temporary, as opposed to permanent, injunctions.

Dominion also argued that the Virginia Supreme Court's rule only applies to special "remedial" statutes. Again, there is no authority for this assertion. In Virginia Beach, the statute that the Supreme Court held empowered the trial court was Va. Code Ann. § 54-786.7, which states that "any person unlawfully practicing veterinary medicine may be temporarily or permanently enjoined." Virginia Beach S.P.C.A., 229 Va. at 354, 329 S.E.2d 12-13.

In Carbaugh v. Solem, 225 Va. 310, 302 S.E.2d 33 (1983), the Supreme Court held a similar statute authorized the trial court to issue an injunction without finding irreparable harm. In Carbaugh, the Supreme Court observed that the complainants did not seek the injunction solely under "traditional equitable grounds," but rather invoked the provisions of Va. Code Ann. § 3.1-530.8, which states that "[i]n the event of a violation of any provision of this article [Milk Product

Standards of Quality], either commissioner may petition any appropriate court for relief by injunction.” Id. at 315, 302 S.E.2d at 35. In finding that the complainant did not have to show irreparable harm, the court held that “[w]hen the General Assembly determines that certain conduct is inimical to the public interest, a petition for an injunction ‘need not contain an allegation of “irreparable injury.”’” Id. at 351, 302 S.E.2d at 35 (quoting WTAR Radio-TV v. Virginia Beach, 216 Va. 892, 894, 223 S.E.2d 895, 897 (1976)).

In WTAR Radio-TV, the Supreme Court held that no irreparable harm was required to be alleged because “the irreparable injury inquiry has . . . been mooted by the Act” since the Act stated “[a]ny person . . . denied rights and privileges conferred by this chapter [Virginia Freedom of Information Act] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction.” See Va. Code Ann. § 2.1-346 (2000).

In this proceeding, Va. Code Ann. § 56-6 likewise virtually identically provides:

[a]ny person . . . aggrieved by anything done . . . in violation of any of the provisions of [Title 56] by any public service corporation . . . shall have the right to . . . seek relief by petition. . . . If the grievance complained of is established, the Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this law.

In addition, as discussed in NOVEC's previous brief, Va. Code Ann. § 12.1-13 specifically empowers the Commission to enter both preliminary and permanent injunctions.

This Commission has applied these principles before in VYVX of Virginia, Inc. v. Cassell, 258 Va. 276, 519 S.E.2d 124 (1999). In VYVX, the Commission staff filed “a motion for a rule to show cause and a temporary injunction” when it determine that VYVX likely violated the Utilities Facilities Act. Id. at 285, 519 S.E.2d at 128. The Commission found that VYVX was proceeding with construction of facilities to provide fiber optic telecommunications service through Orange

County, Virginia without obtaining a certificate under the Utility Facilities Act. Id. at 283-285, 519 S.E.2d at 126-127. The Commission held that VYVX essentially had completed construction of facilities without obtaining authority under the Act knowingly and by design, and that the construction was “now an accomplished fact.” Id. at 285, 519 S.E.2d at 128. The Commission enjoined VYVX, denied its application for a certificate, and imposed a substantial fine. Id. at 285-286, 519 S.E.2d at 128-129.

VYVX appealed, and the Virginia Supreme Court affirmed the Commission’s decision—including the fine it imposed against VYVX for violating the Commission’s temporary injunction against VYVX that required it to cease construction of the fiber optic line.Id. at 290, 519 S.E.2d 130-131. The Virginia Supreme Court held that there was no merit to VYVX’s claim that it did not receive adequate notice, because it was afforded an opportunity to present its case in a preliminary hearing. Id. at 289, 519 S.E.2d at 130. The Virginia Supreme Court observed that VYVX “did not request an opportunity to present testimony before the Commission[’s preliminary hearing].” Id., 519 S.E.2d at 129-130. The Virginia Supreme Court never questioned the Commission’s jurisdiction or power to issue the preliminary injunction, nor did it evaluate the injunction under traditional equitable principles. It held that the Commission had authority to take its action under the Utility Facilities Act. Id. at 288, 293.

The law in Virginia from this state’s highest court is that where a statute empowers the tribunal to enter an injunction, the General Assembly has abrogated the traditional equitable requirements of irreparable injury. The primary inquiry is whether the statute has been violated. Virginia Beach S.P.C.A., 229 Va. at 354, 329 S.E.2d at 12.

The federal authorities and circuit court decisions that Dominion cites do not negate or even diminish this proposition. The fact that a preliminary injunction was not granted in RGC Mineral

Sands or Kentucky Utilities is irrelevant, because no party in those cases requested a preliminary injunction. In addition, those cases are distinguishable, because this Commission's precedent was not established at the time those proceedings were brought. In this proceeding, the law is established that clearly entitles NOVEC to relief.

### **III. NOVEC WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION DOES NOT ISSUE**

NOVEC has brought its motion for a preliminary injunction in order to defend the valuable property right that it possesses to provide service within its certificated territory to the Smithsonian facility. NOVEC's franchise to provide service to its customers is a right that is entitled to protection, and the invasion of its territory is a harm of a distinctly irreparable nature. NOVEC will suffer irreparable harm if the Smithsonian is allowed to continue to build permanent facilities to supply electricity to one of NOVEC's customers. Under Virginia law, even a threatened invasion of rights conferred by a franchise is entitled to protection by injunction. Transportation Co. v. Woodfin, 196 Va. 747, 750, 885 S.E.2d 217, 219 (1955); Turner v. Hicks, 164 Va. 612, 617, 180 S.E. 543, 545 (1935). Equity will extend to protect NOVEC from Dominion's threatened invasion of its rights.

As we argued at the hearing, this is a damage that is clearly irreparable. If Dominion is permitted to move forward, Dominion will be encouraged to take this course of action in each and every case in which it wishes to poach a customer from another utility. Moreover, other utilities may very well follow suit.

A Commission-issued franchise is a valuable property right 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 (1964). It is akin to the property right of a landowner, and Dominion's invasion of NOVEC's franchise is akin to a continuing trespass under common law. An invasion of the

certificated territory of a utility is entitled to protection by a preliminary injunction under these circumstances. Turner v. Hicks, 164 Va. at 617, 180 S.E. at 545 (threatened invasion of Commission-issued franchise constitutes irreparable harm); cf. Benoit v. Baxter, 196 Va. 360, 366, 83 S.E.2d 442, 445-446 (1954) (threatened repeated trespass of prima facie owner of property constitutes irreparable harm); Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 398, 105 S.E. 117 (1920) (only adequate remedy for continued trespass is injunction).

#### **IV. NOVEC IS UNQUESTIONABLY LIKELY TO SUCCEED ON THE MERITS**

At the hearing, Dominion conceded that the majority of the main facility lies within NOVEC's certificated territory. There is also unrebutted evidence that the main buildings will consume approximately 95 percent of the electricity that the entire Smithsonian facility will use. Under this Commission's precedents in RGC Mineral Sands and Kentucky Utilities, the utility in whose territory the customer's main facility lies is the utility that is entitled to provide service to that customer. In this proceeding, that means that NOVEC is the utility that is entitled to provide service to the Smithsonian. Under either the point of use test, or under a bulk of the load analysis, NOVEC will prevail.

Dominion admitted at the October 25, 2001 hearing that it knew from the outset that NOVEC asserted the Smithsonian facility was within its certificated territory, yet Dominion essentially ignored NOVEC. Now, Dominion argues that NOVEC cannot adequately provide service, and submits that the allegedly advanced stage of its construction of facilities should be part of the Commission's consideration in evaluating the merits of NOVEC's case. Just as in VYVX, Dominion attempts to submit to the Commission that its construction will be "an accomplished fact," something the Commission does not have the authority to control. Dominion has simply ignored the Utility

Facilities Act, and NOVEC is entitled to a preliminary injunction maintaining the status quo until the Commission can finally adjudicate this matter.

## V. CONCLUSION

It is hard to imagine a stronger factual scenario for the issuance of a preliminary injunction. There is no question that the facility is within NOVEC's territory, and that the point of use is, therefore, within NOVEC's territory. The fact that the line runs through the edge of the facility and, therefore, that a very minute portion of the use lies within Dominion Virginia Power's territory should not and does not change the result. NOVEC is essentially asking the Commission to prevent a continuing trespass on its service territory by a competing utility. The Commission has been granted the definite and specific statutory authority to enter an injunction to prohibit Dominion's violation of a statute under the facts of this case. Consequently, NOVEC urges the Commission to enter a preliminary injunction, pendente lite, to maintain the status quo pending resolution of the current dispute.

NORTHERN VIRGINIA ELECTRIC  
COOPERATIVE

By Counsel

W. Bradford Stallard, Esq.  
Eric R. Thiessen, Esq.  
PENN, STUART & ESKRIDGE  
P.O. Box 2288  
Abingdon, VA 24212-2288  
Phone: 276/628-5151  
Fax: 276/623-1730

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 caused to be mailed or hand delivered a true copy of the foregoing this 1<sup>st</sup> day of November 2001, to E. Duncan Getchell, Jr., Esq. and Kodwo Gharthey-Tagoe, Esq., McGuire Woods, One James Center, 901 East Cary Street, Richmond, VA 23219, via regular first class mail; Steven E. Gordon, Esq., Assistant U.S. Attorney, 2100 Jamison Avenue, Alexandria, VA 22314, via regular first class mail; John K. Lapiana, Esq., Assistant General Counsel, Smithsonian Institution, Washington, DC 20560, via 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, Virginia State Corporation Commission, P.O. Box 1197, Richmond, VA 23218-1192, via regular first class mail; Joel H. Peck, Clerk of the Virginia State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, VA 23218, via hand delivery; James Patrick Guy, II, Esq., LeClair Ryan, Innsbrook Corporation Center, 4201 Dominion Boulevard, Suite 200, Glenn Allen VA, via regular first class mail; and John D. Sharer, Esq., Managing Counsel, Law Department - PH-1, Dominion Resources Services, Inc., P.O. Box 26532, Richmond, Virginia 23261-6532, via first class mail.

  
JOANNE L. NOLTE

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

1. My name is James C. Moxley. I am Senior Vice President of Northern Virginia Electric Cooperative.
  
2. NOVEC has the experience and capability to install and maintain electric service for the Smithsonian's project from a 35kV primary voltage source, based on NOVEC's experience with 35kV systems that began in the early 1970's. Indeed, NOVEC currently serves customers with loads that exceed the requirements of the Smithsonian, and NOVEC routinely delivers electricity to customers that require more intricate and complicated delivery systems than is required for the Smithsonian project. Hence, NOVEC possesses

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the requisite expertise to provide the Smithsonian with service, as our record and experience demonstrates.

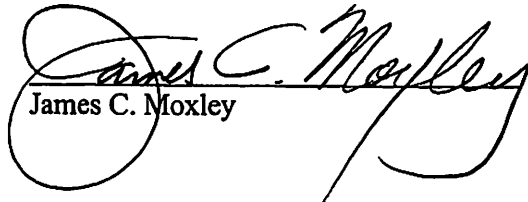
3. NOVEC can perform the necessary work to meet the projected April 1, 2002 date for permanent service, providing NOVEC has timely access to the current service, and technical specifications which will enable NOVEC engineers to confirm assumptions about the requirements.

4. NOVEC expects to install electric cables, transformers, and ancillary equipment on a schedule that supports an April 1, 2002 date. Should the delivery date of transformers extend beyond April 1, 2002, NOVEC will provide transformers with sufficient capacity to meet the Smithsonian's interim needs until the arrival of the permanent transformers.

5. NOVEC further anticipates that the installation of delivery point equipment by Dominion Virginia Power will take place in a timely manner, consistent with previous experiences.

6. Based on NOVEC's experience, and the expected work that must be performed to complete installation of permanent service, it is projected that it will take 14-21 days to install permanent service, assuming the availability of the appropriate equipment, including transformers and electric cable. This is a conservative estimate, and the time necessary to install permanent service should even be less than this time projected.

7. The affiant sayeth further not.

  
James C. Moxley

STATE OF VIRGINIA

COUNTY/CITY OF PRINCE WILLIAM

Before me, a Notary Public in and for the State and County/City aforesaid, on the  
30<sup>TH</sup> 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

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.

**SUPPLEMENTAL MEMORANDUM of**  
**VIRGINIA ELECTRIC AND POWER COMPANY**  
**IN OPPOSITION**  
**TO MOTION FOR INJUNCTION**

To: **Hon. Deborah V. Ellenberg, Chief Hearing Examiner**

In response to the Chief Hearing Examiner's order permitting supplemental briefs, respondent, Virginia Electric and Power Company, d/b/a Dominion Virginia Power ("Dominion Virginia Power"), respectfully submits this supplemental memorandum in opposition to petitioner's motion for injunction. Dominion Virginia Power is simultaneously filing supplemental declarations.

**I. INTRODUCTION**

In its oral argument on October 25, 2001 and in its previously filed supplemental affidavits and other pleadings, NOVEC failed to make out a case that would support the issuance of a preliminary injunction. To the contrary, the substance of its argument and supporting materials only serve to bolster Dominion Virginia Power's position that the balance of equities

does not favor such relief. Even if a lesser standard were to be used to evaluate its entitlement to preliminary relief, NOVEC has still failed to demonstrate that it is likely to prevail on the merits. Granting preliminary relief would be contrary to the public interest, which the Commission is constitutionally required to protect, because NOVEC is neither ready, willing, nor able to provide permanent power to the Smithsonian Institution within a time frame that is compatible with the Smithsonian's construction schedule. As a consequence, NOVEC should only be permitted to pursue declaratory and permanent injunctive relief so that, if it does ultimately prevail on the merits, any ensuing transfer of service can proceed in an orderly manner that does not threaten the public interest.

**II. NOVEC is required to meet the traditional equitable requirements for the issuance of an injunction.**

In its pre-hearing memorandum, NOVEC asserts that it has an absolute right to an injunction by virtue of Dominion Virginia Power's alleged violation of Va. Code §56-265.4. NOVEC cites several cases for the proposition that when a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites. See Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Assoc., 229 Va. 349, 353-354, 329 S.E.2d 10, 12-13 (1985) (holding that statute authorizing the appropriate circuit court to enjoin "any person unlawfully practicing veterinary medicine" negates the requirement of balancing the equities); Carbaugh, Comm'r of Agriculture and Consumer Services, et al. v. Some, 225 Va. 310, 315, 302 S.E.2d 33, 35 (1983) (finding that a showing of violation of a statute prohibiting the sale of unpasteurized milk was sufficient grounds for issuing an injunction); WTAR Radio – T.V. Corp. v. City Council for the City of Virginia Beach, 216 Va. 892, 895, 223 S.E.2d 895, 898 (1976) (holding that statute requiring city council meetings to

be public and authorizing the appropriate circuit court to issue injunctions to enforce that requirement mooted the traditional balance of equities test)

These decisions are inapposite here. First, they do not involve preliminary relief. Second, these cases stand for the principle that where a statute provides for equitable relief, the General Assembly has already weighed the equities by permitting injunctive relief under the facts specified in the statute. Carbaugh, 225 Va. at 315, 302 S.E.2d 33, 35 (1983). Here, the Commission merely has been given the injunctive powers of a court of record and a general power to grant injunctions. Va. Code Anno. § 12.1-13 and Va. Code Anno. § 56-6. Here, also, the General Assembly has not engaged in any advance weighing of the equities. As a consequence, the Commission should weigh the equities as any other court of record would do in a case that does not involve a specific statutory right to an injunction. The importance of doing so is further reinforced by the fact that the Commission is constitutionally required to ensure that the public interest is represented. Va. Const. Art. IX, § 1. Under these circumstances, NOVEC must satisfy the traditional balance of equities test in order to demonstrate entitlement to preliminary relief.

### **III. The Balance of Equities does not Favor NOVEC.**

#### **A. There is no threat of irreparable harm to NOVEC.**

Despite being heavily pressed, counsel for NOVEC was unable at oral argument to articulate a convincing reason why NOVEC, even in the absence of a preliminary injunction, could not receive complete relief if the Commission were to rule in NOVEC's favor by issuing a declaratory judgment on the merits after a full hearing. To the extent that NOVEC argues that the case involves matters of principle, that argument is equally available to Dominion Virginia Power. To the extent that NOVEC expresses revenue concerns, questions involving non-

jurisdictional revenue could be resolved fully in an action at law, thus demonstrating that NOVEC has an adequate remedy at law and therefore, is not entitled to a preliminary injunction. Here again, Dominion has an equal interest in any revenue at issue so that the equities do not tip in favor of NOVEC.

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

As noted above, because this is a territorial dispute the harm that would flow to Dominion Virginia Power in the event the injunction is granted would be at least equal to the harm to NOVEC if an injunction is denied. Hence, the balance of harms cannot tip in NOVEC's favor.

**C. NOVEC Cannot Show that it is Likely to Succeed on the Merits Because Dominion Virginia Power Will Likely Prevail on its Claim to a Right to Provide Some or all of the Smithsonian's Power Needs.**

It is not disputed that pursuant to Va. Code § 56-265.3 - .4 the Commission has granted Dominion Virginia Power a certificate of convenience and public necessity to serve most of the territory in which the Smithsonian's structures are located. All of the structures lie wholly or partly within the territory of Dominion Virginia Power. Thus, Dominion Virginia Power has at least an equal, if not superior right, to provide electrical service to the Smithsonian given the stated preferences of the Smithsonian and the nearness of Dominion Virginia Power's facilities. Under these circumstances, NOVEC cannot demonstrate that it will succeed on the merits in barring Dominion Virginia Power from constructing and maintaining permanent facilities to serve all or some of the needs of the Smithsonian.

Furthermore, it is undemonstrated that NOVEC could provide power needed for construction. NOVEC claims that its lack of ability to timely perform is the result of Dominion



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Virginia Power's "unclean hands" in not providing a connection point. But Dominion Virginia Power cannot be guilty of unclean hands by not surrendering its substantial rights. The Network Operating Agreement requires that the Network Operating Committee review a customer's plans for reasonableness and consistency with good utility practices. Because of the practical concerns raised by the Smithsonian with respect to replacing Dominion Virginia Power with NOVEC as the Smithsonian's service provider, Dominion Virginia Power contends that NOVEC's actions are at odds with good utility practices. Moreover, Dominion Virginia Power asserts that under the Network Operating Agreement there is a requirement that future delivery points be established at 115 KV or higher except where the Committee finds an exception to be appropriate. Presently, the delivery point is at 34 KV. NOVEC has not even attempted to articulate a basis for disregarding the 115 KV requirement.

The overarching consideration, however, is that this issue is within the jurisdiction of the FERC. Even if, as NOVEC argued at the hearing, the FERC declined to exercise jurisdiction over a contract dispute and deferred to an appropriate state circuit court, this Commission would not have jurisdiction to hear NOVEC's contract claim. Hence, the delivery point dispute does not belong in front of the Commission under any set of circumstances. Therefore, it is up to the FERC, or the appropriate state circuit court - and not this Commission - to decide any claims that ODEC or NOVEC may wish to pursue based upon the Network Operating Agreement. To date, neither NOVEC nor ODEC has sought recourse from the FERC, or from the state courts, with respect to the delivery point issue. As a result of this inaction, the delivery point-based claims cannot, as a practical matter, be resolved within any time frame that would permit NOVEC to provide permanent power for construction.

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It also should be noted, contrary to NOVEC's contention, that the Commission does consider customer choice in making decisions on boundary swaps. Such swaps, of course, have been the usual way of resolving boundary disputes of the type presented here. Because the situation here - a user being in two service territories - was not presented in and is not controlled by Prince George Electric Cooperative, For declaratory judgment, and Petition for RGC (USA) Minerals, Inc., For declaratory relief, Case NO. PUE960295, 1998 S.C.C. Ann. Rept. 344, 346 (Jun. 25, 1998), there is no reason to conclude that customer preference should not be considered along with other practical considerations in this novel proceeding.

Under these circumstances, the likelihood of NOVEC prevailing on the merits remains doubtful. Accordingly, no temporary injunction should issue in this proceeding, any more than it did in RGC Mineral Sands.

**D. The Public Interest Would not be Served by a Temporary Injunction.**

The Smithsonian is a public institution which is of national public concern. It has filed a declaration demonstrating that it wishes to have an additional connection that NOVEC has made no provision for supplying. It also has demonstrated a need for permanent facilities no later than the beginning of April. Because only Dominion Virginia Power can guarantee the Smithsonian's needs, at least in the short term, the public interest does not support forbidding Dominion Virginia Power from erecting the facilities which will permit it to do so.

**IV. NOVEC's Petition is Barred by the Equitable Doctrines of Unclean Hands and Laches.**

Under the doctrine of unclean hands, "a party is denied relief because of his own inequitable conduct." Brown v. Kittle, 225 Va. 451 at 456, 303 S.E.2d 864 at 867 (1983). The doctrine of laches serves to bar a party from asserting a right that it could have asserted, but

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failed to assert after an excessive amount of time. Camp Manufacturing Co. v. Green, 129 Va. 360, 106 S.E. 394 (1921). NOVEC's prior actions with regard to the Smithsonian's proposed project indicate that NOVEC has waited too long to seek preliminary relief.

As evidenced by its own filings, NOVEC allegedly became aware of the Smithsonian's plan to construct the National Air and Space Museum in September 1996. (Joint Stipulation of Facts p. 2). In January 1999, NOVEC allegedly learned of Dominion Virginia Power's intention to provide electrical service to the Smithsonian. (Joint Stipulation of Facts p. 6). With the exception of a few exchanges between NOVEC and the Smithsonian, NOVEC did not take any action during that time that would have enabled it to service the Smithsonian, such as requesting a delivery point, contesting the denial of a delivery point in the proper forum, or constructing the necessary facilities.

NOVEC's inaction in this regard indicates that either it did not intend to provide service to the Smithsonian during this time and, thus, did not feel compelled to initiate a plan allowing it to effectuate such service, or that it purposefully allowed Dominion Virginia Power to begin providing service so that NOVEC could reap the benefits of any effort Virginia Power had expended in initiating service to the Smithsonian.

If the latter proves to be true, then the equitable doctrine of unclean hands should serve as a bar to granting NOVEC's petition for preliminary relief. However, under either scenario, the doctrine of laches bars NOVEC's present assertion of its right. "[H]e who slumbers over his rights, with no impediment to his asserting them, ...may from lapse of time, be presumed to be lost." Camp Manufacturing Co., 129 Va. 360 at 368, 106 S.E. 394 at 397 (1921). Consequently, NOVEC, after failing to take reasonable steps to prepare to exercise its claimed right to provide electrical service and after allowing Dominion Virginia Power to commit substantial resources to

providing such service, should not now be permitted to obtain a contrary right on a mere preliminary showing under circumstances that would threaten the public interest if preliminary relief were granted.

### **CONCLUSION**

For the reasons set forth above, NOVEC's Motion for a Temporary Injunction should be denied and this proceeding should be decided on the merits after trial.

Respectfully submitted,

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

By: E. Duncan Getchell, Jr.  
Counsel

E. Duncan Getchell, Jr.  
Kodwo Ghartey-Tagoe  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
Telephone: (804) 775-1000  
Facsimile: (804) 698-2061  
E-Mail: [dgetchell@mcguirewoods.com](mailto:dgetchell@mcguirewoods.com)  
E-Mail: [kghartey-tagoe@mcguirewoods.com](mailto:kghartey-tagoe@mcguirewoods.com)

John D. Sharer, Esq.  
Managing Counsel  
Law Department - PH-1  
Dominion Resources Services, Inc.  
P.O. Box 26532  
Richmond, Virginia 23261-6532  
Telephone: (804) 819-2271  
Facsimile: (804) 819-2183  
E-Mail: john\_d\_sharer@dom.com

**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 the parties of record to this proceeding by facsimile and by first class, postage prepaid mail to the addresses shown below and have hand-delivered a copy of the same to Sherry H. Bridewell, Senior Counsel and to Wayne Smith, Senior Counsel, Office of General Counsel, State Corporation Commission, Tyler Building, Tenth Floor, 1300 East Main Street, Richmond, Virginia 23219 on this 1<sup>st</sup> day of November, 2001.

JoAnne L. Nolte, Esq., PennStuart, P.O. Box 617, Richmond, Virginia 23218-0617;  
Steven E. Gordon, Assistant U.S. Attorney, 2100 Jamieson Avenue, Alexandria, Virginia 22314;  
John A. Pirko and James Patrick Guy II, LeClair Ryan, Suite 200, 4201 Dominion Boulevard, Glen Allen, Virginia 23060.

F. Duncan Gettel 4

**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.

**Affidavit of Rebecca H. Buchanan**

1. Dominion Virginia Power has been requested by the Steven F. Udvar-Hazy Center (the "Smithsonian") to provide permanent electrical service to the proposed facility in Dulles, Virginia. To the best of my knowledge, at no time during any discussions with the Smithsonian has Dominion discouraged Smithsonian officials, or any agents of the Smithsonian, from speaking with NOVEC officials.
2. All proposed permanent distribution facilities, owned and operated by Dominion Virginia Power, will be installed within Dominion Virginia Power's service territory and electric service will be delivered to the Smithsonian entirely within Dominion Virginia Power's service territory. There will be no Dominion facilities located within NOVEC's service territory.

3. Dominion Virginia Power is currently providing temporary power to the Smithsonian for their construction purposes. NOVEC did not object to this arrangement. The facilities Dominion installed to provide temporary power will not be used to provide permanent power. Upon completion of Dominion's construction of permanent electrical facilities, all temporary facilities will be removed.
4. It is anticipated that the construction of Dominion's permanent electrical facilities to serve the Smithsonian will take approximately ten working days from the date construction begins.
5. Dominion Virginia Power stands ready, willing, and able to provide electric service as requested by the Smithsonian.

  
Rebecca H. Buchanan

City/County of Richmond, Virginia:

to wit:

Subscribed and sworn before me on this 1 day of November, 2001 by Rebecca

H. Buchanan.

Deborah A. Gaby  
Notary Public

My commission expires: 10/31/04



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.

Affidavit of Tim Parsons

1. I am Tim Parsons, a technician for Timmons, Inc.
2. I have reviewed the Affidavit of John Caskey. I am the person referred to in that affidavit as performing the GPS work. I agree with Mr. Caskey's description of my actions.

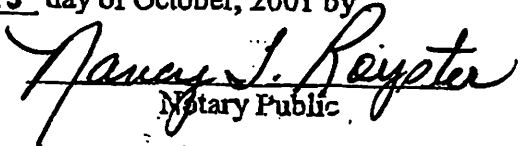
  
TIM PARSONS

City/County of Technicville Virginia:

to wit:

Subscribed and sworn before me on this 25 day of October, 2001 by

My commission expires: July 31, 2004

  
Nancy L. Reyster  
Notary Public

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSIONCOMMONWEALTH OF VIRGINIA, ~~vs~~ et al.

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 ("Udvar-Hazy Center"), National Air and Space Museum, in Chantilly, 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 Smithsonian wishes to have, and has planned for, both normal and alternate power sources at the Udvar-Hazy Center. Virginia Power proposed normal and alternate power sources in a letter to the Smithsonian dated February 9, 1999, which the Smithsonian accepted at or about that time. It is the Smithsonian's standard practice to design its museums with at least two sources of power to minimize the risk of power failure that would endanger its collections and visiting public. To this end, the Udvar-Hazy Center ductbank was designed to accommodate an alternate power circuit.

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

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Nov-01-2001 03:18pm

From-PARSONS BRINCKERHOFF CONSTRUCTION SVC

703-263-8423

T-827 P.003/003 F-438

Dated: Washington, D.C.  
November 1, 2001

  
JUSTIN ESTOQUE November 1, 2001

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

November 2, 2001

2001 NOV -2 P 4:47

On September 17, 2001, Northern Virginia Electric Cooperative ("NOVEC") filed a Petition for Declaratory Judgment and Motion for Injunction. Therein NOVEC petitioned 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") to the Smithsonian Institution ("Smithsonian") and/or the U.S. General Services Administration ("GSA") for consumption at facilities to be located in Fairfax County, Virginia violates Virginia law and the property rights of NOVEC under its certificate of public convenience and necessity granted by the Commission pursuant to the Utility Facilities Act, Chapter 10.1 of Title 56 of the Code of Virginia. The Smithsonian is building the Steven F. Udvar-Hazy Center, National Air and Space Museum in Dulles, Virginia. The Petition alleges that the "footprint" of the facility, and thus the bulk of the load to be consumed, would be located in the service territory of NOVEC. The Petition names Dominion Virginia Power, the Smithsonian and the GSA as respondents. NOVEC also petitioned the Commission to temporarily and permanently enjoin Virginia Power from selling and delivering directly or indirectly any power to the Smithsonian.

On October 2, 2001, the Commission issued a Preliminary Order. The Commission assigned this matter to a hearing examiner, directed NOVEC and Virginia Power to file a joint stipulation of facts and issues upon which they agree and also upon which they disagree, and scheduled an oral argument on the request for an injunction pendente lite.

On October 12, 2001, Virginia Power filed its Answer denying that its sale of electricity to the Smithsonian violates Virginia law and a Counter Petition seeking a declaration that it has the statutory and legal obligation to provide service to the entire Smithsonian facility.

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Also on October 12, 2001, the U.S. Department of Justice accepted the Commission's invitation to offer comments on the matter in dispute and filed the United States' Response on behalf of the Smithsonian and the GSA<sup>1</sup>. The Smithsonian addressed its practical concerns and support for Virginia Power to provide service to the new museum. Therein, it emphasized that its paramount and practical concern was that the phased construction of the museum not be compromised. It asserts that only timely completion of each phase will ensure that the facility to be open in December 2003, the centennial of the first powered flight by the Wright Brothers on December 17, 1903. That date is significant because (1) many individuals and corporate donors who provided funding expect completion of this air and space museum by that anniversary date; (2) the project's time line for completion could be endangered by scheduling changes; and (3) the museum plans to take advantage of the unique educational opportunities associated with opening on the centennial of the Wright Brothers' first flight. The Smithsonian represents that the planned delivery and installation by Virginia Power of its first transformer is in November 2001, and is on the critical path of the construction schedule. It is contended that the contractor must have that additional power by April 1, 2001 to maintain its schedule.

By hearing examiner ruling dated October 22, 2001, a Motion for Leave to Participate filed by Old Dominion Electric Cooperative ("ODEC") and the Association of Virginia, Maryland and Delaware Cooperatives ("the Association") was also granted.

On October 25, 2001, an oral argument was held on the NOVEC's Motion for Injunction, Pendente Lite. The parties presented arguments in support of the positions taken in their filed pleadings. Staff and the parties filed briefs on the Motion on November 1, 2001, and it is pending. Regardless of the action on that Motion, however, it is clear that time is of the essence to the parties. I find therefore that it is of paramount importance that an expedited schedule be established on the merits of this matter. Accordingly,

**IT IS DIRECTED THAT:**

(1) A public hearing is hereby scheduled to begin December 11, 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 receiving evidence on the Petition;

(2) On or before November 19, 2001, NOVEC 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 any testimony and exhibits that it intends to present at the hearing. Copies should be served on all parties of record to this proceeding and counsel for the Staff by hand delivery, facsimile delivery, electronic mail or overnight delivery. Service upon counsel for the Commission shall be directed to Sherry H. Bridewell, Senior Counsel, and Wayne

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<sup>1</sup> The Response also noted that the GSA has played no role in the events that have led to the dispute in this case. (Response at 2, footnote 1).


Smith, Senior Counsel, Office of General Counsel, State Corporation Commission, Tyler Building, Tenth Floor, 1300 East Main Street, Richmond, Virginia 23219;

(3) On or before noon on November 21, 2001, ODEC and the Association shall file with the Clerk of the Commission, an original and fifteen (15) copies of any testimony and exhibits that they intend to present at the hearing and deliver copies to Staff and the other parties in the same manner prescribed for delivery in Paragraph 2;

(4) On or before November 28, 2001, Virginia Power and the Smithsonian shall file with the Clerk of the Commission an original and fifteen (15) copies of any testimony and exhibits that they intend to present at the hearing, and deliver copies of the same to Staff and the other parties in the same manner prescribed for delivery in Paragraph 2;

(5) On or before November 30, 2001, Staff may 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 any testimony and exhibits that it intends to present at the hearing and deliver copies to the parties in the same manner prescribed for delivery in Paragraph 2; and

(6) On or before December 5, 2001, NOVEC 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 any rebuttal testimony and exhibits and deliver copies to the parties in the same manner prescribed in Paragraph 2.

  
Deborah V. Ellenberg  
Chief Hearing Examiner

Document Control Center is requested to mail or deliver a copy of the above Ruling on November 2, 2001, to: JoAnne L. Nolte, Esquire, and W. Bradford Stallard, 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; Steven E. Gordon, Assistant U. S. Attorney, 2100 Jamieson Ave., Alexandria, VA 22314; John Ashcroft, U. S. Attorney General, 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, and Duncan Getchell, Esquire, One James Center, 901 E. Cary St., Richmond, VA 23219; Pamela Walker, Esquire, and John D. Sharer, Esquire, P. O. Box 26532, Richmond, VA 23621; John F. Dudley, Esquire, 900 E. Main St., 2<sup>nd</sup> Fl., Richmond, VA 23219; 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

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE No. PUE010612<sup>512</sup>

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

COMMONWEALTH OF VIRGINIA, ex rel.

NORTHERN VIRGINIA ELECTRIC COOPERATIVE,

Petitioner,

v.

CASE No. PUE010612<sup>512</sup>

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 ("Udvar-Hazy Center"), National Air and Space Museum, in Chantilly, 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 Smithsonian wishes to have, and has planned for, both normal and alternate power sources at the Udvar-Hazy Center. Virginia Power proposed normal and alternate power sources in a letter to the Smithsonian dated February 9, 1999, which the Smithsonian accepted at or about that time. It is the Smithsonian's standard practice to design its museums with at least two sources of power to minimize the risk of power failure that would endanger its collections and visiting public. To this end, the Udvar-Hazy Center ductbank was designed to accommodate an alternate power circuit.

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

Dated: Washington, D.C.  
November 1, 2001



JUSTIN ESTOQUE November 1, 2001

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

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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

December 5, 2001

On September 17, 2001, Northern Virginia Electric Cooperative ("NOVEC") filed a Petition for Declaratory Judgment and Motion for Injunction. Therein, NOVEC petitions 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") to the Smithsonian Institution ("Smithsonian") and/or the U.S. General Services Administration ("GSA") for consumption at the Steven F. Udvar-Hazy Center, National Air and Space Museum ("the museum" or "the facility") under construction in Fairfax County, Virginia, is within the service territory of NOVEC, and violates Virginia law and NOVEC's property rights under its certificate of public convenience and necessity granted by the Commission pursuant to the Utility Facilities Act.<sup>1</sup> The Petition names Virginia Power, the Smithsonian, and the GSA as respondents.

NOVEC also petitions the Commission to temporarily and permanently enjoin Virginia Power from selling and delivering directly or indirectly any power or providing any service to the Smithsonian. NOVEC agreed to permit Virginia Power to construct facilities to provide temporary power to the facility during construction, but NOVEC asks the Commission to enjoin Virginia Power from the construction of any permanent infrastructure.<sup>2</sup> Thus, NOVEC seeks an injunction pendente lite to maintain the status quo while the Commission considers the evidence and rules on the merits of this dispute and the propriety of a permanent injunction.

On October 2, 2001, the Commission issued a Preliminary Order. Therein, the Commission assigned this matter to a hearing examiner, directed NOVEC and Virginia

<sup>1</sup>Chapter 10.1 of Title 56 of the Code of Virginia.

<sup>2</sup>NOVEC Petition at 9-11; Transcript at 6-7.

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Power to file a joint stipulation of facts and issues upon which they agree and also upon which they disagree, and scheduled an oral argument for October 25, 2001, on the request for an injunction pendente lite.

On October 12, 2001, Virginia Power filed an Answer denying that its sale of electricity to the Smithsonian violates Virginia law and a Counter Petition seeking a declaration that it has the statutory and legal obligation to provide service to the entire Smithsonian facility. Virginia Power simultaneously filed a Memorandum in Opposition to the Motion for Injunction.

Also on October 12, 2001, the Smithsonian and the GSA, by counsel, accepted the Commission's invitation to offer comments on the matter in dispute.<sup>3</sup> The Smithsonian addressed its practical concerns and support for Virginia Power to provide service to the new museum. It has contracted with Virginia Power to provide that service. In its Response, the Smithsonian emphasized that its paramount and practical concern is that the phased construction schedule of the museum not be compromised. It asserts that only timely completion of each phase of the project will ensure that the facility will open in December 2003, the centennial of the first powered flight by the Wright Brothers on December 17, 1903. That opening date is significant because (1) many individual and corporate donors who provided funding expect completion of the museum by that anniversary date; (2) the project's time line for completion could be endangered by scheduling changes; and (3) the museum plans to take advantage of the unique educational opportunities associated with opening on the centennial of the Wright Brothers' first flight.

The planned delivery of Virginia Power's first transformer in November 2001 is part of the construction schedule and is on the project's critical path. Installation will make permanent power available to the contractor beyond the current and temporary power capacity. The contractor must have that additional power by April 1, 2002, to permit construction and start-up of mechanical and electrical equipment necessary for construction of the museum's buildings.

The Smithsonian also addressed several practical concerns that go to the ultimate question presented in this case. Specifically, it identifies construction and costs that have been undertaken in anticipation of Virginia Power providing service. If the Commission concludes that NOVEC is the proper provider, this work would have to be reconsidered, which would also cause delays.

On October 18, 2001, NOVEC and Virginia Power filed a joint stipulation of facts upon which they could agree and to which they disagree ("Joint Stipulation"). There remain critical questions of fact upon which the parties cannot agree.

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<sup>3</sup>The GSA is the record landholder for the property on which the facility is being constructed. (Petition at 4). The United States' Response, however, noted that the GSA has played no role in the events that have led to the dispute in this case. (Response at 2, n. 1).

By hearing examiner ruling dated October 22, 2001, a Motion for Leave to Participate filed by Old Dominion Electric Cooperative ("ODEC") and the Association of Virginia, Maryland and Delaware Cooperatives (the "Association") was granted.

On October 24, 2001, NOVEC filed several affidavits. On October 25, 2001, before the scheduled oral argument, NOVEC also filed a pre-hearing memorandum.

At 10:00 a.m. on October 25, 2001, an oral argument was held on NOVEC's motion for injunction pendente lite. Appearances were entered by William Bradford Stallard, Esquire, and JoAnne L. Nolte, Esquire, on behalf of NOVEC; E. Duncan Getchell, Jr., Esquire, Kodwo Gharthey-Tagoe, Esquire, and John D. Sharer, Esquire, on behalf of Virginia Power; Steven E. Gordon, Assistant U. S. Attorney on behalf of the U.S. Government, Smithsonian, and the GSA; James P. Guy, II, Esquire, and John A. Pirko, Esquire, on behalf of ODEC and the Association; and Sherry H. Bridewell, Esquire, and Wayne N. Smith, Esquire, on behalf of Staff. Staff and the parties presented arguments in support of the positions taken in their filed pleadings, and on November 1, 2001, Staff and the parties filed post-hearing memoranda.

### **STIPULATION AND AFFIDAVITS**

In the Joint Stipulation, NOVEC and Virginia Power agree that NOVEC is a Virginia electric distribution cooperative, that Virginia Power is a Virginia public service corporation, and that the Smithsonian was created by an Act of Congress to serve the public. They agree that the Smithsonian is constructing a National Air and Space Museum annex at the Dulles Airport. They also stipulate that Virginia Power is currently providing temporary power to the facility. They independently recognize that the museum will have several points of electric usage including a hangar, an IMAX theatre, a chiller, and a parking lot.<sup>4</sup>

The list of facts to which they disagree is much longer. NOVEC contends that all or virtually all of the buildings are solely in its certificated territory. NOVEC alleges that the "footprint" of the facility, and the bulk of the load to be consumed, would be located in its service territory. Virginia Power asserts that the majority of the Smithsonian's property lies in its service territory and that all buildings that constitute the museum are wholly or partially in its territory.

NOVEC alleges that it began to work with the Smithsonian on or about August 6, 1996, to obtain specifications for the proposed facility.<sup>5</sup> The Cooperative avers that it periodically informed the Smithsonian that the bulk of electric power usage was in NOVEC's certificated territory, and it was therefore the proper entity to provide service. NOVEC further contends that it learned on or about January 25, 1999, that Virginia Power was also working with the Smithsonian.<sup>6</sup> On November 22, 2000, NOVEC, through ODEC, requested a new delivery point pursuant to the Interconnection and Operating

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<sup>4</sup> NOVEC Petition Exhibit 2; Virginia Power Answer and Counter Petition at 6; Joint Stipulation at 3, 11-13.

<sup>5</sup> Joint Stipulation at 3.

<sup>6</sup> Id. at 6.



Agreement ("the Agreement") between ODEC and Virginia Power.<sup>7</sup> That request was denied on April 6, 2001. According to NOVEC, its request was denied because the Smithsonian had requested service from Virginia Power.<sup>8</sup> NOVEC continues to maintain that it is willing and able to serve the Smithsonian facility, and that it has the exclusive duty and obligation to provide such service.

NOVEC submitted the affidavits of James C. Moxley, Peter G. Moore, and Gilbert Jaramillo. Mr. Moxley addressed the Agreement between ODEC and Virginia Power, and stated that NOVEC was ready, willing and able to provide service to the Smithsonian.<sup>9</sup> Mr. Moore, a Virginia land surveyor, stated that there are certain limiting factors that preclude exact calculations, however, it was his opinion that approximately 95% of the Smithsonian's structures are within NOVEC's service territory.<sup>10</sup> Mr. Jaramillo stated that he works with rate design, studies cost of energy distribution and generation, produces analyses of project loads, and conducts financial analyses regarding NOVEC's service to its customers.<sup>11</sup> He calculated the projected revenue NOVEC would receive if it served the Smithsonian facility and determined that providing electricity to the facility would result in gross revenue to NOVEC of approximately 1.4 million dollars per year. Assuming a five-megawatt load, and a load factor of 70%, the yearly distribution revenue alone would exceed \$225,000 to NOVEC based upon applicable rate schedules the Cooperative would use for similarly situated customers.<sup>12</sup>

James Moxley also submitted a supplemental affidavit after the oral argument stating that based on NOVEC's experience, it projects that it will take 14 to 21 days to install permanent service, assuming the availability of the appropriate equipment including transformers and electric cable. He affirmed that NOVEC "can perform the necessary work to meet the projected April 1, 2002 date for permanent service, providing NOVEC has timely access to the current service, and technical specifications which will enable NOVEC engineers to confirm assumptions about the requirements."<sup>13</sup>

ODEC submitted the affidavit of D. Richard Beam who also addressed a delivery point for NOVEC and the Agreement.<sup>14</sup>

Virginia Power contends the Smithsonian has expressed a preference for service from Virginia Power, that NOVEC did not object to Virginia Power currently providing temporary power, and that it is of paramount importance that the phased construction schedule not be compromised. It contends that not permitting Virginia Power to begin

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<sup>7</sup> Id.

<sup>8</sup> Id. at 7.

<sup>9</sup> Moxley affidavit, October 24, 2001.

<sup>10</sup> Moore affidavit, October 24, 2001.

<sup>11</sup> Jaramillo affidavit, October 24, 2001.

<sup>12</sup> Jaramillo affidavit, October 24, 2001.

<sup>13</sup> Moxley affidavit, November 1, 2001.

<sup>14</sup> Beam affidavit October 24, 2001.

construction of permanent facilities would harm its ability to ensure timely delivery of permanent power to the Smithsonian in accordance with its needs.<sup>15</sup>

John Caskey, the Virginia Power account manager for the Smithsonian, tried to determine where the service territory boundary crosses the Smithsonian site. He was unable to locate the northeast corner of the NOVEC service territory because the point is well within the airport property. However, he determined that the greater part of the Smithsonian's real property, the IMAX theater and the entire parking lot are in Virginia Power's territory and that part of the hangar is also in its territory.<sup>16</sup> He admitted that it was not possible to calculate the particular percentage of the hangar area in each utility's area because the northeast corner of the boundary could not be located on the ground.

Virginia Power also filed the Declaration of Justin Estoque, the project manager for construction of the museum employed by the Smithsonian. Mr. Estoque addressed why it is of paramount and practical importance that the construction schedule not be compromised. He confirmed that the schedule requires permanent power connection at the latest by the beginning of April 2002.<sup>17</sup>

Virginia Power challenges NOVEC's assertion that it is able to provide service, because it has not received a delivery point from Virginia Power. Moreover, Virginia Power contends that resolution of any dispute over a delivery point falls outside the jurisdiction of this Commission.<sup>18</sup> It argues that the Agreement between it and ODEC is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

After the oral argument, Virginia Power submitted the affidavits of Rebecca H. Buchanan, Tim Parsons, and a supplemental Declaration of Justin Estoque. Ms. Buchanan confirmed that all proposed permanent distribution facilities to be owned by Virginia Power would be installed within its service territory and electric service would be delivered to the Smithsonian entirely within that territory. The temporary facilities now in place would be removed and no Virginia Power facilities would remain in NOVEC's service territory. She anticipated that the construction of the permanent electrical facilities to serve the Smithsonian would take approximately ten working days.<sup>19</sup> Mr. Parsons confirmed that he performed the Global Position Satellite ("GPS") work discussed by Mr. Caskey in attempting to locate service boundaries.<sup>20</sup> Mr. Estoque stated that the Smithsonian has planned for both normal and alternate power sources at the museum to minimize the risk of power failure that would endanger its collections and the visiting public, and that Virginia Power had agreed to provide it.<sup>21</sup>

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<sup>15</sup> Virginia Power Memorandum in Opposition to Motion for Injunction, October 12, 2001; Estoque declaration, October 24, 2001.

<sup>16</sup> Caskey affidavit, October 12, 2001.

<sup>17</sup> Estoque declaration, October 24, 2001.

<sup>18</sup> Transcript 79-80.

<sup>19</sup> Buchanan affidavit, November 1, 2001.

<sup>20</sup> Parsons affidavit, November 1, 2001.

<sup>21</sup> Estoque declaration, November 1, 2001.

## **DISCUSSION**

### ***Legal Standard for Temporary Injunction***

The parties first differ on the standard that the Commission should apply as it considers the pending request for a temporary injunction. NOVEC asserts that §§ 12.1-13, 56-6, 56-265.3 and 56-265.4 of the Code of Virginia authorize the Commission to issue a preliminary injunction if it finds that NOVEC is likely to succeed on the merits in this proceeding.<sup>22</sup> NOVEC argues that the precedent established in two Commission cases<sup>23</sup> decided in 1998 and 1999, respectively, mandates the conclusion that it, not Virginia Power, has the obligation and right to serve the Smithsonian. In both cases the Commission applied a point of use analysis to conclude that the right of a utility to serve the customer in those cases was determined by the service territory in which the customer would use the electricity. NOVEC contends that application of that precedent to this case yields the clear conclusion that Virginia Power's attempt to serve the Smithsonian violates Virginia law and that such violation should be enjoined.

Virginia Power and Staff contend that the proper standard to apply to the request for a temporary injunction requires the equitable balance of four factors including: harm to the movant, harm to the respondents, the likelihood of success of the merits, and the public interest.<sup>24</sup>

Clearly, as NOVEC contends, the Commission has the authority to issue both a preliminary and a permanent injunction. Article IX, section 3 of the Constitution of Virginia provides that "[I]n all matters within the jurisdiction of the Commission, it shall have the powers of a court of record..." More specifically, Section 12.1-13 of the Code of Virginia provides that "[I]n the administration and enforcement of all laws within its jurisdiction, the Commission shall have the power ... to issue temporary and permanent injunctions."

NOVEC argues that when a statute expressly empowers a court to grant injunctive relief against its violation, no showing of irreparable harm is necessary. Indeed, in *Virginia Beach S.P.C.A. v. South Hampton Roads*, 229 Va. 349 (1985), the Virginia Supreme Court sustained a permanent injunction issued against the S.P.C.A. to prohibit the practice of veterinary medicine without a license. The applicable statute expressly empowered the courts to enjoin the unlawful practice of veterinary medicine,<sup>25</sup> and the Court concluded that once a court finds a person is engaged in the unlawful practice of veterinary medicine it has the power to enjoin that practice. It held that:

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

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<sup>22</sup> Transcript 45; NOVEC Supplemental Memorandum filed November 1, 2001.

<sup>23</sup> *Prince George Electric Cooperative v. RGC (USA) Mineral Sands, Inc.*, Case No. PUE960295, 1998 S.C.C. Ann. Rep. 344 (the "Prince George case") and *Petition of Kentucky Utilities Company*, Case No. PUE960303, 1999 S.C.C. Ann. Rep. 368 (the "Kentucky Utilities case").

<sup>24</sup> Virginia Power and Staff Post-hearing Memoranda filed November 1, 2001.

<sup>25</sup> Virginia Code section 54-786.7.

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.<sup>26</sup>

In *Carbaugh v. Solem*, 225 Va. 310 (1983), the Virginia Supreme Court also held that an injunction could be issued without a finding of irreparable harm. There the Court found that a showing of violation of the statute<sup>27</sup> prohibiting the sale of unpasteurized milk was sufficient grounds for an injunction. The Court held that when the "General Assembly determines that certain conduct is inimical to the public interest, a petition for an injunction 'need not contain an allegation of "irreparable injury."'"<sup>28</sup> Thus the General Assembly had already weighed the equities by permitting injunctive relief under the facts specified in the statute.<sup>29</sup>

The Commission has issued injunctions after application of this standard when a statute expressly provided for injunctive relief from its violation. The Virginia Securities Act,<sup>30</sup> for example, includes an express provision authorizing the Commission to issue an injunction "against any violation or attempted violation" of any provision of that Act.<sup>31</sup> The Commission has relied on that statute to issue temporary injunctions upon a showing that a statute therein had been violated.<sup>32</sup>

In the Utility Facilities Act, Virginia Code § 56-6 provides that:

[a]ny person...aggrieved by anything done...in violation of any of the provisions of [Title 56] by any public service corporation...shall have the right to...seek relief by petition...If the grievance... [is] established, the Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this law,...

The Commission has considered a balance of equities in one case considering the abandonment of facilities under section 56-265.1 (b) (1).<sup>33</sup> The Commission found that abandonment of a sewer system would result in irreparable harm to the public if not enjoined, and would violate the Utility Facilities Act.

The Commission, however, has also applied the standard urged by NOVEC to enjoin a public service corporation from violation of the Utility Facilities Act. The

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<sup>26</sup> *Virginia Beach S.P.C.A. v. South Hampton Roads*, 229 Va. 349, 354 (1985).

<sup>27</sup> Virginia Code section 3.1-530.8.

<sup>28</sup> *Carbaugh* at 315 (quoting *WTAR Radio-TV v. Virginia Beach*, 216 Va. 892, 894 (1976)).

<sup>29</sup> *Id.* at 315.

<sup>30</sup> Virginia Code section 13.1-501 *et seq.*

<sup>31</sup> Virginia Code section 13.1-519.

<sup>32</sup> *Bright Cove Securities, Inc.*, Case Nos. SEC010111 & SEC010120, Order (October 24, 2001) and *Commonwealth of Virginia, ex rel. State Corporation Commission v. Aircable of Roanoke, LLC, Digital Broadcast Corporation*, Case Nos. SEC000069 & SEC000072, Hearing Examiner's Report (December 19, 2000).

<sup>33</sup> *Commonwealth of Virginia, ex rel. State Corporation Commission v. Ruby and Sam Donaldson, Jr., t/a the Donaldson Sewer System*, Case No. PUE8810084, Order (September 9, 1988).

Commission enjoined VYVX of Virginia, Inc. ("VYVX") from exercising eminent domain authority to condemn and acquire property and constructing facilities before it obtained a certificate of public convenience and necessity. The injunction, however, was issued only after the Commission found that VYVX was not lawfully authorized to operate until such time as the Commission had acted upon its application for a certificate.<sup>34</sup>

Thus, the Commission has not always applied the equitable balance of factors if a statute expressly empowers injunctive relief to prevent continuing violation of the statute, and the Commission has before it affirmative proof that the statute has been violated.

Although NOVEC contends that all it need show is that its statutory right to a franchise is threatened or has likely been violated for the Commission to issue a preliminary injunction in this case, the very cases it cites appear to require more. This standard requires NOVEC to prove that a statute has been violated. The Commission may ultimately conclude that NOVEC has the superior right to serve this customer, but NOVEC has made no prima facie showing that the Utility Facilities Act has been violated by Virginia Power to support a preliminary injunction. To the contrary, both Virginia Power and NOVEC hold certificates of public convenience and necessity authorizing them to provide electric service in Fairfax County, and specifically to the Smithsonian property. Both utilities therefore have a valuable property right that may be affected and is entitled to protection.<sup>35</sup> Moreover, Virginia Power has represented that it will not extend service lines inside NOVEC's certificated service territory to provide permanent service to the museum.

The standard urged by Virginia Power and Staff requires a balance of several considerations, and I find that, absent an affirmative showing that a statute has been violated, it is the proper standard to apply in deciding whether NOVEC is entitled to a temporary injunction. The courts in Virginia have generally applied this standard which was first established by the Fourth Circuit in the *Blackwelder* case.<sup>36</sup> The consideration of four specific factors thus should govern the decision to grant a preliminary injunction. Those factors are:

1. the likelihood of irreparable harm to the plaintiff if the injunction is denied;
2. the likelihood of harm to the defendant if the relief is granted;
3. the likelihood that plaintiff will succeed on the merits; and
4. the public interest.<sup>37</sup>

The balance of hardships is the most important determination in applying the *Blackwelder* factors.<sup>38</sup> The degree to which the petitioner must show its likelihood of success on the merits to obtain the injunction varies inversely with the probability of irreparable harm.<sup>39</sup> If the balance of harm favors the petitioner, a preliminary injunction can be granted if the petitioner has raised questions going to the merits so serious, substantial, difficult and

<sup>34</sup> *Application of VYVX of Virginia*, Case No. PUC970047, Order (November 25, 1997).

<sup>35</sup> *Town of Culpeper v. VEPCO*, 215 Va. 189 (1974).

<sup>36</sup> *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4<sup>th</sup> Cir. 1977).

<sup>37</sup> *Id.* at 193.

<sup>38</sup> *Id.* at 196.

<sup>39</sup> *Id.*

doubtful, as to make them fair ground for litigation.<sup>40</sup> As the balance tips away from the petitioner a stronger showing on the merits is required.

### ***Balance of Harm***

Thus, I first must consider whether NOVEC faces irreparable harm, harm that is neither remote nor speculative, but actual and imminent. The Virginia Supreme Court has held that irreparable harm does not require "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."<sup>41</sup>

NOVEC contends that this case involves a "matter of principle," and that it will suffer significant and irreparable harm. It argues that it will suffer lost revenues, its planning process will be jeopardized, and that if not enjoined now, Virginia Power will be encouraged to employ similar tactics to steal other customers.<sup>42</sup>

Virginia Power asserts that there is no threat of irreparable harm to NOVEC.<sup>43</sup> Virginia Power contends that any potential harm to NOVEC is offset by the same potential harm that could be caused Virginia Power if it were enjoined from selling power to the Smithsonian.

Staff avers that adequate remedies are available to address any potential harm faced by NOVEC.<sup>44</sup>

In the *Prince George* case, the Commission ultimately found that the cooperative had the exclusive right to sell power to the customer, but Virginia Power had the facilities in place and was selling power to the customer at the time of that decision. The Commission ordered the parties to effect the orderly transfer of the facilities. Virginia Power contends that similar relief would be sufficient in this case as well.<sup>45</sup> Counsel for NOVEC argues that it would not be sufficient but he could not adequately explain why the same relief would not be appropriate in this case.<sup>46</sup> Further, the Smithsonian is a customer that under Virginia Code section 56-234 would not be subject to the Commission's rate or service authority, thus any dispute over lost revenues could be resolved in an action at law.

Virginia Power admits that any potential harm to it resulting from a temporary injunction is no more than that faced by NOVEC absent such an injunction. It also considers this dispute a matter of principle and a challenge to its right to serve under its certificate. It too could suffer lost revenues if enjoined. I agree. I find that any potential harm is the same for both parties, and the facts presently in evidence do not demonstrate

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<sup>40</sup> Id.

<sup>41</sup> *Calloway v. Webster*, 98 Va. 790 (1900).

<sup>42</sup> NOVEC Pre-hearing Memorandum at 10-11; Transcript at 53.

<sup>43</sup> Virginia Power Post-hearing Memorandum at 3.

<sup>44</sup> Transcript 26.

<sup>45</sup> Transcript 84.

<sup>46</sup> Transcript at 52-55.

that NOVEC or Virginia Power will be irreparably harmed. Adequate remedies are available to either party.

The potential harm faced by the customer, however, is significant and would be irreparable. The Smithsonian has clearly defined the timely availability of permanent power as critical to maintaining the construction schedule designed to assure that the museum, a national air and space museum of wide renown, opens in December of 2003, in celebration of the centennial of the first flight of the Wright Brothers. An interruption in the construction schedule due to the failure to have permanent power available by April of 2002 could affect that opening. Any delay would cause the loss of the opportunity to commemorate this centennial in such a fitting manner forever. There would be no remedy available to compensate for that loss.

Moreover, both NOVEC and Virginia Power have been aware of this territorial dispute for some time and chose not to bring it to the Commission until October of 2001. Despite their delay, the Commission has expedited consideration of this dispute, and a hearing on the merits is set for December 11, 2001.

### ***Likelihood of success***

As the potential harm to the Smithsonian is significant and irreparable, I conclude that NOVEC must make a very strong showing of its likely success on the merits to support a temporary injunction in this case. There certainly is a chance that NOVEC will prevail on the merits. The evidence shows that there are power requirements related to the facilities in NOVEC's service territory.<sup>47</sup> Application of the point of use analysis that the Commission considered in the *Prince George* and *Kentucky Utility* cases may ultimately support at least a portion of NOVEC's contention. Some, but not all of the use, would appear to fall in NOVEC's territory and thus strict application of a point of use analysis could support the conclusion that NOVEC was entitled to serve at least the specific points of use in its territory. However, as Virginia Power observed, the Commission clearly stated that it was not establishing an absolute test in the *Prince George* case, and cautioned that it would always consider the practical realities of each situation.<sup>48</sup>

There are several important differences in the practical realities in the case now before the Commission. NOVEC's chance of success here is not certain. Unlike the *Prince George* case, two-thirds of the Smithsonian property and several points of use are in Virginia Power's service territory. In the *Prince George* case, the customer had acquired a narrow strip of land representing only .4% of its total property for the sole purpose of reaching an alternative electric provider. No points of use were in the alternative provider's territory in that case. Here, the customer did not manipulate the delivery point to reach Virginia Power. Rather a significant portion of the real property and some of the museum facilities lie in Virginia Power's territory. Virginia Power has existing facilities closer to the points of use, and NOVEC's territory itself is a strip of land approximately 400 yards wide bounded on three sides by Virginia Power territory. Virginia Power is in a position to

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<sup>47</sup> Transcript 38-40.

<sup>48</sup> Virginia Power Memorandum in Opposition to Motion for Injunction, at 4.

provide timely service to the customer. The practical ability of NOVEC, however, to timely provide service is a matter of factual dispute. NOVEC must cross several hurdles before it can provide any service to the Smithsonian, including acquiring a delivery point from Virginia Power, an issue in dispute and beyond this Commission's jurisdiction. NOVEC and ODEC argue that the dispute over the delivery point will "go away" if the Commission concludes that NOVEC has the superior right to serve the Smithsonian, and that the FERC would likely decline to exercise jurisdiction over the contract dispute and defer action to the state.<sup>49</sup> In that case, the dispute would be resolved in a state circuit court, but it still would not come before the Commission. Also, and importantly, no action has been taken in any forum to resolve this critical controversy.

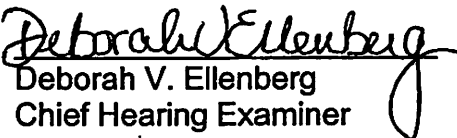
### ***The Public Interest***

The Smithsonian was created by an Act of Congress. Congress granted a charter to it in 1877 as an "establishment... for the increase and diffusion of knowledge among men...."<sup>50</sup> The new facility will be available to serve the public in that endeavor. It is clearly in the public interest for the facility to open and to open on time to celebrate the centennial of the Wright Brothers' first powered flight. Time is critical as the facility's opening in December 2003 is scheduled to coincide with the centennial anniversary of the Wright Brothers' historic flight. Any risk that the museum opening might be delayed must be avoided.

### **FINDINGS AND CONCLUSIONS**

1. Significant and irreparable harm to the Smithsonian, one of the respondents, could result from a delay in the scheduled opening of the new museum;
2. There are remedies available, albeit at some cost, to NOVEC if the Commission ultimately finds in its favor;
3. There is some likelihood that NOVEC will prevail, at least in part, based on the point of use test applied in the *Prince George* case, but there are significant differences in this case that make the outcome far less than certain;
4. Any likelihood of success does not offset the irreparable harm that could face the Smithsonian if a temporary injunction were granted; and
5. The public interest, educational opportunities, and the interests and expectations of the benefactors of the facility will be adversely affected if this new museum of undisputed national importance and reputation fails to open on the centennial anniversary of the Wright Brothers' historic first flight.

Accordingly, NOVEC's motion for an injunction pendente lite is **DENIED**.

  
Deborah V. Ellenberg  
Chief Hearing Examiner

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<sup>49</sup> Transcript at 67.

<sup>50</sup> 20 U.S.C. § 41.



Document Control Center is requested to mail or deliver a copy of the above Ruling on December 5, 2001, to: JoAnne L. Nolte, Esquire, and W. Bradford Stallard, Esquire, P. O. Box 617, Richmond, VA 23218-0617; Paul J. McNulty, U.S. Attorney, and Steven E. Gordon, Assistant U. S. Attorney, 2100 Jamieson Ave., Alexandria, VA 22314; Kodwo Ghartey-Tagoe, Esquire, and E. Duncan Getchell, Esquire, One James Center, 901 E. Cary St., Richmond, VA 23219; Pamela Walker, Esquire, and John D. Sharer, Esquire, P. O. Box 26532, Richmond, VA 23621; John F. Dudley, Esquire, 900 E. Main St., 2<sup>nd</sup> Fl., Richmond, VA 23219; James Patrick Guy, II, Esquire, and John Pirko, Esquire, LeClair Ryan, 4201 Dominion Blvd., Ste. 200, Glen Allen, VA 23060; Sherry H. Bridewell, Esquire, and Wayne N. Smith, Esquire, Office of General Counsel; and to the Commission's Division of Energy Regulation.

December 26, 2001  
REPORT DATE

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

HEARING DATE(S): December 11, 2001

IN RE: CASE NO. PUE010512

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

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

**APPEARANCES:**

JoAnne L. Nolte and W. Bradford Stallard, Counsel for Northern Virginia Electric Cooperative

Sherry H. Bridewell and Wayne N. Smith, Counsel for the Commission

John Daniel Sharer, E. Duncan Getchell, Jr. and Kodwo Ghartey-Tagoe, Counsel for Virginia Electric and Power Company

James P. Guy, II and John A. Pirko, Counsel for Old Dominion Electric Cooperative and Virginia, Maryland and Delaware Association of Electric Cooperatives

Steven E. Gordon, Counsel for Smithsonian Institution and General Services Administration

**WITNESSES: (9)**

Peter G. Moore, 10521 Battleview Parkway, Manassas, VA 20109

James C. Moxley, Senior Vice President for Electric and Telecommunications Systems Development of Northern Virginia Electric Cooperative, 10323 Lomond Drive, Manassas, VA 20109-0875

Gilbert D. Jaramillo, Manager of Account Services for Northern Virginia Electric Cooperative, 10323 Lomond Drive, Manassas, VA 20109-0875

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Konstantanos N. Kappatos, Senior Vice President of Engineering and Operations at Old Dominion Electric Cooperative, 4201 Dominion Boulevard, Glen Allen, VA

Rebecca H. Buchanan, Manager Customer Contracts - Distribution Operations Products and Services for Dominion Virginia Power, 701 E. Cary Street, Richmond, VA 23219

Justin Estoque, Project Manager for the construction of Steven F. Udvar-Hazy Center, National Air and Space Museum for the Smithsonian Institution, 750 9<sup>th</sup> St. NW, Suite 5200, Washington, DC 20560-0908

Harold Wilson Payne, Jr., Manager of Distribution Operations for Virginia Electric and Power Company, 701 E. Cary Street, Richmond, VA

Dale Bradshaw, CEO of Prince George Electric Cooperative, P. O. Box 168, Waverly, VA

Randall G. Trott, Timmons, Inc., 6501 Mechanicsville Turnpike, Suite G3, Mechanicsville, VA

#### **EXHIBITS: (21)**

PGM-1 - Pre-Filed Direct Testimony of Peter G. Moore

PGM-2 - Mylar

JCM-3 - Pre-Filed Direct Testimony of James C. Moxley

GDJ-4 - Pre-Filed Direct Testimony of Gilbert D. Jaramillo

KNK-5 - Direct Testimony of Konstantanos N. Kappatos

KNK-6 - Meeting Minutes, Network Operating Committee, 12/05/01

KNK-7 - Network Operating Agreement Between Virginia Electric and Power Company and Old Dominion Electric Cooperative

KNK-8 - Virginia Power, Old Dominion Electric Cooperative and Northern Virginia Electric Cooperative Meeting Minutes

RHB-9 - Direct Testimony of Rebecca H. Buchanan

JE-10 - Direct Testimony of Justin Estoque

JE-11 - Video - Smithsonian Institution National Air & Space Museum, Steven F. Udvar-Hazy Center Computer Animation

HWP-12 - Report of the Division of Energy Regulation, Case PUE960295, 09/25/98

HWP-13 - Final Report of the Division of Energy Regulation, Case PUE960295, 10/30/98

RGT-14 - Direct Testimony of Randall G. Trott

RGT-15 - Map E51

RGT-16 - Attachment 2, as marked

KNK-17 - Email to Wood from LaVigne, 09/30/97

KNK-18 - Handwritten Notes

PGM-19 - Rebuttal Testimony of Peter G. Moore

JCM-20 - Rebuttal Testimony of James C. Moxley

JCM-21 - Fax Letter to Bothwell from Harris, 06/18/01

DISPOSITION: UNDER ADVISEMENT

BAILIFF

*SL 2. mcl*  
Sherman L. McLaughlin, Jr.

## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): JoAnne L. Nolte

OFFICE ADDRESS:

W. BRADFORD STALLARD

PEW STUART

801 E. Main St Ste 1110  
Richmond Va 23218-0611

MEMBER OF THE VIRGINIA STATE BAR? ☒ YES NO ☐

NAME AND ADDRESS OF PARTY:

CHECK ONE:

APPLICANT

☒

DEFENDANT

☐

RESPONDENT

☐

Northern Virginia Electric  
Cooperative

10323 Lomond Drive

P.O. Box 2710

Manassas Va 22110

## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): JOHN DANIEL SHARER  
OFFICE ADDRESS: DOMINION RESOURCES SERVICES, INC.  
P.O. Box 26532  
RICHMOND, VA 23261-6532

MEMBER OF THE VIRGINIA STATE BAR? [~~4~~YES NO [ ]

CHECK ONE:

APPLICANT [ ]

DEFENDANT ~~XX~~

RESPONDENT [ ]

NAME AND ADDRESS OF PARTY:  
VIRGINIA ELECTRIC and  
Power Company  
\_\_\_\_\_  
\_\_\_\_\_

## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): McGuire Woods  
E. Duncan Getchell, Jr.

OFFICE ADDRESS: 901 E. Cary  
Richmond 23219

MEMBER OF THE VIRGINIA STATE BAR? ☒ YES ☐ NO

NAME AND ADDRESS OF PARTY:

CHECK ONE:

APPLICANT ☐

DEFENDANT ☒

RESPONDENT ☐

Dominion Virginia Power

## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): E. DUNCAN GETCHELL, JR.  
KDDND GHARTEY - TABOE

OFFICE ADDRESS: MCGUIRE WOODS LLP  
901 E CARY ST  
RICHMOND, VA 23219

MEMBER OF THE VIRGINIA STATE BAR? [☒] YES NO [ ]

CHECK ONE:

APPLICANT [ ]

DEFENDANT ☒

RESPONDENT ☒

NAME AND ADDRESS OF PARTY:

VIRGINIA ELECTRIC + POWER Co.

701 E. CARY ST

RICHMOND, VA



## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): JAMES P. GUY II

OFFICE ADDRESS: JOHN A. PIKRO

4201 Dominion Blvd

Suite 200

Glen Allen, VA 23060

MEMBER OF THE VIRGINIA STATE BAR? [~~4~~YES NO [ ]]

NAME AND ADDRESS OF PARTY:

CHECK ONE:

APPLICANT [ ]

DEFENDANT [ ]

RESPONDENT [ ]

Old Dominion Electric Coop.

VA. MD, DE Association

of Electric Cooperatives

## APPEARANCE FORM

NAME OF COUNSEL (PLEASE PRINT): Steven E. Gordon

OFFICE ADDRESS: 2100 Sammisson Ave  
Alexandria, VA ~~22302~~ 22314

MEMBER OF THE VIRGINIA STATE BAR? ☐ YES ☐ NO ☐

Appearing pursuant to 28 USC § 517

NAME AND ADDRESS OF PARTY:

CHECK ONE:

APPLICANT ☐

DEFENDANT ☐

RESPONDENT ☒

United States

Smithsonian Institution

GSA

General Service Administration

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.

The complete transcript of the  
testimony and other incidents of the above-captioned  
matter when heard on December 11, 2001, having been  
continued from October 25, 2001, before the Honorable  
Deborah V. Ellenberg, Chief Hearing Examiner for the State  
Corporation Commission, Richmond, Virginia.

Reported and transcribed  
by: Karen Baxter Tubbs  
and Susan E. Moser

## APPEARANCES:

Honorable Deborah V. Ellenberg,  
Chief Hearing Examiner

Sherry H. Bridewell, Esquire,  
and  
Wayne N. Smith, Esquire,  
Counsel to the Commission

William Bradford Stallard, Esquire,  
and  
JoAnne L. Nolte, Esquire,

Counsel to Northern Virginia  
Electric Cooperative

E. Duncan Getchell, Jr., Esquire,  
Kodwo Gharthey-Tagoe, Esquire,  
and  
John D. Sharer, Esquire,

Counsel to Virginia Electric  
and Power Company, d/b/a  
Dominion Virginia Power

James Patrick Guy, II, Esquire,  
and  
John A. Pirko, Esquire,

Counsel to Old Dominion Electric  
Cooperative and the Virginia,  
Maryland and Delaware Association  
of Electric Cooperatives

Steven E. Gordon, Esquire,

Counsel to the U.S. Government,  
Smithsonian Institution, and  
U.S. General Services Administration

# I N D E X

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1                   NOTE: The matter is called to be  
2                   heard at 10:00 o'clock a.m., December 11, 2001,  
3                   and begins as follows, viz:

4  
5                   THE BAILIFF: On this morning's docket  
6                   we have Case No. PUE010512, Commission of  
7                   Virginia, ex rel., Northern Virginia Electric  
8                   Cooperative, Petitioner v. Virginia Electric and  
9                   Power Company, Smithsonian Institution, and U.S.  
10                  General Services Administration, Respondents,  
11                  for a Petition for Declaratory Judgment and  
12                  Motion for Injunction.

13                 JoAnne L. Nolte and W. Bradford  
14                 Stallard, Counsel for Northern Virginia Electric  
15                 Cooperative.

16                 Sherry Bridewell and Wayne Smith,  
17                 counsel for the Commission.

18                 John Daniel Sharer, E. Duncan  
19                 Getchell, Jr., and Kodwo Ghartey-Tagoe, counsel  
20                 for Virginia Electric and Power Company.

21                 James P. Guy, II, and John A Pirko,  
22                 counsel for Old Dominion Electric Cooperative  
23                 and Virginia, Maryland and Delaware Association  
24                 of Electric Cooperatives..

25                 Steven E. Gordon, counsel for the



1           Smithsonian Institution and General Services  
2           Administration.

3                   The Honorable Deborah V. Ellenberg,  
4           Chief Hearing Examiner presiding.

5                   HEARING EXAMINER: Thank you.

6                   Good morning, ladies and gentlemen.

7  
8                   NOTE: All counsel respond.

9  
10                   HEARING EXAMINER: Mr. Sharer, I see  
11           you have a table all to yourself.

12                   MR. SHARER: I was banished here, Your  
13           Honor.

14                   (Laughter)

15                   HEARING EXAMINER: We, of course, are  
16           here this morning to receive evidence relevant  
17           to the territorial dispute that has been raised  
18           in the petition and the counter petition.

19                   I have before me on the bench an order  
20           of presentation and proceeding this morning that  
21           Ms. Bridewell has prepared, and it looks fine to  
22           me.

23                   Before we start with opening  
24           statements, are there any preliminary matters  
25           that we need to address this morning?

1 Ms. Bridewell?

2 MS. BRIDEWELL: Your Honor, I'm  
3 unaware of any preliminary matters that we have  
4 at this time.

5 HEARING EXAMINER: All right.

6 I understand we have some technical  
7 problems with the video tape, but I also know in  
8 looking at the order of proceeding that we're  
9 not likely to get far by lunch, and so we can  
10 take a look at it and try to work through those  
11 technical problems at lunch, or even at the end  
12 of the day if we don't get that far.

13 So if there are no preliminary  
14 matters, let's begin with opening statements.

15 Ms. Bridewell?

16 MS. BRIDEWELL: Thank you, Your Honor.  
17 Good morning.

18 HEARING EXAMINER: Good morning.

19 MS. BRIDEWELL: May it please the  
20 Hearing Examiner, my name is Sherry Bridewell,  
21 and I'm appearing today with Wayne N. Smith, on  
22 behalf of the Staff of the State Corporation  
23 Commission.

24 Your rulings in November and of  
25 December 5, 2001, contain a procedural history

1 of this case as well as a good description of  
2 the arguments being put forth by the parties in  
3 the case. One of the principal issues before  
4 the Commission and the Hearing Examiner in this  
5 proceeding is whether Northern Virginia Electric  
6 Cooperative, whom I shall refer to as NOVEC, or  
7 the Cooperative, should be the exclusive  
8 provider of service to the Smithsonian Institute  
9 for the Steven F. Udvar-Hazy Center, National  
10 Air and Space Museum that is currently under  
11 construction in Fairfax County, Virginia.

12 As you're aware, Your Honor, NOVEC  
13 asserts that they are entitled to serve this  
14 facility pursuant to their certificate of public  
15 convenience and necessity granted by the State  
16 Corporation Commission under the Utility  
17 Facilities Act.

18 As you're aware from their petition,  
19 they've asked for a whole raft of ancillary  
20 relief, in addition to a declaration that they  
21 are entitled to serve.

22 NOVEC contends that the majority of  
23 the proposed Museum structures and points of  
24 electric use is within it's certificated service  
25 territory, and that it, and not Virginia Power

1           has a right to serve the Museum.

2                   NOVEC further asserts that it has  
3           maintained that it is the only certificated  
4           public utility that should have the right to  
5           serve the Museum since 1996.

6                   Virginia Power, on the other hand,  
7           after you've reviewed all of the -- or heard all  
8           of the testimony and evidence in this case,  
9           contends that it, not NOVEC, has the right to  
10          serve this facility, because, among other  
11          things, the Museum's property straddles the  
12          boundary lines between NOVEC and Virginia  
13          Power's service territories, that all or a  
14          portion of the load associated with each point  
15          of use is in Virginia Power's service territory,  
16          that Virginia Power is the provider of normal  
17          electric service and alternative electric  
18          service, that Virginia Power is the electric  
19          distribution provider with or with NOVEC's  
20          involvement, and that NOVEC has demonstrated no  
21          ability, absent a delivery point from Virginia  
22          Power to provide electric service in accordance  
23          with the Museum's requirements, and that it  
24          would be wasteful and imprudent to have both  
25          utilities to serve a single customer's property.

1                   NOVEC, of course, challenges each of  
2                   these assertions by Virginia Power.

3                   The Commission's October 2nd, 2001,  
4                   preliminary order authorizes Staff to  
5                   participate in this proceeding to the extent  
6                   permitted by 5 VAC 520-80 D of the Commission's  
7                   Rules of Practice and Procedures. And your  
8                   ruling of November 2nd, 2001, set up today's  
9                   hearing, permitting the Staff to file testimony  
10                  it planned to offer in this proceeding.

11                  After reviewing the testimony filed by  
12                  the participants in the case, the Staff elected  
13                  not to file independent testimony, but will  
14                  participate today through cross-examination in  
15                  this proceeding, to make sure that the interests  
16                  -- the public interest is represented and that  
17                  the record is developed for the Hearing Examiner  
18                  and the Commission's consideration in this case.

19                  The Staff welcomes the opportunity to  
20                  participate and certainly agrees with the  
21                  Examiner's assessment in her December 5, 2001  
22                  ruling that it's important that the construction  
23                  of the Steven F. Udvar-Hazy Center, National Air  
24                  and Space Museum should not be delayed, and that  
25                  this facility should be permitted to maintain

1 its scheduled opening date of December, 2003, to  
2 coincide with the centennial anniversary of the  
3 Wright Brothers' historic flight.

4 This concludes my opening statement,  
5 unless you have any questions for me, Your  
6 Honor.

7 HEARING EXAMINER: No questions.  
8 Thank you, Ms. Bridewell.

9 MS. BRIDEWELL: Thank you.

10 HEARING EXAMINER: Mr. Stallard,  
11 welcome back to Richmond.

12 MR. STALLARD: Thank you, Your Honor.  
13 It's very nice to be here.

14 May it please the Court and the  
15 Commission, this is a proceeding in which  
16 Northern Virginia Electric Power is seeking a  
17 declaration that it rightfully may serve the  
18 Udvar-Hazy Center that's currently under  
19 construction in Northern Virginia.

20 At the outset, let me emphasize to  
21 Your Honor that the issue today is governed by  
22 statutes enacted by our General Assembly, the  
23 Virginia Code Annotated Section 56-265.3 and  
24 265.4. It's also governed by the Commission's  
25 decisions in Mineral Sands and Kentucky

1           Utilities decisions that I'm sure Your Honor is  
2           extremely familiar with. In these cases, the  
3           Commission adopted the point of use test. The  
4           point of use test requires that the utility  
5           authorized to serve within a certificated  
6           territory may provide power to a facility within  
7           that territory.

8                     Your Honor, we believe that the facts  
9           of this case -- in fact the overwhelming facts  
10          in this case clearly show that the majority of  
11          the facility in this instance is within NOVEC's  
12          territory, and that under this test and under  
13          its certificate, NOVEC is entitled to serve this  
14          facility.

15                    And, Your Honor, I congratulate  
16          Dominion Virginia Power and it's counsel for  
17          doing such a marvelous job. They have  
18          essentially -- and are essentially asking this  
19          Hearing Examiner and the Commission to disregard  
20          statutory mandate, disregard the decisions of  
21          the Commission, and through adoption of this  
22          practical considerations test, this ad hoc test,  
23          they ask the Commission to put aside all those  
24          items and adopt and follow this exception.

25                    May I suggest that this exception

1 swallows the rule, and it certainly would be in  
2 violation of the Commission's decisions in  
3 Kentucky Utilities and Mineral Sands which  
4 mandate and state clearly and unequivocally that  
5 the primary consideration is the protection of  
6 the territorial rights of the utility.

7 Now, Dominion Virginia Power says  
8 there are no clear rules, and it puts its spin  
9 on the facts, and it urges essentially, I guess,  
10 another test, either customer choice or point of  
11 delivery, which both of those concepts were  
12 rejected by the Commission in those cases.

13 What it does is it blames NOVEC for  
14 the delay, creates doubt about delivery point,  
15 and also advocates customer choice, and with Mr.  
16 Estoque's help creates fear that somehow the  
17 construction path is endangered if NOVEC is  
18 entitled to serve this facility.

19 Your Honor, these issues all are  
20 without factual or legal merit. Once you peel  
21 away the layers and examine these issues  
22 factually, I believe Your Honor will conclude  
23 that the evidence suggests and establishes that  
24 they have no merit, and do not entitle Dominion  
25 Virginia Power to serve this facility.



1                   With respect to the evidence that  
2                   NOVEC was dilatory, Your Honor, the record is  
3                   clear in this case. It shows a history. From  
4                   the moment that Northern Virginia Electric  
5                   Cooperative found out this facility was being  
6                   built, it expressed its intent and interest to  
7                   serve this facility.

8                   Dominion says the first time it let  
9                   everyone know of its interest was 1999, and  
10                  that's true. They wrote a letter and began  
11                  dialogue, but that letter was by no means some  
12                  expression that Northern Virginia Electric  
13                  Cooperative should be excluded from  
14                  consideration as far as providing service. In  
15                  fact, they copied NOVEC in, recognizing NOVEC's  
16                  rights in this matter.

17                  Delivery point was requested in  
18                  November of 2000. It was not officially and  
19                  formally denied until April of 2000, over five  
20                  months later. During this whole period of time,  
21                  Jim Moxley, on behalf of NOVEC, was speaking  
22                  with his counterpart at Dominion Virginia Power  
23                  in an effort to resolve this dispute. They had  
24                  discussions about what can we do to solve the  
25                  problem. And only after it became clear that

1           this situation could not be resolved, did they  
2           pursue this proceeding before the Commission.

3                     Your Honor, if Dominion Virginia Power  
4           -- if their argument is to prevail, then the  
5           public policy impact of this will be that my  
6           client, NOVEC, will be discouraged from talking  
7           with Dominion Virginia Power in an effort to  
8           work these matters out, and certainly as soon as  
9           a dispute rises, we'll run to the Commission and  
10          file an action to protect our rights, otherwise,  
11          we'll be accused of being dilatory.

12                    I really don't see how these facts,  
13          the evidence before the Commission, could  
14          possibly be portrayed as showing that NOVEC was  
15          dilatory. That is simply the characterization  
16          by Dominion Virginia Power, and may I suggest  
17          that when these facts are held up to the light,  
18          it simply has no merit. In fact, we tried to  
19          work it out, and only this past summer did we  
20          reach an impasse, and that is uncontradicted.

21                    Now, the delivery point issue is  
22          another such issue that when you hold it up to  
23          the light, examine the facts, it should have no  
24          bearing on this proceeding whatsoever, and I'll  
25          explain why.

1                   Your Honor will recall Mr. Getchell  
2                   telling the Commission, Your Honor, that you  
3                   don't need to enter a preliminary injunction.  
4                   If the Commission rules in our favor, it will  
5                   transfer service. And Your Honor recognized  
6                   that in your opinion.

7                   There will be evidence today from Mr.  
8                   Moxley. He had conversations with Mr. Ed  
9                   Cowell, with Dominion Virginia Power. Mr.  
10                  Cowell told Mr. Moxley last summer, "If you  
11                  can't work it out and you go to the Commission  
12                  and win, we'll sell you the equipment." Mr.  
13                  Moxley will tell you that today.

14                 The representative of ODEC, which as  
15                 Your Honor will recall, is the sort of parent  
16                 cooperative that has the delivery point right.  
17                 Mr. Konstantinos, Gus, Kappatos will testimony  
18                 they recently had a committee meeting, and that  
19                 committee was the one that Your Honor will  
20                 recall was mentioned under the Network Operating  
21                 Agreement, and the result of that is clear, that  
22                 if the Commission says that NOVEC is entitled to  
23                 serve this customer, there will be a transfer,  
24                 an orderly transfer of service.

25                 So among these items, if the

1 Commission so orders, service will be  
2 transferred. And I don't think there's any  
3 question, these companies, based on their  
4 history have worked together, they'll continue  
5 to work together in the future, and the question  
6 of delivery point should not be an issue.

7 Certainly if NOVEC is entitled to one  
8 delivery point, they should be entitled to a  
9 second, if the Smithsonian wants alternate  
10 service from a different circuit to provide that  
11 redundancy.

12 With respect to the Smithsonian's  
13 involvement in choice, we certainly respect the  
14 U.S. Government and appreciate their concerns.  
15 But, Your Honor, service can be transferred.  
16 Reliability is not in danger. It's not a  
17 problem. They will not go one second without  
18 electricity. The simple truth is, is that this  
19 does not create any sort of technical or  
20 engineering problem.

21 The Commission ordered transfer in  
22 both Mineral Sands and Kentucky Utilities. That  
23 can occur in this case, and certainly to the  
24 extent that they say that customer choice should  
25 govern, while it's clear that customer choice

1           may be an issue through some aspects of  
2           electrical service in Virginia, the Commission  
3           was clear in both Mineral Sands and Kentucky  
4           Utilities, customer choice is not going to  
5           override the very important territorial rights  
6           of a utility.

7                       So, Your Honor, once these issues are  
8           examined, the evidence examined, and you peel  
9           them away, they all really have no bearing on  
10          this case. We have virtually undisputed  
11          evidence about where this boundary line goes,  
12          and I realize that Dominion Virginia Power's  
13          expert moves it a few feet to the west, but not  
14          significantly, and so there's not a huge dispute  
15          about where this facility is or where the  
16          boundary line lies.

17                      So we have a facility which we believe  
18          at least over 90 percent is within NOVEC's  
19          territory. We have a boundary line that cuts  
20          down the very front of it, and then we have the  
21          parking lot.

22                      And, Your Honor, it's a simple task  
23          here. What do practical considerations counsel?  
24          What is the answer to this problem? Should you  
25          have two providers? We don't believe that's the

1 right way to go, because clearly I'm sure the  
2 customer would want one, and we would agree  
3 that's the most efficient thing to do. But we  
4 would accept an alternative if the Commission  
5 says that they should have the parking lot, and  
6 we should have the building. That would be  
7 fine.

8 Nonetheless, the practical  
9 considerations counsel that if you have 5  
10 percent of a structure in Dominion Virginia  
11 Power's territory, the real answer in this case  
12 is to give the whole facility to NOVEC. That's  
13 the practical considerations I believe the  
14 Commission was talking about, instead of having  
15 a hard and fast rule and splitting the baby.  
16 These facts counsel that the facility should be  
17 served by NOVEC.

18 Your Honor, we are here asking the  
19 Commission for relief, consistent with our  
20 rights. We believe the evidence is very strong  
21 and very clear, in that the evidence only  
22 differs from the spin which Dominion Virginia  
23 Power puts on it, by calling it dilatory, by  
24 calling into question the delivery point. They  
25 want to create doubt and fear and give the

1 Commission some reason to ignore NOVEC's rights.

2 We implore the Commission to follow  
3 its mandate in the Mineral Sands and Kentucky  
4 Utilities case. We ask the Commission to follow  
5 that precedent, to follow Virginia law, and to  
6 rule and hold today that NOVEC is the rightful  
7 and proper server of the new facility.

8 Thank you very much.

9 HEARING EXAMINER: Thank you, Mr.  
10 Stallard.

11 Mr. Guy?

12 MR. GUY: May it please the Commission  
13 and the Chief Hearing Examiner, good morning.

14 I am Jim Guy with LeClair Ryan. I am  
15 appearing here today. My partner, John Pirko,  
16 will also appear on behalf of Old Dominion  
17 Electric Cooperative, the wholesale power supply  
18 cooperative of which Northern Virginia Electric  
19 Cooperative is a member, and on behalf of the  
20 Virginia, Maryland and Delaware Association of  
21 Electric Cooperatives, whose members include, in  
22 addition to Northern Virginia Electric  
23 Cooperative, all of the other electric  
24 cooperatives operating in the Commonwealth.

25 Old Dominion and the Association, and

1 I'll refer to them collectively as "the  
2 Cooperatives", filed their motion for leave to  
3 be admitted as parties on October 18th, 2001.  
4 Without objection, the Chief Hearing Examiner  
5 granted the motion by ruling dated October 22nd,  
6 2001.

7 The Cooperatives participated in the  
8 oral argument on October 25th, 2001. In  
9 accordance with the Chief Hearing Examiner's  
10 ruling dated November 2, 2001, Old Dominion  
11 filed the direct testimony of its senior vice  
12 president of Engineering and Operations, Gus  
13 Kappatos on November 21, 2001.

14 Mr. Kappatos is here today. He is  
15 going to testify that Old Dominion has  
16 conscientiously and timely pursued a new  
17 delivery point. His testimony will describe the  
18 delivery point request process under the Network  
19 Operating Agreement, and the Interconnection and  
20 Operating Agreement, between Dominion Virginia  
21 Power and Old Dominion. His testimony will  
22 demonstrate that the formal delivery point  
23 request did not initiate the process, but  
24 instead was the culmination of a long process  
25 involving extensive engineering and design work



1           between the companies, and that it produced a  
2           mutually agreeable technical approach to  
3           providing service to the new Steven F. Udvar-  
4           Hazy museum, which if you'll forgive me, I'll  
5           refer to as the new airplane museum.

6                     Mr. Kappatos' testimony will also show  
7           that contrary to Dominion Virginia Power's  
8           speculation in oral argument in October, there  
9           has never been any impediment raised to the  
10          requested delivery point, other than the  
11          territorial question.

12                    Mr. Kappatos will update his prefiled  
13          testimony to describe for you the subsequent  
14          meeting of the Network Operating Committee. In  
15          fact, it met just a few days ago, at which Old  
16          Dominion and Dominion Virginia Power agreed that  
17          the only disputed issue related to the delivery  
18          point request is the territorial question, and  
19          that that question is not within that  
20          Committee's scope or mandate, because it's  
21          within yours.

22                    His testimony will clarify that far  
23          from resting on its rights, Old Dominion  
24          vigorously and timely pursued a new delivery  
25          point. He will give evidence that only the

1           representations of both Dominion Virginia Power  
2           and Northern Virginia Electric Cooperative,  
3           assuring that they were actively pursuing a  
4           mutually agreeable resolution of the dispute,  
5           caused Old Dominion to forbear seeking a more  
6           aggressive adjudication of its important rights  
7           under its contracts. In essence, they held back  
8           because they wanted the parties to work things  
9           out.

10                 Mr. Kappatos will also comment on  
11           several of the misstatements and errors in the  
12           testimony of Dominion Virginia Power witness  
13           Rebecca Buchanan. In particular, he will refute  
14           her assertion that DVP is the effective  
15           distribution service provider, a novel concept,  
16           by virtue of providing a transmission system  
17           delivery point. He will refute her contention  
18           that Dominion Virginia Power is uniquely  
19           situated to provide alternate service, whatever  
20           that may be.

21                 Finally, as one of the authors of Old  
22           Dominion's Network Agreement -- Network  
23           Operating Agreement and I&O Agreement, and as a  
24           member of the Network Operating Committee that  
25           administers it, Mr. Kappatos will speak

1           authoritatively to correct witness Buchanan's  
2           efforts to miss -- I'm sorry -- efforts to  
3           construe the Network Operating Agreement. That  
4           was a misstatement, and I apologize.

5                   The issues in this case relating to  
6           Old Dominion are critically important to Old  
7           Dominion and its member cooperatives. They are  
8           very important to us. But to tell the truth,  
9           they're not important to this case.

10                   This case is important, but the  
11           questions about delivery point rights and what  
12           the proper process is and all of that, really  
13           doesn't have anything to do with this case.  
14           This case is a question of territory. That's  
15           all it's about, but we're here to slough through  
16           the issues with you, hoping that in the end  
17           you'll peel through the layers, as my friend  
18           says.

19                   The evidence will demonstrate that Old  
20           Dominion and NOVEC have done exactly what the  
21           Commission should want them to do and what I  
22           believe it does want them to do. They have  
23           conscientiously pursued proven processes to work  
24           out practical solutions to the challenge of  
25           providing service to the new airplane museum.

1                   There are more red herrings in this  
2                   case than in an Agatha Christie mystery. What  
3                   is the appropriate service voltage? When should  
4                   a delivery point should be requested?

5  
6                   NOTE: The reporter interrupts.

7  
8                   MR. GUY: Thank you for the  
9                   opportunity to repeat that rhetorical device.

10                  (Laughter)

11                  I also have a copy.

12                  There are more red herrings in this  
13                  case than in a Jewish deli -- I mean an Agatha  
14                  Christie mystery. What is the appropriate  
15                  service voltage? When should a delivery point  
16                  be requested? Is a transmission provider  
17                  effectively a distribution provider? Is NOVEC a  
18                  certificated public utility, obligated to prove  
19                  that it can fulfill its utility obligations?  
20                  When should the Network Operating Committee  
21                  meet?

22                  Once you cull out the red herrings,  
23                  the evidence is very clear that the only issue  
24                  that NOVEC and Dominion Virginia Power haven't  
25                  worked out is who should serve a customer who

1 has a majority of its load in one utility's  
2 service territory and a fraction in the service  
3 territory of another utility.

4 Do you apply the precedent established  
5 in the Prince George and Kentucky Utilities  
6 cases strictly and split the service? Do you  
7 invoke the practical considerations reservation  
8 to allow the utility with the majority of the  
9 load to serve the whole thing? And I think  
10 that's what that language is about. Or do you  
11 accept the analytically insupportable admonition  
12 in DVP's testimony to use this regulatory  
13 proceeding to introduce customer choice and  
14 utility competition for electric service -- for  
15 electric distribution service?

16 The practical and public policy  
17 consequences of the Commission's decision in  
18 this case dwarf the unlikely possibility, the  
19 impossibility that the Smithsonian's ribbon  
20 cutting ceremony and opening for its admittedly  
21 beautiful, wonderful new airplane museum might  
22 be delayed.

23 Our industry is struggling -- our  
24 industry is struggling to get through the  
25 introduction of consumer choice for power

1 supply, and all the restructuring that that  
2 entails. It's a hard thing to do. At this  
3 point, to institutionalize border skirmishes and  
4 territorial poaching on distribution systems  
5 will -- can only exacerbate the problem.

6 I'm not sure there's a public interest  
7 standard in this case. In an injunction, that's  
8 part of the standard. You've got to consider  
9 that. I'm not sure there's one in this case. I  
10 think it's applying the statute on certificated  
11 territories. But if you think there's an  
12 important public policy interest consideration  
13 standard, again, a beautiful museum, lovely, and  
14 we hope they meet their deadlines, and we  
15 believe they will, no matter which service  
16 provider they have. But even if they miss it,  
17 those public policy interests disappear compared  
18 to what's important with respect to  
19 administering an orderly utility system in  
20 Virginia. That's what my client's charge is.  
21 That's what this Commission's charge is, and  
22 that's the most important public policy  
23 consideration that's before you today.

24 The Cooperatives hope -- the  
25 Cooperatives believe that you won't be able to

1           avoid finding that the vast majority of the load  
2           is in NOVEC's territory and that you'll apply  
3           the point of use test adopted in the preceding  
4           cases to confirm NOVEC's right and duty to serve  
5           the majority of the load.

6                     The Cooperatives further urge you to  
7           acknowledge the practical considerations of the  
8           difficulties of splitting loads by finding that  
9           Dominion Virginia Power should be relieved of  
10          its obligation to serve the parking lot and the  
11          movie theatre and the other fractions of the  
12          buildings, and recommend that the factional load  
13          be transferred along with the facilities already  
14          in place to ODEC.

15                    This isn't a hard case. This is  
16          territorial integrity. Answer that question in  
17          conformance with the cases, and all the other  
18          problems evaporate.

19                    Thank you.

20                    HEARING EXAMINER: Mr. Getchell?

21                    MR. GETCHELL: If Your Honor please,  
22          the purpose of an opening statement is to  
23          forecast what the evidence will be and to make  
24          some brief observations of the significance of  
25          that evidence. And it is my forecast that at

1 the end of this proceeding, that Your Honor will  
2 conclude that none of the matters in contention  
3 between the parties is legally significant, that  
4 the legally significant facts are, in fact,  
5 undisputed.

6 It's uncontroverted in substance, and  
7 it just quarrels around the edges, that the  
8 property and the points of use at issue here are  
9 transected by a boundary through no manipulation  
10 on the part of the landowner. It is beyond  
11 dispute that most of the parcel is in Virginia  
12 Power's territory.

13 Our surveyors don't really disagree  
14 that all or part of each point of use is  
15 transected by the boundary. It is beyond  
16 reasonable dispute that the government wants  
17 Dominion Virginia Power to provide the service.  
18 And I think that it is beyond reasonable  
19 dispute, although this is where most of the  
20 "back-ing" and the "forth-ing" and "to-ing" and  
21 "frow-ing" will be today, that Dominion Virginia  
22 Power can better demonstrate an ability to  
23 timely and adequately serve this customer, both  
24 because of unresolved issues of the delivery  
25 point and the work -- the planning that's



1 already been done and the equipment that's  
2 already been ordered. The practicalities of a  
3 point in favor of Dominion Virginia Power.

4 Now, I think the parties have agreed  
5 that it would be impractical to have the same  
6 provider meter a building. So that's not really  
7 a solution.

8 Well, what are the legal alternatives  
9 available to this Commission? The first is to  
10 adopt what NOVEC wants, which is, despite what  
11 they say, not at all the point of use test, but  
12 the load center test, which was discussed in  
13 Prince George. In fact, there was a citation to  
14 the Colorado Public Service Commission case  
15 where it was pointed out that a load center test  
16 is inconsistent with honoring statutes that  
17 create exclusive territories because if you  
18 simply say I'm going to give to one utility all  
19 of that service, when there's a divided  
20 territory, then you're ousting one utility that  
21 has a statutory right and obligation to serve.  
22 So the alternative being urged upon the  
23 Commission by NOVEC is, in fact, illegal.

24 The second alternative would be to say  
25 we're just going to absolutely strictly follow

1           the boundary statute without regard to  
2           practicalities, and have two service meters on  
3           these buildings. Well, except that's not the  
4           law in Virginia because what Prince George's  
5           stands for is that there will be no point of  
6           delivery test used where there's manipulation,  
7           the territoriality will be respected and that  
8           practicalities will always be considered.

9                     Well, if practicalities are a part of  
10           the law, and if both parties agree that it's  
11           impractical to double meter these buildings,  
12           then that alternative falls out. That leaves  
13           only the third alternative, the one that's being  
14           urged upon the Commission by Dominion Virginia  
15           Power, and that is that we have customer choice,  
16           because that would be the least -- do the least  
17           violence to the territorial concept. Because  
18           there the Commission would merely be recognizing  
19           that under Section 56-234 of the Code of  
20           Virginia, it shall be the duty of every public  
21           utility to furnish reasonably adequate service  
22           and facilities at reasonable and just rates to  
23           any person, firm or corporation along its lines  
24           desiring same.

25                     There's already a recognition that you

1 don't have a right to serve even in your  
2 territory, unless the customer desires service.  
3 So why not, when the customer is in two  
4 territories, should it not matter from whom he  
5 desires the service.

6 Consider the flip side of this  
7 argument. Had it turned out that this use of  
8 business was undesirable, and the Smithsonian  
9 had come to either of these utilities and said  
10 we want your service, and the utility had  
11 declined, this Commission would doubtless find  
12 that it had an obligation to serve. And so this  
13 Commission would in that circumstance recognize  
14 customer choice.

15 We're not asking for anything new, ad  
16 hoc. We are simply asking the Commission to  
17 follow the law. We agree that territoriality is  
18 the issue in this case, as territorially -- as  
19 territoriality is understood by Prince George's  
20 and by the law of Virginia.

21 Now, NOVEC says it's entitled to serve  
22 under 56-265.3 and 4. That creates equal rights  
23 in the utilities. They say that the delivery  
24 point is not an issue. It is, in fact, an  
25 issue, and there is not even a suggestion that

1           they are entitled as a matter of right to  
2           provide alternative service through another  
3           delivery point. They say that there's been a  
4           recent meeting, and somehow concessions were  
5           made by Dominion Virginia Power that the only  
6           issue on a delivery point is how this Commission  
7           rules. The minutes of that meeting are  
8           available. They're being spun by NOVEC. All it  
9           says is that the Operating Committee sees no  
10          point in meeting until after this Commission has  
11          ruled on the territoriality issue.

12                 Under the agreement, although it's not  
13          within the jurisdiction of this tribunal to  
14          determine the rights and obligations under it,  
15          as written it requires a consensus. There's  
16          never a requirement under the agreement that  
17          automatically makes Dominion Virginia Power  
18          provide a connection point, certainly not a  
19          second connection point.

20                 The fact of the matter is that both  
21          utilities have territorial rights. The customer  
22          is in both territories. The customer has a  
23          right to demand service from both utilities, and  
24          when it's impractical for both to serve, then  
25          the only practical and reasonable and just

1 resolution of the dispute is to let the customer  
2 decide whose going to provide it.

3 We believe that, as I say, the  
4 evidence will be controverted around the edges.  
5 I hope it will be interesting, but I don't think  
6 it's going to change much at the end of the day.

7 HEARING EXAMINER: Mr. Gordon?

8 MR. GORDON: Good morning, Your Honor.

9 HEARING EXAMINER: Good morning.

10 MR. GORDON: I'm Steven Gordon from  
11 the United States Attorney's Office for the  
12 Eastern District of Virginia, and I'm here today  
13 representing the United States, specifically the  
14 Smithsonian Institution and the General Services  
15 Administration.

16 Although we continue to take the  
17 position that the Commission may not directly  
18 order the United States to do something, we very  
19 much appreciate the Commission's invitation for  
20 our participation in this proceeding, and we're  
21 happy to provide you with our input.

22 As the evidence will demonstrate, and  
23 as the opening statements demonstrated, Virginia  
24 Power and NOVEC are fighting to provide power to  
25 a very important customer, the new annex to the

1           Air and Space Museum located just outside of  
2           Dulles Airport. And as you can see from the  
3           visual aids that I brought along with me today,  
4           this is going to be a magnificent museum.

5                   As the evidence will indicate, and  
6           hopefully our video will indicate, if we're able  
7           to get the VCR up and running, this museum will  
8           be housing some invaluable historic relics from  
9           our nation's history. I also brought with me  
10          today, Mr. Justin Estoque, who will be -- excuse  
11          me -- Estoque, who will be testifying about the  
12          museum and about the schedule, and he's sitting  
13          back here behind me.

14                   The video tape will give you a virtual  
15          tour of the museum. We had an artist who put  
16          together this tape for these purposes, and  
17          you'll have an opportunity to see that the  
18          museum basically covers the achievements of the  
19          United States during the 20th Century, from the  
20          Wright Brothers' first powered flight to  
21          President Kennedy's declaration that we would be  
22          the first to the moon by the end of the '60s,  
23          right down to President Bush's statement today,  
24          that the Smithsonian Institute and buildings  
25          around the White House cover some of American's

1           -- America's achievements, its victories, and  
2           unfortunately some of the defeats that we've had  
3           as well. In this time, three months, from  
4           September 11th, this museum has a special  
5           importance to the American psyche. It's about  
6           what we've done and what we can do. It's about  
7           our healing process, and we're very pleased in  
8           your decision on the preliminary injunction that  
9           you recognize the significant public importance  
10          of opening the museum in time for the centennial  
11          of the Wright Brothers' first powered flight.

12                   I occasionally have made the mistake  
13          of reading from a decision of a judge who I'm  
14          appearing before, but I think that your words  
15          were so important that I would like to read a  
16          couple of passages from your earlier decision,  
17          because we would like to ask you to consider  
18          these very same issues as you're deliberating on  
19          the permanent injunction.

20                   You stated that an interruption -- and  
21          this is on page 10 of your decision -- in the  
22          construction schedule due to the failure to have  
23          permanent power available by April of 2002 could  
24          affect that opening, meaning the opening of the  
25          museum. You went on to state, any delay would

1           cause the loss of the opportunity to commemorate  
2           this centennial, the centennial of the Wright  
3           Brothers' flight, in such a fitting manner  
4           forever. There would be no remedy available to  
5           compensate for that loss, and that loss is not  
6           just to the United States. It is not just to  
7           the Smithsonian. That loss is also to the  
8           American people.

9                     . So when the folks who are seeking the  
10           relief get up and speak about the public  
11           interest, I urge you to consider the weighty  
12           public interest involved in a delay in opening  
13           the museum.

14                     (Pause)

15                     The evidence will also indicate,  
16           including Mr. Estoque's testimony, that a switch  
17           from Virginia Power to NOVEC will, indeed,  
18           delay the opening of the museum. As Mr.  
19           Estoque's testimony will illustrate, much of the  
20           infrastructure has been put into place and has  
21           been fitted for Virginia Power's purposes.

22                     Additionally, the delivery lines have  
23           been put in place, and this infrastructure would  
24           have to be reevaluated and potentially changed  
25           were NOVEC to become the power supplier.



1 I, fortunately, when I went out to  
2 look at the boards and the videos that you'll  
3 have an opportunity to see or the video you'll  
4 have an opportunity to see, I got to see the  
5 construction site. And in a way, I wish we  
6 could almost go out and do a site visit so that  
7 you could see the amount of work that's already  
8 been done.

9 Mr. Estoque is the project manager,  
10 and I'm sure he can also explain and will  
11 explain some of that in his testimony. It's a  
12 huge construction site that's nestled right next  
13 to Dulles Airport. And there's been a  
14 tremendous amount of work on the infrastructure,  
15 what's been underground and the frame of the  
16 building is starting to go up at this point.

17 You can see down below, we have an  
18 illustration of what the building is going to  
19 look like, and you can see it's starting to take  
20 shape. And once again, the size is immense.  
21 The amount of wires that a power company would  
22 have to deal with in terms of getting their  
23 power into this location is quite awesome.

24 In the Prince George case, the  
25 Commission recognized that the practical

1 realities of the situation were very important,  
2 and you recognize that in your decision as well.  
3 And we urge you to recognize the practical  
4 realities that the Smithsonian faces at this  
5 point in time, should the Commission direct that  
6 NOVEC be the provider. The practical reality is  
7 that this will delay the opening of the museum.

8 (Pause)

9 . In short, we're caught between the  
10 Hatfield's and the McCoy's, and I ask the  
11 Commission not to allow us to be hit with the  
12 plates that are flying back and forth, but to  
13 ensure that the Smithsonian receives the power  
14 that it needs in a timely fashion and without  
15 delay.

16 Thank you.

17 HEARING EXAMINER: Thank you.

18 Mr. Getchell, you are the only one  
19 that didn't give me a colorful metaphor, so I'm  
20 sure there will be many opportunities, you know,  
21 as we proceed, but I just need to point that out  
22 to you that I've heard colorful metaphors from  
23 everyone in opening statements.

24 MR. GETCHELL: I will do my best as we  
25 proceed.

1 HEARING EXAMINER: All right.  
2 Thank you for your opening statements.  
3 Ms. Nolte, Mr. Stallard, do you want  
4 to proceed with your witnesses?

5 MR. STALLARD: Thank you, Your Honor.  
6 NOVEC will call Peter G. Moore.

7 (Pause)

8 HEARING EXAMINER: Good morning, Mr.  
9 Moore.

10 MR. MOORE: Good morning.

11

12

13

14 PETER G. MOORE, a witness being called  
15 by and on behalf of Northern Virginia Electric  
16 Cooperative, having first been duly sworn, testifies as  
17 follows, viz:

18

DIRECT EXAMINATION

19 BY MR. STALLARD:

20 Q Please state your name and business  
21 address for the record.

22 A My name is Peter G. Moore, and my  
23 address is 10525 Battlevue Parkway, Manassas, Virginia.

24 Q Mr. Moore, did you cause to be filed  
25 in this matter on November 19th, 2001, your testimony

1 consisting of 13 pages?

2 A Yes, I did.

3 Q Do you have any additions or  
4 corrections to that testimony?

5 A No, I don't.

6 Q If I asked you the same questions  
7 today, would your answers be the same?

8 A Yes, they would.

9 Q So you adopt this testimony today as  
10 your own.

11 A Yes, I do.

12 MR. STALLARD: Your Honor, we ask that  
13 Mr. Moore's testimony be marked as an exhibit  
14 and admitted into evidence.

15 HEARING EXAMINER: Mr. Moore's  
16 prefiled direct testimony dated November 19,  
17 2001, will be marked as Exhibit PGM-1 and  
18 admitted into the record, subject to cross-  
19 examination.

20 MR. STALLARD: Your Honor, we had  
21 referenced in our testimony of Mr. Moore, and he  
22 actually attached a copy of -- a reduced copy of  
23 a Mylar. He brought his actual Mylar today and  
24 fit it over this. This is for Your Honor's  
25 benefit and for the benefit of the other

1 lawyers, but if I may have those marked and  
2 approach Mr. Moore.

3 HEARING EXAMINER: Certainly. You  
4 only have one?

5 MR. STALLARD: Well, it's a blow up  
6 copy of what we produced as an exhibit.

7 HEARING EXAMINER: Okay.

8 MR. STALLARD: As an attachment to the  
9 --

10 HEARING EXAMINER: Do you want it  
11 marked as an exhibit and admitted into the  
12 record, too, or is it -- can you hold it up so I  
13 can see. Does it look the same as what you --

14 THE WITNESS: Correct. It is a Mylar  
15 of that particular document.

16 HEARING EXAMINER: All right.

17 Why don't you go ahead and approach  
18 the witness with the larger version of it, and  
19 attached to Mr. Moore's testimony we have the  
20 reduced size, so --

21 BY MR. STALLARD: (Continuing)

22 Q Mr. Moore --

23 This actually is two pieces. Can you  
24 flip this up?

25 (Pause)

1 HEARING EXAMINER: Do you want us to  
2 move the easel over there?

3 MR. STALLARD: Actually, that would be  
4 helpful.

5 (Pause)

6 MR. GETCHELL: Could I see that?

7 MR. STALLARD: Sure.

8 (Pause)

9 MR. STALLARD: Okay.

10 (Continuing)

11 Q Mr. Moore, you've explained in your  
12 direct testimony that the ultimate end result of the  
13 processes you used with this Mylar; is that correct?

14 A That's correct.

15 Q And a reduced version of this Mylar is  
16 attached as an exhibit to your testimony?

17 A Yes, it is.

18 Q And ultimately, when you produced this  
19 Mylar, you fit it over this other map?

20 A That's correct.

21 Q And this shows the end result of your  
22 work.

23 A And this is the end result of my work,  
24 showing the boundary in relation to the building.

25 MR. STALLARD: Your Honor, that's all

1 I have. I would like to introduce this for Your  
2 Honor's benefit and for the --

3 HEARING EXAMINER: All right.

4 Any objection?

5 MR. GETCHELL: We don't have any  
6 objection to it being admitted, subject to  
7 cross-examination. We have some issues with it.

8 HEARING EXAMINER: All right.

9 We will mark that Mylar as Exhibit  
10 PGM-2, and admit it, subject to cross-  
11 examination.

12 Okay.

13 MR. STALLARD: Thank you, Your Honor.

14 HEARING EXAMINER: Do you have any --

15 MR. STALLARD: No, Your Honor. I  
16 submit Mr. Moore for cross.

17 HEARING EXAMINER: All right.

18 Ms. Bridewell?

19 MS. BRIDEWELL: Thank you.

20 Good morning, Mr. Moore.

21 THE WITNESS: Good morning.

22  
23 CROSS-EXAMINATION

24 BY MS. BRIDEWELL:

25 Q I have a couple of questions. Let's

1 start with your Mylar, how about?

2 A Okay.

3 Q Is that Mylar the same as Attachment  
4 Two to your testimony?

5 A Yes, it is.

6 Q Okay.

7 I notice on your Mylar, there's  
8 considerable more lines and detail than there are on  
9 Attachment Two. Would you agree that that is the case?

10 A Could you repeat that again, please,  
11 now?

12 Q It looks like on your Mylar, there's a  
13 considerable amount of more lines and detail than there  
14 are on Attachment Two to your testimony. Isn't that the  
15 case?

16 A No. It should be one in the same.

17 Q Well, I see all these little  
18 transecting lines, and on Attachment Two, I see one  
19 building form that cuts through a line, right?

20 A Well, I need to get the piece of paper  
21 in front of me.

22 (Pause)

23 Let's see. The only additions that I  
24 made to this was to add the labeling.

25 Q Add the what?



1           A           Add the labeling. I added a north  
2 arrow, I added a text to Attachment Two; service boundary,  
3 and the Dulles outer boundary.

4           Q           Uh-huh.

5           A           But this, this drawing is the same as  
6 this one right here.

7           Q           Okay.

8                       I take it you have actually been out  
9 onto the building site --

10          A           Yes, ma'am, I have.

11          Q           And have you also done a records  
12 search concerning where the parcel -- the total sum of the  
13 parcel runs?

14          A           Oh, yes, I have.

15          Q           And would you agree that the total sum  
16 of the parcel covers both Virginia Power and Northern  
17 Virginia Electric Cooperative's service territories?

18          A           You have to rephrase that again. I  
19 don't understand the boundaries. You have to define the  
20 boundaries for me.

21          Q           Well, there's a large piece of land --

22          A           Okay.

23          Q           -- on which these buildings are being  
24 placed.

25          A           Okay.

1                   Q            Would you agree that that piece of  
2 land is both in Virginia Power and in Northern Virginia  
3 Electric Cooperative's --

4                   A            Yes.

5                   Q            -- service territories?

6                   A            Yes.

7                   Q            Based on your record search, is the  
8 preponderance of that land in Virginia Power or Northern  
9 Virginia Electric Cooperative's --

10                  A            In NOVEC's.

11                  Q            Excuse me?

12                  A            NOVEC's.

13                  Q            You think that all of the land is  
14 within Northern Virginia Electric Cooperative's. I'm not  
15 talking about structures. I'm talking about real  
16 property.

17                  A            The property itself.

18                  Q            Yes.

19                  A            Well, you have to define the boundary.  
20 You have to -- let me see what you're talking about.

21                  Q            Okay.

22                                The property is owned by the General  
23 Services Administration.

24                  A            Right.

25                  Q            Correct?

1           A           Right.

2           Q           Is the property that is owned by the  
3   General Services Administration predominantly in Virginia  
4   Power's territory or in NOVEC's territory?

5           A           You can't accurately answer that  
6   because of the scope of the project. It falls haphazardly  
7   on both territories.

8           Q           I'm not --

9           A           -- based on that --

10          Q           I'm not asking you about the museum  
11   facilities. I'm asking you about the parcel of land owned  
12   by the General Services Administration.

13          A           Yes.

14          Q           Is most of that in Virginia Power's  
15   territory or in NOVEC's territory?

16          A           I need you to define the boundary for  
17   the General Services Administration.

18          Q           Well, you looked at the deed, didn't  
19   you?

20          A           There is no deed.

21          Q           There is no deed?

22          A           No, ma'am.

23          Q           How did you determine where the  
24   General Services Administration property was then, if you  
25   didn't look at that?

1           A           Well, fortunately I have a very good  
2 friend of mine that's a surveyor. His name is Herman  
3 Corsen, and he's one of the patriarchs of the surveying  
4 business, and through him, he provided me with a map of  
5 the whole Dulles boundary that he personally performed in  
6 1960. And I've had the opportunity to survey up against  
7 that on many occasions, and I know that map to be accurate  
8 and true. And based on that map, I can tell where the  
9 boundaries to the outer boundary of the whole airport is  
10 and also to where the boundaries are to the service area.

11           Q           Uh-huh.     Ckc Corsen

12           A           And there's -- it's all haphazard,  
13 and there's no way to put a number on what percentage is  
14 in NOVEC and which percentage is in VEPCO's territory.

15           Q           But you would agree that some of that  
16 property is in both utilities' service --

17           A           Yes.

18           Q           -- territory.

19           A           Yes, but I can't measure it.

20           Q           All right.

21                       There is a large structural outline  
22 shown on Attachment Two --

23           A           That's correct.

24           Q           -- that you have before you.

25                       Do you know whether, in fact, this is

1 a single building or connected buildings?

2 A I do not know.

3 Q Okay.

4 A I've only been provided one sheet.

5 Q Okay.

6 Do you know if -- which part of this  
7 outline, for example, represents the IMAX Theater.

8 A Yes, I do.

9 Q Where is that?

10 A It's the approximate circle that I  
11 have drawn up in the northeast corner of that sketch.

12 Q By circle, do you mean this sort of --

13 A Yes, ma'am.

14 Q -- bubble right there?

15 A Uh-huh. That's the approximate  
16 location of it.

17 Q Okay.

18 And I see a -- there's a large service  
19 boundary that comes down the right side of Attachment Two.

20 A On the --

21 Q Do you see that?

22 A -- side; that's correct.

23 Q Okay.

24 Now, on the right side of that service  
25 boundary, is that Virginia Power's service territory or

1 NOVEC's service territory?

2 A That is the boundary that was  
3 delineated on the E51 map.

4 Q That's fine, but whose on which side  
5 of the boundary is my --

6 A Okay.  
7 On the right-hand side is VEPCO, and  
8 on the left-hand side is NOVEC.

9 Q . Thank you.  
10 Okay. Let me direct you to the text  
11 of your prefiled direct testimony. Specifically, let me  
12 take you to page 2 of 4, Response 8 of your --

13 A Okay. I don't have that in front of  
14 me.

15 Q It should be in front of that  
16 attachment you were just handed.

17 A No, that's just one piece of paper.

18 (Pause)

19 MS. BRIDEWELL: Mr. Bailiff, could you  
20 hand this witness a copy of his testimony.

21 HEARING EXAMINER: Mr. Stallard has a  
22 copy. He is handing it to his witness.

23 THE WITNESS: Thank you.

24 Okay, and where are we again?

25 BY MS. BRIDEWELL: (Continuing)

1 Q Let's go to page 2.

2 A Okay, page 2.

3 Q Specifically lines 24 through 25. And  
4 I believe you note that any --

5 A I'm sorry. I'm still having -- what  
6 question was it?

7 Q All right. Let's look at Q8 and  
8 Answer 8.

9 A Okay.

10 Okay.

11 Q Are you with me?

12 A Yes, ma'am, I am.

13 Q Okay.

14 In Answer 8, you talk about the E51  
15 map, which I take it is the certificate map for Northern  
16 Virginia Electric Cooperative.

17 A Yes, ma'am, with several revisions.

18 Q Right. And you say at line 24 that  
19 "...any slight distortions will have an impact on the scale  
20 and accuracy of this kind of a map;" is that correct?

21 A That's correct.

22 Q And you seem to indicate that the  
23 width of the line on the certificate map, E51, is  
24 approximately 30 feet wide.

25 A That's correct.

1 Q Okay.

2 If that is the case, would a variance  
3 of that size be sufficient to put the entire Udvar-Hazy  
4 Center facility shown in your Attachment Two in NOVEC's  
5 territory?

6 A To a layperson, yes, but not to me,  
7 being the experienced surveyor. I know how to interpret  
8 those lines, and I can accurately place them on there.

9 Q Okay, but would it put the entire  
10 thing in NOVEC's territory, that degree of variance, 30  
11 feet?

12 A Well, the line that's on here is a  
13 representation of the center.

14 Q Uh-huh.

15 A It's my best estimate of the center of  
16 that line.

17 Q Well, if you moved it to the right 30  
18 feet, would that put this entire outline on Attachment Two  
19 in NOVEC's service territory?

20 A Yes, it could, but that's not what I  
21 did.

22 Q Okay.

23 You don't believe that that's a  
24 correct result.

25 A No, it is the correct result.



1           Q           If we move the line 30 feet, that is a  
2 correct result, or do you think that --

3           A           The line that I used was not the edge  
4 of the 30 foot line. The line that I used was the center.

5           Q           Okay.

6           A           So what I have placed is the center of  
7 that 30 foot wide line, not the right-hand side or the  
8 left-hand side of that 30 foot line.

9           Q           Okay.

10                    So could you tell me how much of this  
11 building structure is on the right of this service  
12 boundary?

13           A           As the way I have it drawn right now,  
14 it's approximately 5 percent.

15           Q           5 --

16           A           5 percent.

17           Q           Do you know what that is in feet?

18           A           Feet? No, I don't. But I could go  
19 back to my office and measure it.

20           Q           Do you know what the entire footage of  
21 this outline shown on Attachment --

22           A           No, I don't.

23           Q           Okay.

24                    Now, from your testimony it looks like  
25 you consulted the certificate map and the Patton, Harris,

1 Rust and Associates drawing as part of a means to situate  
2 the outline on Attachment Two.

3 A Yes, ma'am, I did.

4 Q And you indicate that you have  
5 personally observed the building site for the Steven F.  
6 Udvar-Hazy Center; is that correct?

7 A I've gone out and visited the site.

8 Q When did you visit?

9 A . I have to look at my notes. I want to  
10 say October 26th or thereabouts.

11 Q Okay.

12 Have -- what amount of construction  
13 was completed on or around October 26th?

14 A Of the walls? Gosh, I would estimate  
15 less than -- less than 10 percent.

16 Q Did you observe any power facilities  
17 in place when you went out on or around --

18 A No, ma'am.

19 Q -- October 26th?

20 Have you revisited the site since  
21 October 26th?

22 A No, ma'am.

23 Q And you did not observe any particular  
24 Virginia Power facilities at that time?

25 A No, ma'am, I didn't.

1 MS. BRIDEWELL: That's all I have for  
2 this witness, Your Honor.

3 HEARING EXAMINER: All right, thank  
4 you.

5 Mr. Getchell?

6  
7 CROSS-EXAMINATION

8 BY MR. GETCHELL:

9 Q Mr. Moore, you will agree with me,  
10 based on that Mylar, won't you, that to the best of your  
11 professional judgment, all the parking lot, the majority  
12 of the IMAX dome, and some of the hanger building are  
13 physically situated in Virginia Electric and Power  
14 Company's service territory?

15 A No, that's not correct.

16 Q In what respect is that incorrect?

17 A The IMAX theater -- it's hard to  
18 define it here, but the IMAX theater is probably 50  
19 percent. Now, the parking lot is a hundred percent, but  
20 the IMAX theater here is probably about 50 percent, not  
21 the majority.

22 Q Okay.

23 Other than that objection, was my  
24 question correct? That is in your judgment -- special  
25 judgment, all of the parking lot, at least 50 percent of

1 the IMAX theater and part of the hanger building is in  
2 Virginia Power's service area.

3 A A small portion of the hanger is in  
4 the building, yes.

5 Q Now, I want you to look at --

6 May I approach the witness?

7 HEARING EXAMINER: Certainly.

8 Do you have the Attachment Two? Is  
9 that what you're approaching him --

10 MR. GETCHELL: No. I wanted to point  
11 something out on that Mylar, and I also wanted  
12 to call to his attention Exhibit B to the  
13 prefiled testimony of Randall G. Trott.

14 HEARING EXAMINER: All right.

15 (Pause)

16 BY MR. GETCHELL: (Continuing)

17 Q Now, if you look at this building  
18 here, particularly this part that's sticking out right  
19 here, those lines are not parallel, are they?

20 A Not on my drawing, no.

21 Q All right.

22 And therefore, they're not right  
23 angles here at the base?

24 A No, they're not.

25 Q And the IMAX theater on your drawing

1 is not circular, is it?

2 A No, it's not.

3 Q It looks sort of like a squashed egg,  
4 to use a metaphor.

5 (Laughter)

6 Is that correct?

7 A That's correct.

8 Q All right.

9 Now, is that the result of distortion?

10 A No, it's not.

11 Q Well, let me show you Exhibit B to the  
12 prefiled testimony of Randall G. Trott.

13 A Okay.

14 Q -- and ask you whether or not on his  
15 drawing the lines are at right angles, and the IMAX  
16 theater is spherical.

17 A Yes. It's a much clearer drawing.

18 Q Now, what do you suppose the  
19 likelihood is that on the building being constructed that  
20 the lines are supposed to be at a right angle?

21 A They are.

22 Q And that the dome was supposed to be  
23 circular?

24 A They certainly are.

25 (Pause)

1 MR. GETCHELL: I have no further  
2 questions.

3 HEARING EXAMINER: All right.

4 MR. GETCHELL: Oh, could I publish one  
5 thing, Your Honor?

6 Staff had asked the question with  
7 respect to this witness whether or not he knew  
8 whether a majority of the parcel, that is the  
9 land, is in the territory. And I would like to  
10 call Your Honor's attention to paragraph 14 of  
11 the petition of NOVEC in which it has alleged  
12 that on or about January 25, 1999, NOVEC  
13 learned, upon receiving a copy of a letter from  
14 Dominion to the Smithsonian that it had service  
15 facilities available in the area of the proposed  
16 facility and importantly two-thirds of the site  
17 was in Dominion's service area.

18 Then if you will look at our response  
19 to Paragraph 14, Dominion Virginia Power said it  
20 was without sufficient knowledge or information  
21 of the truth and averments of Paragraph 14, and  
22 therefore it denies them, except to admit that a  
23 majority of the parcel is within Dominion  
24 Virginia Power's territory, so it is admitted,  
25 at least a majority is in our territory.

1 HEARING EXAMINER: We'll have an  
2 opportunity at the end of the hearing to brief  
3 all the evidence relative to the allegation and  
4 assertions.

5 MR. STALLARD: Your Honor, this issue  
6 actually came up at the preliminary injunction  
7 hearing, and you will recall that that was an  
8 allegation which we were representing what was  
9 represented in the letter. It wasn't an  
10 allegation where we adopted that representation.

11 HEARING EXAMINER: All right.

12 MR. STALLARD: That was Dominion  
13 Power's representation.

14 HEARING EXAMINER: All right, and I  
15 recognize that the allegations in the petition  
16 and the response were preliminary statements of  
17 belief and assertion, and what is really going  
18 to be important is the evidence we receive today  
19 and your opportunity to tell me how it all fits  
20 together.

21 MR. GETCHELL: I would just like to  
22 point out for the record that because of that  
23 admission, we didn't have anybody go and survey  
24 the land boundaries as opposed to where the  
25 buildings were. So we have relied, to our

1           detriment, on the fact that they made that  
2           allegation and we admitted it.

3                       Furthermore, in the preliminary  
4           injunction ruling of this Commission, through  
5           the Chief Hearing Examiner, I did, in fact, also  
6           note that that had been admitted. So if, in  
7           fact, it becomes an issue as to whether or not a  
8           majority is in our territory, we would ask to  
9           reopen the record and show it.

10                      HEARING EXAMINER: All right.

11                      When we break, you can discuss that  
12           with counsel for NOVEC, if it is going to be an  
13           issue of contention. Let me know how we want to  
14           proceed.

15                      Clearly I don't think there's any  
16           disagreement that a lot of real property is in  
17           both territories.

18                      MR. GETCHELL: All right.

19                      HEARING EXAMINER: All right.

20                      Mr. Gordon, you reserved the right to  
21           cross.

22                      MR. GORDON: Yes.

23  
24                      CROSS-EXAMINATION

25           BY MR. GORDON:



1                   Q           When you went out to the site, the  
2 building site, were you given a guided tour, or was it  
3 something where you just went out and did your work as a  
4 surveyor?

5                   A           I just went out and did my work as a  
6 surveyor.

7                   Q           And isn't it true that you never asked  
8 to look at the power infrastructure that was in place?

9                   A           . No.

10                   HEARING EXAMINER: Mr. Guy?

11                   MR. GUY: No questions, Your Honor.

12                   HEARING EXAMINER: Mr. Stallard?

13                   MR. STALLARD: Nothing, Your Honor,  
14 except that I would point out Staff counsel  
15 asked questions about the Mylar, and perhaps she  
16 couldn't see all the way across the room, that  
17 the Mylar is this piece of plastic that overlays  
18 the map, and so the Mylar actually is this  
19 drawing.

20                   I just wanted to clarify that.

21                   HEARING EXAMINER: That clarification  
22 helps a lot because I saw a whole lot more  
23 detail on that map, too.

24                   MS. BRIDEWELL: May I ask a question,  
25 please?

1 HEARING EXAMINER: Yes.

2 MS. BRIDEWELL: In terms of clarifying  
3 the record, did we receive the top sheet, or a  
4 top sheet and a bottom sheet?

5 Mr. STALLARD: The bottom sheet is an  
6 exhibit to our petition. The top sheet is an  
7 attachment and exhibit to Mr. Moore's affidavit  
8 and testimony.

9 MS. BRIDEWELL: So what is the entire  
10 exhibit?

11 HEARING EXAMINER: You offered --

12 MR. STALLARD: This exhibit --

13 HEARING EXAMINER: -- the top or the  
14 whole thing?

15 MR. STALLARD: The whole thing, Your  
16 Honor.

17 MS. BRIDEWELL: I can see really well  
18 from here that's why I asked you. I could see  
19 more than just --

20 MR. STALLARD: Can you see that now?

21 MS. BRIDEWELL: 20/20.

22 MR. STALLARD: Your Honor, just for  
23 the record, one of these just came loose, and so  
24 I moved this. It doesn't fit as neatly because  
25 it moved. I just want to introduce this, and I

1 have no redirect.

2 MR. GETCHELL: I would object to that  
3 being made a composite exhibit. Either they did  
4 or they didn't prefile the thing that's  
5 underneath. I have no objection to them putting  
6 in the Mylar because it did appear as Exhibit 2  
7 to Mr. Moore's report, but I don't think we  
8 should create an exhibit here in court.

9 HEARING EXAMINER: The underlying --  
10 your objection is well noted. The underlying  
11 exhibit -- the underlying map is attached to the  
12 petition, but what is relevant, I think, to Mr.  
13 Moore's testimony is how the two fit together,  
14 and as you just noted, a little slip in the  
15 corner changes where the line goes across the  
16 facility, correct?

17 MR. STALLARD: That's correct. I just  
18 did that, but, Your Honor, there is a note in  
19 the rule, obviously, documents of this type, for  
20 example, this photo, we didn't have to produce.  
21 Certainly this is no surprise. I mean this is  
22 for your assistance, and if you don't want it,  
23 then we certainly won't offer it, if the court  
24 sustains the objection. But our whole purpose  
25 is to let Your Honor know his methodology and

1 receive an actual copy of his model.

2 MR. GETCHELL: We object to it being  
3 introduced for the truth of any matter asserted  
4 in it. Its use as demonstrative evidence is --  
5 obviously it's already been done for that.

6 HEARING EXAMINER: All right.

7 We have attached to Mr. Moore's  
8 testimony his representation of where the  
9 service boundary lies across the facility, clear  
10 and unmoving, and we will accept Exhibit PGM-2  
11 in its entirety as an exhibit which demonstrates  
12 how he arrived at the attachment to the prefiled  
13 testimony.

14 MR. STALLARD: Thank you, Your Honor.

15 Your Honor, I have no redirect. Thank  
16 you.

17 HEARING EXAMINER: All right, thank  
18 you.

19 Mr. Moore, thank you for your  
20 testimony.

21 THE WITNESS: Thank you.

22 HEARING EXAMINER: You may step down.

23 \* \* \* \* \*

24 WITNESS STOOD ASIDE  
25

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HEARING EXAMINER: Ms. Nolte?

MS. NOLTE: Your Honor, we'd like to  
call Mr. Moxley to the stand, please.

JAMES C. MOXLEY, a witness being  
called by and on behalf of Northern Virginia Electric  
Cooperative, having first been duly sworn, testifies as  
follows, viz:

DIRECT EXAMINATION

BY MS. NOLTE:

Q Good morning again, Mr. Moxley. Would  
you please state your full name and address for the  
record.

A My name is James C. Moxley. My work  
address at NOVEC is 10323 Lomond Drive, Manassas,  
Virginia.

Q And did you cause to be filed  
testimony in this matter on November the 19th, consisting  
of 17 pages?

A Yes.

Q Do you have any additions or  
corrections to that testimony?

1 A I have none.

2 Q If I were to ask you those same  
3 questions today, would your answers be the same?

4 A Yes, they would.

5 Q So you adopt this testimony as your  
6 own?

7 A I do.

8 MS. NOLTE: Your Honor, we would ask  
9 that this testimony be marked as an exhibit and  
10 moved into evidence, subject to cross-  
11 examination.

12 HEARING EXAMINER: All right.

13 Mr. Moxley's prefiled direct testimony  
14 dated November 19th, 2001, with its attachments  
15 will be marked as Exhibit JCM-3 and admitted  
16 into the record, subject to cross-examination.

17 MS. NOLTE: And we tender Mr. Moxley  
18 for cross, Your Honor.

19 HEARING EXAMINER: All right.

20 Ms. Bridewell?

21 MS. BRIDEWELL: Thank you.

22

23 CROSS-EXAMINATION

24 BY MS. BRIDEWELL:

25 Q Good morning, Mr. Moxley.

1 A Good morning.

2 Q Before I begin my examination, do you  
3 have a copy of your prefiled testimony in front of you?

4 A Yes, I have.

5 Q Good. Thank you.

6 Could I refer you to page 2 of 8 of  
7 your prefiled direct testimony.

8 You note at Question 6 and Answer 6  
9 that you "participated in two meetings in Washington, D.C.  
10 with Smithsonian representatives present, during which  
11 technical requirements were discussed, as well as NOVEC's  
12 position as the electric utility entitled to provide  
13 service to the Smithsonian;" is that correct?

14 A I'm looking. Maybe I didn't have what  
15 I thought I had. I apologize.

16 Q Okay.

17 (Pause)

18 MS. NOLTE: Your Honor, may we give

19 Mr. Moxley --

20 HEARING EXAMINER: Yes.

21 MS. NOLTE: I apologize.

22 BY MS. BRIDEWELL: (Continuing)

23 Q Just to repeat, we're looking at page  
24 2 of 8.

25 A Question 6?

1 Q Yes, thank you.

2 You note that you attended two  
3 meetings in Washington, D.C. with Smithsonian  
4 representatives.

5 A Yes.

6 Q When were those meetings held?

7 A When or where?

8 Q When.

9 A I don't have the exact dates. One was  
10 in late summer, I believe, and one was -- at least one was  
11 later in the year, around December, if I recall correctly.

12 Q The first one was when, to the best of  
13 your recollection?

14 A I believe it was late summer.

15 Q Late summer.

16 June, July?

17 A I think it was later than that.

18 Q August, perhaps?

19 A Possibly even early fall.

20 Q Okay, early fall, perhaps.

21 Were any other utilities present  
22 besides NOVEC at that meeting?

23 A No.

24 Q At the time of that meeting, did you  
25 -- did you or another Northern Virginia Electric



1 Cooperative representative request construction or site  
2 plans at that meeting?

3 A At least one of the meetings we did,  
4 yes.

5 Q Do you know whether it was the first  
6 meeting or the one in December of 1996?

7 A I believe it was the first one,  
8 because I think we received some information prior to the  
9 second meeting.

10 Q Okay, so you did receive construction  
11 or site plans at the first meeting?

12 A Some construction specifications or  
13 design specifications that were preliminary in nature.

14 Q Did you address at those meetings  
15 where on the parcel these facilities would be located?

16 A We had received -- in addition to the  
17 design specifications, a map, a site plan, map of sorts,  
18 that indicated the location of the actual museum  
19 buildings, yes.

20 Q What was the date of that site plan  
21 map that you received?

22 A I believe it was a 1994. I don't  
23 recall if there was a specific date, but it was 1994, I'm  
24 pretty sure.

25 Q Okay.

1 Did -- so you did not have a -- you or  
2 Northern Virginia Electric Cooperative did not have a site  
3 specific plan dated 1996 at that time.

4 A No.

5 Q Okay.

6 During 1997, did you or any other  
7 member of Northern Virginia Electric Cooperative -- a  
8 representative of Northern Virginia Electric Cooperative  
9 request an updated construction plan or site plans during  
10 1997?

11 A Probably so, verbally. There were  
12 some follow-up discussions and correspondence and meetings  
13 that I may -- that I did not attend.

14 Q Based on your knowledge, when did  
15 those meetings occur, or do you know?

16 A I think as -- perhaps as late as 1998.

17 Q So in 1997, you're not aware of any  
18 request of construction plans or site plans, but such a  
19 request was made in 1998?

20 A There may have been some in '97 or  
21 even prior to that. The engineering consultant, the HOK  
22 firm had indicated that the specifications given to us  
23 were preliminary, and they would change. And we expected  
24 to receive updates as they were prepared.

25 Q Okay.

1                   Did you inquire -- did you or Northern  
2 Virginia Electric Cooperative inquire from HOK for any  
3 updates in 1997?

4                   A           We probably did. I don't have a  
5 record of that.

6                   Q           Do you know if you received any  
7 updated specifications or site plans in 1997?

8                   A           Not specifically, no.

9                   Q           Did you go back to HOK in 1997 and  
10 renew that request, when you didn't get any?

11                  A           No. At the time, the plan was that  
12 this was a very long-term project, with the planned  
13 opening date of December 17th, 2003. This was seven years  
14 away, and it was very likely that this was going to be a  
15 long time in the design stage, development stage, and  
16 there was ample time to finalize any designs so that NOVEC  
17 could respond as needed.

18                  Q           Okay.

19                               So just to recap, in 1997, the design  
20 specifications and site plans that NOVEC had in its  
21 possession were still the ones as of 1994; is that  
22 correct?

23                  A           1996, I believe.

24                  Q           You just told me --

25                  A           A site plan was just a map, a simple

1 map, and that was dated 1994.

2 Q Okay.

3 A The specifications that we received, I  
4 believe had a later date. I believe those were '96.

5 Q Okay, so you had design specifications  
6 as of 1996 and a site plan dated --

7 A 1994.

8 Q -- 1994, in 1997.

9 A Yes.

10 Q Okay.

11 Now, let's chat about 1998.

12 A Uh-huh.

13 Q Did you receive a more updated site  
14 plan in 1998? You being you or Northern Virginia?

15 A The site plan itself, no.

16 Q No. Did you get more updated design  
17 specifications in 1998?

18 A I don't believe so.

19 Q If I could direct your attention to  
20 page 2 of 8, lines 33 through 34, you refer to a letter  
21 attached to the petition advising Northern Virginia --  
22 advising the Smithsonian of Northern Virginia Electric  
23 Cooperative's position in this regard.

24 A Correct.

25 Q Do you see that reference?

1                   A           Yes, I do.

2                   Q           And I looked at that letter behind Tab  
3   8 in the petition, and sort of the upshot of it is that  
4   Northern Virginia Electric Cooperative is the electric  
5   utility entitled to serve this service territory. Would  
6   you agree with that characterization?

7                   A           Absolutely, uh-huh.

8                   Q           And at the end of that letter, Mr.  
9   Jaramillo suggests that a representative of the  
10   Smithsonian call him concerning his specific needs for  
11   temporary power and permanent service; is that correct?

12                  A           I don't have the letter in front of me  
13   right now, but I -- it seems to be an accurate  
14   characterization.

15                  Q           You did read this letter, right,  
16   before you prepared your testimony?

17                  A           Yes, but I haven't read it in many  
18   weeks.

19                  Q           Let me hand you a copy of it.

20                  A           Okay.

21                               (Pause)

22                  Q           You have before you a document that  
23   purports to be an attachment labeled Exhibit A to NOVEC's  
24   petition, a letter from Mr. Jaramillo to a Mr. Robert  
25   Weisman.

1 A Correct.

2 Q Do you have that in front of you?

3 A Yes, I have.

4 Q After looking at it briefly, would you  
5 read the last sentence in that letter aloud?

6 A The last paragraph?

7 Q Sure.

8 A "Please feel free to call me at your  
9 earliest convenience to arrange for any appointments so  
10 that we may begin to address your specific needs for  
11 temporary power and permanent service. My direct number  
12 is" -- and so on --

13 Q All right.

14 Did NOVEC in that letter request an  
15 update of the site plans?

16 A Not -- let's see. Not specifically, I  
17 don't believe.

18 Q Did you -- did you or did anyone from  
19 NOVEC follow up with the Smithsonian regarding a site plan  
20 request at that point?

21 A I do not know.

22 Q You don't know.

23 A No.

24 Q Is there a reason why, in your  
25 opinion-- do you know whether Mr. Jaramillo wrote that

1 letter because he thought someone else was proposing to  
2 serve at that point?

3 A Well, we knew that Virginia Power had  
4 an interest all along, but NOVEC has maintained from the  
5 outset in the very first meetings that we had with the  
6 Smithsonian that NOVEC, we felt, was the rightful power  
7 provider for them, and there was -- we have been  
8 unwavering in that, and we've had no doubt about it.

9 Q Now, you said that NOVEC knew all  
10 along that Virginia Power had an interest. By "all  
11 along", do you mean since 1996?

12 A Yes.

13 Q You were aware of that since 1996?

14 A (the witness is nodding his head)

15 Q Okay.

16 Has the -- has NOVEC ever requested  
17 Smithsonian to provide updated site plans, since the 1994  
18 ones?

19 A Earlier this year, yes, we did.

20 Q In August of 2001?

21 A No, in the spring, late winter, spring  
22 of 2001, there were repeated calls to obtain updated  
23 specifications.

24 Q Okay.

25 Prior to the spring of 2001, did NOVEC

1 request those site plans?

2 A Prior to --

3 Q The spring of 2001.

4 A Well, at some time, yes.

5 Q From the Smithsonian?

6 A Uh-huh.

7 Q Okay.

8 Let me rephrase that.

9 A We went back from 1997, '98 time  
10 frame, and -- is that what you're referring to?

11 Q Okay.

12 Between '98 and 2001, did NOVEC  
13 request the Smithsonian to provide it with an updated site  
14 plan?

15 A I don't think we did.

16 Q Okay.

17 A No. We were aware of progress at the  
18 site through contacts with Dominion Virginia Power in  
19 Northern Virginia, so we knew pretty much what was the  
20 progress, state of progress or lack thereof, and so there  
21 was no clear need to have a specific plan at that point,  
22 seeing that the museum construction and opening day was  
23 still three, four, five, six years away.

24 Q But yet you knew at that point that  
25 Virginia Power was interested in serving.



1 A Yes.

2 Q Okay.

3 Did the Smithsonian at any point  
4 between November -- between the spring of 2001 and 1998,  
5 refuse to provide NOVEC with site plans?

6 A No, I don't believe so.

7 Q And did any -- at any time did  
8 Northern Virginia Electric Cooperative refuse to meet the  
9 Smithsonian's requirements for electric service?

10 A We have never -- we have always been  
11 very responsive from the first indication that there was a  
12 meeting and that there was a museum site. We have been  
13 very responsive, we believe.

14 Q Okay.

15 A We responded to all requests for  
16 information. We've attended all meetings that we were  
17 notified about.

18 Q Could you explain why NOVEC waited  
19 until September, 2001, to file its petition with the  
20 Commission if it had known since 1996 that Virginia Power  
21 was interested in serving this customer and if -- the  
22 spring of 2001, it was definitely sure Virginia Power was  
23 interested in serving this customer?

24 A Well, we see -- we see coming to the  
25 Commission as really a measure of last resort. We have

1 from time to time, and fairly frequently, in fact, have  
2 issues related to boundary matters that they meet  
3 resolution, and this was one of them. And we have always  
4 been able to work it out between the two utilities. And I  
5 think it became clear by late summer of this year that  
6 that was not going to be the case.

7 Q In the past, issues between Virginia  
8 Power and NOVEC about boundary issues, have there been any  
9 disputes about delivery points as part of those kinds of -  
10 -

11 A No, not to my knowledge.

12 Q Okay.

13 Are you familiar with the parcel of  
14 property upon which these museum facilities are proposed  
15 to be constructed?

16 A Am I familiar with the property?

17 Q Uh-huh.

18 A I know where it is. I've been on the  
19 property.

20 Q Would you agree that that property is  
21 located both in Northern Virginia Electric Cooperative's  
22 and Virginia Power's service territories?

23 A Yes, uh-huh.

24 Q Do you know whether the greater part  
25 of that property is located in Northern Virginia Electric

1 Cooperative or in Virginia Power's service territory?

2 A Based on what I know of the property  
3 boundaries that have been assigned to the museum, I would  
4 say that the majority of the parcel is in Virginia Power's  
5 territory, but virtually none of the electrical load.

6 Q Thank you.

7 Okay. Could I get you to take a look  
8 at page 3 of 8 of your prefiled direct testimony.

9 A Yes.

10 Q And I'm looking at lines 11 through  
11 14, which is in response to Answer 9. Do you see that,  
12 sir?

13 A Yes.

14 Q Okay, and you note that in August of  
15 2001, we -- that you had sent one of your employees to  
16 Fairfax County to determine if we, I guess NOVEC, could  
17 obtain a more recent site plan than the ones that NOVEC  
18 had been given initially by HOK.

19 A Yes.

20 Q Is that correct?

21 A Uh-huh.

22 Q In August of 2001, when you found out  
23 that Fairfax County didn't have it, have these site plans,  
24 did you ask either the Smithsonian or its engineering  
25 design firm for a copy of the construction or site plans

1 for this center?

2 A We had previously, in earlier 2001,  
3 requested information, including site plan information  
4 from the Smithsonian, and over the course of different  
5 conversations, spanning weeks, that we finally were told  
6 that they had been advised that they could not release  
7 that information to us.

8 Q Did they explain why?

9 A Not really.

10 Q They just said --

11 A They were advised by counsel not to  
12 give that information to us.

13 Q Did NOVEC pursue the matter with the  
14 Smithsonian's counsel at that point?

15 A I don't believe so. Sherry -- Ms.  
16 Bridewell - I apologize -- if I could add to my last --

17 Q Sure, please complete it.

18 A -- comments. The only reason given  
19 was related to the apparent fact that they had reached an  
20 agreement with Dominion Virginia Power to serve them.

21 Q Okay.

22 Could I take you to page 4 of your  
23 prefiled testimony --

24 A Yes.

25 Q -- for a sec.

1 I'm specifically looking at lines 13  
2 through 20 of your response in Answer 12.

3 A Yes.

4 Q You note that NOVEC can -- will need a  
5 delivery point, but can meet or exceed the Smithsonian's  
6 schedule. Does that seem to be your response to that  
7 question?

8 A It is my response, yes.

9 Q Okay.

10 But in the next sentence you say, "The  
11 transformer delivery schedule could cause delay to the  
12 full capacity service..."

13 A Uh-huh.

14 Q Could you explain what you mean, why  
15 the transformer delivery schedule could cause delay to the  
16 full capacity service?

17 A Well, transformers of this type are  
18 generally made to order, and are generally not sitting  
19 around on an inventory shelf somewhere. So the delivery  
20 dates for transformers of this type are about four months,  
21 and I indicated that that is likely, or could cause a  
22 delay if we needed to order transformers for this  
23 particular case, and at any rate, I think it's very  
24 reasonable to say that full power is not going to be  
25 needed in April, 2002, at least based on other

1 applications of power and other commercial and industrial  
2 customers.

3                               Nevertheless, my -- I would tell you  
4 that our representative from Dominion Virginia Power in  
5 Fairfax has told me that should the Commission decide in  
6 NOVEC's favor that they would just sell us the  
7 transformers, if we needed them.

8                   Q            Okay.

9                               So I take it from your answer that the  
10 transformer deliver schedule could add four months?

11                  A            No. Typically the delivery time from  
12 order to delivery, manufacturing and delivery time, is  
13 about four months, depending on the manufacturer.

14                  Q            Okay.

15                               Is there a reason why Northern  
16 Virginia Electric Cooperative could not use the  
17 transformer already purchased by Virginia Power for use  
18 here?

19                  A            Probably not. We would certainly want  
20 to review the specifications and the engineering that went  
21 into that to verify that it was sized appropriately. But  
22 it -- based on the information that we have been able to  
23 obtain, I guess through the court proceedings, we believe  
24 that the sizing is probably appropriate and that we would  
25 anticipate being able to use those.

1 Q Okay.

2 Could you describe briefly how NOVEC  
3 would bring distribution service to the Smithsonian in the  
4 event the Commission agreed that NOVEC was the proper  
5 service provider to the Smithsonian?

6 A Yes. The plan, for some time now, has  
7 been to utilize the duct bank that was constructed by the  
8 Commonwealth of Virginia for all of the utilities, not  
9 just electric. But it's my understanding water,  
10 wastewater, and other, from the vicinity of Route 50,  
11 where we had requested a delivery point from Dominion  
12 Virginia Power, pulling cables, the appropriately sized  
13 cable through that duct work onto the site, museum site  
14 proper to a transformer location.

15 This is not -- this is not a complex  
16 piece of work. It's relatively simple, very simple, in  
17 fact.

18 Q On page 5 of 8 of your testimony, you  
19 indicate -- you talk about the request of a new delivery  
20 point from Dominion Virginia Power.

21 A Yes.

22 Q Is the denial of the delivery point  
23 another potential source of delay for NOVEC to offer  
24 service to the Smithsonian?

25 A Well, certainly we need this delivery

1 point because it would be -- it represents the most  
2 effective and efficient means of serving them by NOVEC. I  
3 do understand, however, that Dominion Virginia Power has  
4 stated that should the Commission decide in NOVEC's favor,  
5 that they will give us the delivery point. I just don't  
6 think that's an issue.

7 Q Okay.

8 Hypothetically speaking, for example,  
9 they changed their mind, and suddenly this delivery point  
10 was no longer available --

11 A Uh-huh.

12 Q How would NOVEC provide electric  
13 service to the Udvar-Hazy Center?

14 A Well, obviously in the extremely  
15 unlikely case that that would be -- would be denied, that  
16 would represent a significant departure from our  
17 relationship between -- through ODEC, Old Dominion  
18 Electric Cooperative, and Virginia Power. I just can't  
19 see that happening.

20 However, NOVEC does have facilities  
21 about a mile and a half -- a mile and quarter away that  
22 could be extended to the site.

23 Q So you would, as sort of a remote Plan  
24 B, run it off of that quarter of a mile site to the Udvar-  
25 Hazy Center?



1                   A           It's about a mile and a quarter.

2                   Q           Would that route add delay to the  
3 provision of service to the museum facilities?

4                   A           I --

5                               (Pause)

6                               With the service being required, we  
7 understand, by April, 2002, that's something that we think  
8 is achievable.

9                   Q           Okay.

10                              Are you a -- could you summarize what,  
11 if any, differences there are between the electrical  
12 specifications for Virginia Power's permanent facility to  
13 this center versus those NOVEC would employ, if it were to  
14 provide permanent service to the Smithsonian?

15                   A           Would I compare the technical  
16 specifications?

17                   Q           Yes.

18                   A           Well, I don't have Virginia Power's  
19 technical specifications, but in general, from what we do  
20 know, from past experience, I think there's a lot of  
21 similarity, and certainly some compatibility. We may not  
22 use exactly the same materials to splice cable, for  
23 example, but there are still some fundamental aspects of  
24 the engineering and design that they really have to be  
25 essentially the same, in order to utilize good engineering

1 practice.

2 Q What would be the chief differences,  
3 if you had to pick some?

4 A I don't know of any chief differences.

5 Q Okay.

6 On page 6 of your prefiled direct  
7 testimony, you address the duct bank installation.

8 A Yes.

9 Q Is that duct bank located in NOVEC's  
10 or Virginia Power's service territory?

11 A It is -- it runs through both service  
12 territories.

13 Q Okay.

14 Could you explain briefly what a duct  
15 bank does?

16 A Well, a duct bank consists of a series  
17 of plastic PVC pipe through which cable is pulled, and  
18 that would be a single conduit. A duct bank would consist  
19 of several of these PVC conduits arranged in a -- kind of  
20 a matrix pattern, for pulling multiple cables or other  
21 utilities through.

22 Q Okay.

23 You reference on Response 24 of your  
24 prefiled testimony that VDOT installed and paid for the  
25 duct bank.

1           A           That's my understanding, that's what  
2 the plan was, and to my knowledge that's how it's turned  
3 out.

4           Q           Do you know why VDOT did that?

5           A           It's my understanding again, that the  
6 Commonwealth of Virginia contributed a significant amount  
7 of capital expenditures to this project, including  
8 building the utility infrastructure.

9                   MS. BRIDEWELL: That's all I have for  
10 this witness, Your Honor.

11                   HEARING EXAMINER: All right.

12                   Thank you.

13                   Mr. Moxley, you and Ms. Bridewell were  
14 discussing the timing of your coming to the  
15 Commission, and you indicated that you were  
16 hopeful that you could resolve this dispute  
17 informally, and that normally you do.

18                   THE WITNESS: Yes.

19                   HEARING EXAMINER: What kinds of  
20 considerations do you look at when you, when you  
21 try to resolve a boundary dispute such as this  
22 one?

23                   THE WITNESS: Well, we look at where  
24 the -- what the parcel looks like, what the load  
25 looks like. Generally it's a building or

1           perhaps a housing development, and we try to  
2           accommodate each other by redrawing the line in  
3           some fashion so that it's not through a building  
4           but rather out along the street or -- to make it  
5           more practical to actually construct both the  
6           building as well as provide the utilities.

7                     And the methods that we've  
8           historically used have been if a building has  
9           both utilities serving it, the line actually  
10          runs through that building, we have, I would say  
11          without much variance, taken the approach that  
12          the -- whoever has most of the building is the  
13          one who gets the load.

14                    In our area there is usually at any  
15          given time maybe one or two properties that --  
16          in which the situation arises, so if we make an  
17          accommodation in one instance where NOVEC takes  
18          the building here and there is a small portion  
19          that Virginia Power would theoretically have,  
20          then we might make an accommodation on the other  
21          property by giving -- by redrawing the line  
22          along another street so that there's some equity  
23          involved in that process.

24                    HEARING EXAMINER: Thank you.

25                    Before we go on with cross-

1 examination, it's 11:38. So I would like to  
2 take a short ten minute break, and then we can  
3 pick up with cross-examination of Mr. Moxley, so  
4 ten minutes.

5  
6 NOTE: A recess is taken at 11:40  
7 a.m., after which the hearing resumes its  
8 session at 11:52 a.m., as follows, viz:

9  
10 THE BAILIFF: The Commission resumes  
11 the session.

12 Be seated, please.

13 HEARING EXAMINER: All right.

14 Virginia Power?

15 MR. GHARTEY-TAGOE: Thank you, Your  
16 Honor.

17  
18 CROSS-EXAMINATION

19 BY MR. GHARTEY-TAGOE:

20 Q Now, Mr. Moxley, I believe you've  
21 testified that Virginia Power has said if the SCC decides  
22 this case for NOVEC, that Virginia Power would give NOVEC  
23 a delivery point. What's the basis for that testimony?

24 A That is my understanding.

25 Q What is the basis for that

1 understanding?

2 A Discussions with ODEC.

3 Q Discussions with ODEC?

4 A Yes.

5 (Pause)

6 Q You also have testified about the  
7 process involved in resolving boundary disputes in the  
8 past.

9 A Yes, sir.

10 Q Is it not true that in the past  
11 boundary disputes of this nature have been resolved based  
12 on which utility's facilities are closer?

13 A Once in a while, perhaps.

14 Q Are you familiar with the 1991 dispute  
15 involving the criminal justice facility, the Avion Office  
16 Park?

17 A The Avion Business Park or Office  
18 Park, yes, I'm somewhat familiar.

19 Q And in that case, NOVEC opted not to  
20 serve because it's facilities were further away and did  
21 not want to extend those facilities; isn't that correct?

22 A I don't know what is correct. I was  
23 not around at the time, so I don't know really the basis  
24 for that -- that decision. That is not the decision we  
25 would certainly make today.

1           Q           Tell me if you don't know this, but in  
2     that case the parties agreed, and the Commission approved  
3     a boundary change that moved the boundary further to the  
4     east; isn't that correct?

5           A           I --

6                   MR. STALLARD: Your Honor, I object.

7                   HEARING EXAMINER: Before you answer,  
8     Mr. Stallard has an objection.

9                   MR. STALLARD: Excuse me, Your Honor.  
10     I do object. Mr. Moxley's testified he was not  
11     present, he is not familiar with what happened  
12     then, so you have no basis for this question.

13                  HEARING EXAMINER: And I believe the  
14     question was proceed by "if you know". So I'm  
15     going to allow the question.

16   BY MR. GHARTEY-TAGOE: (Continuing)

17           Q           If you know, can you answer that  
18     question?

19           A           I'm sorry. Would you repeat it,  
20     please?

21           Q           In 19 -- in the 1991 case, involving  
22     the Avion Office Park, would you agree that the Commission  
23     approved a boundary adjustment that moved the boundary  
24     further to the east, and that is the same boundary that is  
25     at issue in this case?

1           A           No, that is not correct. I do know  
2   that.

3           Q           What did the Commission do in that  
4   case?

5           A           The boundary in question has not  
6   changed, to my knowledge, since 1977, if not before.

7           Q           The west boundary of the NOVEC  
8   territory on which the Smithsonian facility is located,  
9   you told me has not changed since 1977?

10          A           I don't believe that's the one you're  
11   referring to, but the west boundary, which is the  
12   property, coincides with the property boundary for the  
13   Airport Authority, yes. It's my understanding that that  
14   did move up to the property boundary.

15          Q           In other words, it moved eastward; is  
16   that correct?

17          A           Yes, that was the case, and, again, I  
18   was not present, not employed at the time, but from what I  
19   understand it was the case where Virginia Power had built  
20   facilities into that area, into NOVEC's territory. When  
21   that was discovered, there was a kind of arrangement and  
22   redrawing of the boundary at that point.

23          Q           With respect to the delivery point  
24   again, you understand that if Virginia Power agrees to  
25   sell you facilities, assuming the Commission rules that



1 NOVEC is the proper party to serve here, that's not the  
2 same as Virginia Power agreeing to provide you with a  
3 delivery point. Would you not agree with that?

4 A The facilities would be whatever  
5 equipment may be appropriate at the time, such as  
6 transformers.

7 Q Thank you.

8 Are you aware that transformer pads  
9 have already been installed in Virginia Power territory to  
10 serve this facility?

11 A No, I'm not.

12 Q If NOVEC were to serve this facility,  
13 would you need to construct transformer pads?

14 A Possibly. As I've said before, we  
15 would need to review exactly what has been done and make a  
16 complete assessment of the site, which can be done in  
17 probably a day.

18 Q You've mentioned efforts to resolve  
19 this dispute before you filed your petition. Will you  
20 agree that Virginia Power made certain offers to swap  
21 territory or facilities with NOVEC?

22 A Yes.

23 Q -- in an effort to resolve this case?

24 A Yes, as did NOVEC.

25 MR. GHARTEY-TAGOE: Nothing further,

1 Your Honor.

2 HEARING EXAMINER: All right.

3 Mr. Gordon?

4 MR. GORDON: Yes, sir, Your Honor.

5 Thank you.

6  
7 CROSS-EXAMINATION

8 BY MR. GORDON:

9 Q During your cross-examination by Ms.  
10 Bridewell, you discussed your attempts to get information  
11 from the Smithsonian, and you indicated that the  
12 Smithsonian had informed you that counsel had advised the  
13 folks not to provide you with information. Isn't it true  
14 that NOVEC never pursued the issue with the Office of  
15 General Counsel with the Smithsonian?

16 A I think that to be true. I don't know  
17 for sure.

18 Q Regarding the transformer issue again,  
19 Ms. Birdwell(sic) elicited testimony from you about the  
20 transformer, and isn't it true that you have not seen the  
21 specifications for the Virginia Power -- Dominion Virginia  
22 Power transformer?

23 A We have not seen the complete  
24 specifications for those transformers, that is correct.

25 Q So isn't it also true you don't know

1 definitively whether or not the NOVEC equipment will be  
2 able to inter -- excuse me.

3 Let me withdraw the question, because  
4 I'm not going in a straight line.

5 (Continuing)

6 Q Isn't it true that you also do not  
7 know definitively whether or not your equipment will be  
8 interoperable with the Virginia Power transformer?

9 A No, but I think it would be highly  
10 unlikely, based on what we know. After years of ongoing  
11 discussions with Virginia Power, we have periodic meetings  
12 to discuss things of an identical nature, and as well as  
13 system planning. So we have a pretty good idea of what  
14 those requirements are, and that's why I feel reasonably  
15 comfortable that there should be compatibility.

16 Q Okay, but --

17 A We would also -- as I also mentioned,  
18 we would want to review that to make sure that it's sized  
19 adequately, and that the design is an adequate design.

20 Q Okay, but it is a possibility that  
21 they won't be interoperable.

22 A I -- possibility -- maybe there's a  
23 possibility, small remote possibility(indicating).

24 MR. GHARTEY-TAGOE: Thank you, Your  
25 Honor.

1 HEARING EXAMINER: Okay.

2 ODEC?

3 MR. GUY: No questions, Your Honor.

4 HEARING EXAMINER: All right.

5 Ms. Nolte?

6 MS. NOLTE: None, Your Honor.

7 HEARING EXAMINER: All right.

8 Mr. Moxley, thank you for your  
9 testimony. You may step down.

10  
11 \* \* \* \* \*

12 WITNESS STOOD ASIDE

13  
14 HEARING EXAMINER: Ms. Nolte?

15 MS. NOLTE: NOVEC calls Mr. Jaramillo  
16 to the stand, please.

17  
18  
19  
20 GILBERT D. JARAMILLO; a witness being  
21 called by and on behalf of Northern Virginia Electric  
22 Cooperative, having first been duly sworn, testifies as  
23 follows, viz:

24 DIRECT EXAMINATION

25 BY MS. NOLTE:

1                   Q            Could you please state your full name  
2                   and business address for the record.

3                   A            My name is Gilbert D. Jaramillo. My  
4                   business address is 10323 Lomond Drive, Manassas,  
5                   Virginia.

6                   Q            Mr. Jaramillo, did you cause to be  
7                   filed on November the 19th, testimony consisting of 19  
8                   pages in this matter?

9                   A            . Yes.

10                  Q            Do you have any additions or  
11                  corrections to that testimony?

12                  A            No, I do not.

13                  Q            And if we were to ask you those same  
14                  questions today, would your answers be the same?

15                  A            Yes.

16                  Q            Do you adopt this testimony as your  
17                  own?

18                  A            Yes.

19                               MS. NOLTE: Your Honor, we'd ask that  
20                               this testimony be marked and admitted to record,  
21                               subject to cross-examination.

22                               HEARING EXAMINER: His testimony will  
23                               be marked as Exhibit GDJ-4 and admitted into the  
24                               record, subject to cross-examination.

25                               He is ready for cross, Ms. Nolte?

1 MS. NOLTE: I'm sorry. Yes, Your  
2 Honor, he is ready for cross.

3 HEARING EXAMINER: All right.

4 Ms. Bridewell?

5 MS. BRIDEWELL: Good afternoon, Mr.  
6 Jaramillo.

7 THE WITNESS: Good afternoon.

8  
9 CROSS-EXAMINATION

10 BY MS. BRIDEWELL:

11 Q In your -- do you happen to have a  
12 copy of your prefiled direct testimony with you?

13 A Yes, I do.

14 Q Very good.

15 If I may refer you to that testimony  
16 at page 2 of 5. You indicate at lines 8 through 11 that  
17 meetings were held on November 8th, 1996 and December  
18 11th, 1996, with HOK and the Smithsonian staff to reaffirm  
19 NOVEC's intent and capability to serve the Air & Space  
20 Museum; do you see that?

21 A Yes.

22 Q Did you or someone under your  
23 direction and supervision attend those meetings?

24 A I did personally.

25 Q Okay.

1                   During those meetings, did the  
2       Smithsonian staff or any member of HOK indicate that the  
3       Smithsonian was seeking other sources of supply and  
4       delivery of electric service other than NOVEC?

5                   A           At the time -- at the first meeting, I  
6       believe they had scheduled two meetings in a row, one with  
7       Virginia Power and one with NOVEC.

8                   Q           Uh-huh, and NOVEC was aware of the  
9       meetings going on with Virginia Power; is that correct?

10                  A           I knew they were meeting with them.

11                  Q           Okay.

12                               At the November 8th and December 11th  
13       meetings, did you or someone under your direction and  
14       supervision request site plans from HOK for the  
15       Smithsonian?

16                  A           Yes. That is very standard. Usually  
17       at the first meeting, at the outset, we would ask for an  
18       approved site plan that would have actually have been  
19       filed with the county that they would be building in.  
20       That is pretty much standard, yes.

21                  Q           And the site plan you got during that  
22       meeting was dated 1994?

23                  A           What I received, according to my  
24       testimony, I received a preliminary mechanical, plumbing,  
25       electrical, a master plan, that was actually dated, I

1 believe, 1995.

2 Q But you did not have any document as  
3 current as 1996 at that time.

4 A No, I did not.

5 Q Okay.

6 Did you press the Smithsonian for more  
7 updated site plans?

8 A Yes.

9 Q What was their response?

10 A I don't remember because at the time,  
11 when they provided the preliminary plans, they had -- they  
12 were looking at various options. At one time they were  
13 looking at a one megawatt photovoltaic electrical grid  
14 that would be installed at the site, which, of course,  
15 would change the electrical plan. So I was looking  
16 forward to receiving that information once it was  
17 completed, the design specifications.

18 Q Did you press them for that  
19 information?

20 A Yes. At each meeting or phone call,  
21 yes, I did.

22 Q Did you press them for that  
23 information between the '96 meetings and say the year end,  
24 1997?

25 A I would have to say yes, especially, I



1 know in November of '98, after that meeting, that we had  
2 basically requested an updated plan, as I was at that  
3 meeting as well.

4 Q All right.

5 Between the '96 meeting and calendar  
6 year 1997, did you press them for information?

7 A I don't know. I don't have a record  
8 of a meeting with them in 1997.

9 Q Okay, but the issue came up again in  
10 November of 1998?

11 A Yes. We had a meeting with them.

12 Q Okay.

13 Did you get a more updated site plan  
14 at that meeting?

15 A No, I did not.

16 Q Did you request a more updated site  
17 plan?

18 A Yes.

19 Q -- at that meeting?

20 A At every meeting, we would ask if we  
21 could get updated information.

22 Q And what was their response?

23 A We, ah --

24 Q Sir?

25 A We did not get the information.

1 Q Did you take it up further with the  
2 Smithsonian's Office of General Counsel?

3 A No, I did not. At the time I was  
4 meeting with the Chief of Energy Management Personnel, Mr.  
5 Weisman?

6 Q Okay.  
7 Did you pursue it further with Mr.  
8 Weisman?

9 A Through phone calls, yes.

10 Q And what was Mr. Weisman's response?

11 A I was unable to get through on the  
12 telephone to Mr. Weisman.

13 Q Did you pursue it further with Mr.  
14 Weisman's boss?

15 A No, I did not.

16 Q Would you agree that the Smithsonian  
17 would be considered part of the federal government in  
18 terms of its classification as Northern Virginia's  
19 customer?

20 A Initially we did not know whether the  
21 Smithsonian was classified as an unregulated account.

22 Q Uh-huh.

23 A It wasn't until recently through the  
24 discovery that I realized that they had executed an  
25 agreement with GSA, so I'm assuming that they are treated

1 as an unregulated account with Virginia Power.

2 Q Okay.

3 How do installations such as the  
4 Smithsonian, how are they usually treated by NOVEC in  
5 terms as a regulated or unregulated account?

6 A Excuse me?

7 Q How would a museum facility like this,  
8 which is linked to the federal government ordinarily be  
9 treated by NOVEC, as a regulated or as a nonregulated  
10 account?

11 A Well, if this truly is a federal  
12 account, it would be treated as an unregulated account.

13 Q Okay, as a --

14 A -- in regards to rates.

15 Q Unregulated?

16 A Unregulated.

17 Q Okay.

18 A In terms of rates and in terms of  
19 conditions of service.

20 Q Okay.

21 As a nonregulated account, isn't it  
22 possible that the Smithsonian could request a special  
23 contract or a non-tariff rate?

24 A That is correct.

25 Q Did the Smithsonian request such a

1 rate from Northern Virginia Electric Cooperative?

2 A No, they did not.

3 Q Did Northern Virginia Electric  
4 Cooperative offer the Smithsonian such a rate?

5 A Initially, what we presented were our  
6 regulated accounts, because we did not know that they were  
7 a federal type of account. Like I -- as -- we have not  
8 presented them an offer, because basically it would be  
9 based on their electrical requirements and usage, and we  
10 would have to look at the entire picture before we would  
11 just offer a rate to them, which we have not.

12 Q Okay. On the initial assumption that  
13 they were a regulated account, what regulated tariff rate  
14 did Northern Virginia Electric Cooperative put to the  
15 Smithsonian?

16 A At the time, when they were talking  
17 about a photovoltaic system and possibly reducing demand  
18 off the grid, we introduced our curtailment type of rate,  
19 and also our standard large power general service rate.

20 Q Okay. In your testimony, I believe  
21 that's on page 3 of 5, you indicate that you expect this  
22 load to be about 6.25 megawatts, and a load factor of 62  
23 percent. And you appear to have derived that based on  
24 a comparison of, I guess, the Washington, D.C.  
25 Smithsonian's usage characteristics; is that correct?

1                   A           That's correct. It's based on a  
2 letter that's attached to my testimony from, I believe,  
3 from Mr. Weisman to Mr. Cowell, which he was -- if I could  
4 read this, I could --

5                   Q           Well, I'll let you do that with your  
6 counsel.

7                   A           Okay.

8                   Q           -- on redirect, how about that?

9                   A           That's what it was based on. The  
10 usage pattern would be similar to the Air & Space Museum  
11 in Washington, D.C.

12                  Q           Okay, and how would you compare the  
13 size of the Steven F. Udvar-Hazy Center with the D.C.  
14 Smithsonian?

15                  A           Well, I don't have --

16                               MR. GORDON: Objection. When you  
17 clarify the Smithsonian as a large institution,  
18 are you referring simply to the Air & Space --

19                               MS. BRIDEWELL: Let me rephrase.

20 (Continuing)

21                  Q           With the Washington, D.C. Smithsonian  
22 Air & Space Museum, specifically, that's referenced in  
23 your testimony.

24                  A           Okay.

25                               With the usage information that I

1 have, the Air & Space Museum, the maximum demand is around  
2 3,000 kW, so I would have to assume that was about half of  
3 what the new museum would be, based on the information  
4 I've seen.

5 Q You're saying the new museum is half  
6 the size of --

7 A Twice as much.

8 Q Twice as much, okay.

9 How many other customers of the size  
10 of the Steven F. Udvar-Hazy Center or larger does NOVEC  
11 now have?

12 A It wouldn't be many. It wouldn't  
13 probably be more than a dozen.

14 Q And what regulated rate are they  
15 served on?

16 A Well, that would vary. They could be  
17 served on the delivery point service or the large general  
18 service rate, and there's options within that rate. Or  
19 they could be serviced under NOVEC's curtailment rate.

20 Q Okay.

21 Could you give me a little more  
22 information about the factors and assumptions you used in  
23 estimating the Smithsonian's electrical requirements of  
24 6.25 megawatts and a load factor of 62 percent?

25 A Okay.

1                   Again, based on this letter from Mr.  
2       Weisman when he refers to the usage path being very  
3       similar, I estimated that the new museum would also have a  
4       similar usage pattern, and I calculated it to be around 62  
5       percent.

6                   Also, through the agreement, the GSA  
7       agreement, I noticed that the minimum demand in July,  
8       2003, that the parties had agreed to was going to be 6.25  
9       megawatts, or 6200 kW, and usually those figures are  
10      conservative, because that is going to be the minimum bill  
11      that that customer will be receiving from that party.

12                  So on a conservative basis, I used  
13      6.25 megawatts at an operating load factor of 62 percent.

14                  Q            Okay.

15                  With the advent of retail access,  
16      isn't it true that NOVEC customers may be able to shop for  
17      energy supply prospectively?

18                  A            That is correct.

19                  Q            And could you state for the record  
20      when NOVEC is going to offer retail access or retail --

21                  A            Our target date is July, 2002.

22                  MS. BRIDEWELL: That's all I have for  
23      this witness, Your Honor.

24                  HEARING EXAMINER: All right.

25                  Mr. Gordon?

1 Mr. Gordon? Oh, I'm sorry, Virginia  
2 Power.

3 MR. GHARTEY-TAGOE: Thank you, Your  
4 Honor.

5 HEARING EXAMINER: Sorry.

6  
7 CROSS-EXAMINATION

8 BY MR. GHARTEY-TAGOE:

9 Q Good morning, sir.

10 A Good morning.

11 Q I believe I heard your testimony that  
12 you did not know that the Smithsonian was an unregulated  
13 account until a discovery in this case. Is that a correct  
14 characterization of your testimony?

15 A Initially I had not received  
16 confirmation that it was unregulated, that was an  
17 unregulated account in the State of Virginia, and like I  
18 said, it wasn't until recently through the discovery that  
19 I came across the GSA contract that I confirmed that  
20 Virginia Power has interpreted them as a nonregulated  
21 account.

22 Q So you -- does NOVEC have any federal  
23 accounts in this --

24 A Yes, sir.

25 Q -- service territory?



1                   Are those unregulated or regulated  
2     accounts?

3                   A           Those are unregulated.

4                   Q           But you knew that the Smithsonian was  
5     a federal account in 1996, didn't you?

6                   A           I was not -- I had no confirmation  
7     between how the Smithsonian related to the federal govt.

8                   Q           Do you have in front of you a letter  
9     you wrote to Bob Weisman on December 20th, 1996?

10                  A           No, I do not. I do not have that  
11     letter.

12                  Q           It is attached to the petition as  
13     Attachment 7, if your counsel can give you a copy.

14                               MS. NOLTE: Your Honor, is it okay if  
15     I give this to Mr. Jaramillo?

16                               HEARING EXAMINER: Please do.

17                               (Pause)

18     BY MR. GHARTEY-TAGOE: (Continuing)

19                  Q           This is a letter you wrote, isn't it?

20                  A           Okay, yes.

21                  Q           And the date on there is December  
22     20th, 1996.

23                  A           Okay.

24                  Q           And it is addressed to Robert A.  
25     Weisman, Chief Energy Management Branch, Smithsonian

1 Institution, correct?

2 A Correct.

3 Q If you turn to page 3 of that letter,  
4 the last of that one paragraph, you say, "Also, as we  
5 discussed during our meeting, the Smithsonian Institution  
6 would be a federal government agency operating in the  
7 state(sic) of Virginia, thereby not falling within the  
8 jurisdiction of the State Corporation Commission as it  
9 pertains only to the purchase price of electric service."

10 A That's correct. At our initial  
11 meetings in August and November, I had not confirmed that.

12 Q All right.

13 Thank you.

14 That's all the questions I have.

15 HEARING EXAMINER: All right.

16 Now, Mr. Gordon.

17 MR. GORDON: Thank you, Your Honor.

18 I have no questions for the witness.

19 I would like to apologize, to Ms.

20 Bridewell, because I have been mispronouncing  
21 her name earlier.

22 HEARING EXAMINER: It probably wasn't  
23 the first time that her last name was  
24 mispronounced, but I'm sure she appreciates the  
25 apology.

1 ODEC?

2 MR. GUY: No questions, Your Honor.

3 HEARING EXAMINER: All right, Ms.

4 Nolte?

5 MS. NOLTE: No redirect, Your Honor.

6 HEARING EXAMINER: All right.

7 Thank you for your testimony.

8

9 \* \* \* \* \*

10 WITNESS STOOD ASIDE

11

12 HEARING EXAMINER: It's a quarter  
13 after 12:00. Let's go ahead and take or at  
14 least start with your witness, Mr. Guy.

15 MR. GUY: Yes, Your Honor.

16 HEARING EXAMINER: -- before we take a  
17 break for lunch.

18 MR. GUY: Your Honor, Old Dominion and  
19 the Association call Konstantinos N. Kappatos,  
20 Gus Kappatos to the stand.

21

22

23

24 KONSTANTINOS N. KAPPATOS, a witness

25 being called by and behalf of Old Dominion Electric

1 Cooperative and the Virginia, Maryland and Delaware  
2 Association, having first been duly sworn, testifies as  
3 follows, viz:

4 DIRECT EXAMINATION

5 BY MR. GUY:

6 Q Good morning, Mr. Kappatos.

7 A Good morning.

8 Q Would you please state your name and  
9 occupation for the record.

10 A My name is Konstantinos Nicholas  
11 Kappatos, and I know it's all Greek to you, so you can all  
12 call me Gus, a senior vice president in Virginia, in  
13 operations for Old Dominion Electric Cooperative, and I  
14 have been with Old Dominion since January of 1984. My  
15 office is located at 4201 Dominion Boulevard, in Glen  
16 Allen, Virginia.

17 Q Thank you.

18 Are you the same Gus Kappatos who  
19 prepared written prefiled direct testimony in this case  
20 consisting of 11 pages of testimony and three two-page  
21 exhibits?

22 A Yes, I am.

23 Q Is that prepared testimony intended to  
24 be your direct testimony in this proceeding?

25 A Yes.

1                   Q           Do you have any corrections or  
2 additions to offer to your prefiled direct testimony at  
3 this time?

4                   A           Yes, I do.

5                   Q           Go ahead and make those now.

6                   A           In my prefiled testimony, I testified  
7 under the current contract, the Network Operating  
8 Committee had never met to resolve a delivery point  
9 dispute, and I had not called a meeting with respect to  
10 this case because the Network Operating Committee does not  
11 convene to discuss new delivery points unless there is a  
12 technical or cost allocation dispute that cannot be  
13 resolved by the companies' engineers.

14                               Given Dominion Virginia Power's  
15 argument for the first time, to my knowledge, in this  
16 proceeding, there might be some technical issues other  
17 than the right to serve. I called for a Network Operating  
18 Committee as soon as I heard about it. The Committee met  
19 on December 5th, 2001, to review these delivery point  
20 requests for the Smithsonian Center.

21                               There was no surprise to me as I said  
22 in my prefiled testimony, all the issue before the  
23 Committee to be resolved is who is entitled to serve that  
24 load. We agreed that the question cannot be resolved by  
25 the Committee, and that closure on a delivery point

1 question would be swiftly reached following a resolution  
2 by the Commission of the territorial issues.

3 In addition, as I mentioned my name  
4 earlier, my middle initial is "N", for Nicholas, not "K".

5 Q Okay, thank you.

6 With those corrections, are the  
7 matters, in fact, set forth in your prepared testimony  
8 true and correct to the best of your knowledge,  
9 information and belief?

10 A Yes, they are.

11 Q And was that prepared by you or under  
12 your supervision and direction?

13 A Yes.

14 Q And, of course, I mean other than the  
15 incorrect initial. And does it accurately depict what it  
16 purports to depict?

17 A Yes.

18 Q Would you please give us a brief  
19 summary of your prefiled direct testimony.

20 A Sure.

21 Q My testimony explains Old Dominion's  
22 role in procuring new delivery points for its member  
23 cooperatives. The typical resolution process for  
24 contested requests and specifically Old Dominion's request  
25 for a new delivery point for Northern Virginia Electric

1 Cooperative's request to serve the Smithsonian Center.  
2 The requests are controlled by the Interconnection and  
3 Operating Agreement, and the Network Operating Agreement  
4 between Virginia Electric and Power Company and Old  
5 Dominion. Those were executed on July 29, 1997.

6 When a member cooperative identifies a  
7 need for a new delivery point, it contacts Old Dominion,  
8 which usually we do our own review of their request, and  
9 if needed, we contact Dominion Virginia Power regarding  
10 any technical questions or concerns.

11 If the engineers for each party can  
12 agree on the resolution of any issue, which they usually  
13 do, then Old Dominion submits a formal request to Dominion  
14 regarding the delivery point. While this submission is  
15 referred to as a request, Dominion actually has little  
16 discretion but to grant it subject to considerations of  
17 technical utility practices and Old Dominion's agreement  
18 on cost allocations.

19 Next, Dominion's contract  
20 administrator determines construction cost  
21 responsibilities for the project, and returns that request  
22 form to Old Dominion for review. If there are no  
23 technical or cost allocation disputes, then Old Dominion  
24 executes the form and returns it to Dominion Virginia  
25 Power.

1                   If there are any technical or cost  
2 allocation disputes, then discussions between the  
3 engineers begin to resolve them. If the engineers cannot  
4 resolve a dispute, then it is sent to the Network  
5 Operating Committee for resolution.

6                   Since July 29, 1997, which is when we  
7 executed those agreements, 13 new delivery points have  
8 been requested by Old Dominion and six revisions to  
9 existing delivery points. Of all of those requests, none  
10 have been denied because Dominion does not have, we  
11 believe, the discretion to deny new delivery point  
12 requests and has purported to do so only in the present  
13 case.

14                  Additionally, none have been referred  
15 to the Network Operating Committee because those people  
16 have always been able to resolve technical or cost  
17 allocation disputes.

18                  In the present case, Old Dominion  
19 first began discussions with Dominion Virginia Power  
20 regarding a new delivery point to provide to this Center  
21 on August 12th, 1997. Follow-up meetings did take place.  
22 On November 27, 2000, having worked out the technical  
23 details, as we believed, pursuant to the Network Operating  
24 Agreement and the Interconnection Operating Agreement, Old  
25 Dominion properly and timely submitted a request for a new



1 delivery point.

2 In a letter dated April 6, 2001,  
3 almost five months later, Virginia Power rejected the  
4 request. The only grounds cited were Dominion's own  
5 intention to provide service to the Center. No technical  
6 or cost allocation issues were raised. In fact, no such  
7 issues were ever raised until the pleadings in this  
8 litigation. That's the first time I became aware of it.

9 Dominion Virginia Power has not raised  
10 any questions, concerns or objections to the bases of good  
11 utility practice or other technical bases with Old  
12 Dominion regarding the requested delivery point.

13 Old Dominion responded to Dominion  
14 Virginia Power's refusal by sending a letter of August 1,  
15 2001, rejecting the denial as being inconsistent with our  
16 agreements. I wrote and sent that letter. And I have not  
17 had a response to that letter since then.

18 Old Dominion has not sought Network  
19 Operating Committee resolution of the dispute because the  
20 Network Operating Committee does not convene to discuss  
21 new delivery points unless there is a technical or cost  
22 allocation dispute that cannot be resolved by the  
23 companies' engineers.

24 The question of whose entitled to  
25 serve the Center is not one of the Network Operating

1 Committee to resolve. If technical issues are raised, it  
2 would be able to resolve them, but I believe any technical  
3 cost allocation issues could be resolved by the engineers  
4 as they have been in the past.

5 Furthermore, Old Dominion has not  
6 sought any Federal Energy Regulatory Commission resolution  
7 of the dispute because the only substantive issue is the  
8 territorial question. FERC may have to resolve the issue  
9 of whether Dominion Virginia Power has any right to deny a  
10 delivery point request, but we have so far deferred  
11 seeking that resolution in hopes that a territorial  
12 question would be resolved at this forum.

13 This concludes the summary of my  
14 testimony.

15 MR. GUY: Thank you, Your Honor.

16 Thank you, Mr. Kappatos.

17 Your Honor, I ask that Mr. Kappatos'  
18 prepared testimony be marked as Exhibit KNK-1  
19 for identification purposes.

20 HEARING EXAMINER: All right.

21 His testimony will be marked as  
22 Exhibit KNK-5 and admitted into the record,  
23 subject to cross-examination.

24 MR. GUY: Thank you, Your Honor.

25 Your Honor, I would like also to pass

1 a copy of a document to the bench and to  
2 counsel. This -- let me pass it along here. I  
3 did provide copies to the other parties prior to  
4 the hearing, and a copy to the witness, if you  
5 don't mind.

6 (Pause)

7 Your Honor, I would like to mark this  
8 for identification as Exhibit KNK-2.

9 HEARING EXAMINER: All right.

10 Any objection?

11 MR. GUY: This is just for  
12 identification.

13 MS. BRIDEWELL: KNK what?

14 HEARING EXAMINER: Six.

15 MR. GUY: Six, I apologize.

16 (Continuing)

17 Q Mr. Kappatos, would you please look at  
18 and describe the document that was just handed to you by  
19 the bailiff?

20 A These are the minutes of the Network  
21 Operating Committee that met on December the 5th of 2001.

22 Q And these are the approved minutes of  
23 the Committee?

24 A Correct. We both have reviewed them  
25 and agree that they reflect the summary of our

1 discussions.

2 MR. GUY: Your Honor, I move that  
3 these minutes be admitted into the record.

4 HEARING EXAMINER: All right.

5 KNK-6, which consists of a cover e-  
6 mail transmittal and the meeting minutes of  
7 December 5, 2001, will be admitted into the  
8 record, subject to cross-examination.

9 MR. GUY: Thank you.

10 (Continuing)

11 Q Mr. Kappatos, with all of the  
12 corrections and additions, do you now adopt your prefiled  
13 direct testimony as your testimony in this case?

14 A Yes, I do.

15 Q Mr. Kappatos, have you had an  
16 opportunity to review the direct testimony prefiled by  
17 Dominion Virginia Power witness Rebecca Buchanan in this  
18 matter?

19 A Yes, I have.

20 Q Would you comment on that review?

21 A Yes. Some aspects of that, I would.  
22 At first, I would say that I was really surprised to read  
23 that testimony and that testimony reflecting Virginia  
24 Power's position. Ms. Buchanan, I guess, is a Virginia  
25 Power employee, and I'm assuming it does reflect VEPCO's

1 position, but that is not the VEPCO that I know.

2 I want to reflect or respond to two or  
3 three comments in that testimony. One is, and I have it  
4 before me, on page 3 of her testimony, item three, and --  
5 in connection with a question, "What do you mean by the  
6 statement Dominion Virginia Power is effectively the  
7 electric distribution provider?"

8 The way that this thing is explained  
9 in here, and my understanding Ms. Buchanan says that since  
10 we receive delivery at a distribution level, or the  
11 transmission level, and we get that from Virginia Power,  
12 that Virginia Power is effectively the provider. In  
13 effect, we do not exist. And that is not the case, as you  
14 all know, and I premised before that.

15 Virginia Power is a transmission  
16 provider of Old Dominion and other customers, and they do  
17 have the responsibility and the obligation to provide a  
18 service to those, and we are here to exist. If that was  
19 the case, neither co-ops or munis would be necessary for  
20 Virginia Power would own and control the state, like  
21 several years ago with the bumper sticker that was saying  
22 that.

23 The other comment that Ms. Buchanan is  
24 saying and I'd like to dispute is that Northern Virginia  
25 has demonstrated no ability -- that's again on page 3,

1 item five. Northern Virginia has demonstrated no ability  
2 absent a delivery point from Dominion Virginia Power to  
3 provide electric service in accordance with the customer's  
4 requirements.

5 I definitely would like to object to  
6 the issue and explain why. We, as I said in my prefiled  
7 testimony, have agreements with Virginia Power in which  
8 they're obligated to provide us delivery points to serve  
9 our customers. We are a wholesale provider to our members  
10 for both transmission and -- and power, and we have agreed  
11 to do it with Virginia Power the most cost-effective way.  
12 In fact, we have agreed that the principle we ought to use  
13 in providing service to a new delivery point, or to a new  
14 customer for that matter, we are supposed to use a single  
15 utility planning process. That means our engineers, when  
16 they sit down and plan for a new delivery point, they need  
17 to forget for a minute that they represent Old Dominion or  
18 Virginia Power. They need to do the best thing they can  
19 to provide the most cost-effective service to that  
20 customer. That saves money to both companies on the long  
21 run, and that's what we do.

22 So the only way that Northern Virginia  
23 cannot support or provide load to a delivery point is if -  
24 - if VEPCO objects to give us a delivery point. In the  
25 alternative, they will have to do extensive extensions of

1 other sources of power within the system to bring the  
2 power to the delivery point in question, like you heard  
3 earlier from Mr. Moxley. They would have to build a 1.25  
4 miles of distribution line. That does not make sense.  
5 That is not single utility planning. That is not cost-  
6 effective, and that's the only reason we can do that.

7 If you take that even further, the  
8 argument further and Virginia Power objects to provide to  
9 us delivery points for whatever reason, it's only time  
10 since our load grows that we won't be able to serve  
11 anything. And that, some people call market power or  
12 whatever. I don't know what it is called, but that's  
13 where that issue is going to drive us to.

14 One other point that -- in her  
15 testimony that I'd like to dispute is, she is making the  
16 comment that Northern Virginia can only serve that load  
17 more effectively because Dominion Virginia Power would  
18 make the investments, and Northern Virginia would take  
19 advantage of this. That is also absolutely wrong because  
20 we did pay for those. Those facilities that they  
21 dedicated to serve a specific load of ours, they do go in  
22 the base case for Virginia Power, and they're getting paid  
23 for the facilities at a reasonable return for those  
24 facilities. So that statement is not true also.

25 Q Mr. Kappatos, with the information

1 that's provided in the testimony, do you understand what  
2 is referred to as alternative service, what is meant by  
3 Ms. Buchanan and others as alternative service?

4 A No, I really am not sure. I did look  
5 at her exhibits, which is Exhibit C, and the way I see  
6 there are two transformers and she also has in Exhibit B,  
7 I believe, is Northern Virginia's plan, and that has one  
8 transformer. So I really did not understand what  
9 "alternative service" means.

10 I know what alternative service means  
11 from the engineering perspective, and that is a separate -  
12 - depending on the importance of the load and what the  
13 customer wants is the -- the best event is two separate  
14 feeds for two different supplies totally. And then, of  
15 course, it gets weaker and weaker as you put, you know,  
16 two lines on the same right-of-way and two transformers,  
17 you know, feeding the same point.

18 But I really am not sure what this --  
19 alternative feed means from Attachment B of Ms. Buchanan's  
20 testimony.

21 Q Thank you.

22 You have discussed the principle of  
23 single utility planning. Are there any other fundamental  
24 principles that go into these determinations between  
25 Virginia Power and Old Dominion in doing system planning



1 for resources?

2 A Well, I think -- I think that  
3 principle basically is as I tried to explain earlier, to  
4 view the supply as coming from a single utility. So it  
5 would be, in effect, immaterial who served that customer.  
6 It's -- what's important is the reliability and the  
7 investment into the facilities.

8 Q Is there any distinction made between  
9 the -- or what distinction would be made between the load  
10 of one utility and of another?

11 A Well, there is not -- I mean, in fact,  
12 there is a big, what I believe, obligation of guidance in  
13 the agreements that we have between us and Virginia Power,  
14 and that is it's called native load status out of the  
15 transmission services section of our Interconnection and  
16 Operating Agreement, and if you will give me a couple of  
17 minutes, I'll read it to you because I believe it's very  
18 important. I think that's the principle that we are -- we  
19 asked for, was negotiated, and Virginia Power agreed to  
20 provide it to us forever, I hope. And that is to treat us  
21 as being their native load customer.

22 And if you would allow me, I'd like to  
23 read that. It's Section 6.02 of the Interconnection and  
24 Operating Agreement.

25 HEARING EXAMINER: This is out of the

1           entire -- a portion of the entire agreement?

2           THE WITNESS: Yes. It's only six or  
3           seven lines.

4           HEARING EXAMINER: Hold on just a  
5           minute. I think we have some objections.

6           THE WITNESS: Okay.

7           MR. GHARTEY-TAGOE: Your Honor, we  
8           would certainly object to that. They have filed  
9           numerous papers in this proceeding. They have  
10          not seen fit to include the agreement. Your  
11          Honor has already recognized this agreement as  
12          outside the Commission's jurisdiction. To pick  
13          and choose specific lines of what I believe is a  
14          pretty extensive agreement to doctor the record  
15          I think is not appropriate.

16          HEARING EXAMINER: Mr. Gordon?

17          MR. GORDON: Your Honor, just as a  
18          matter of courtesy, I haven't seen this, so I'm  
19          not certain of the contents ahead of time as to  
20          whether or not it would create problems. I  
21          think our objection would be similar to Virginia  
22          Power's.

23          MR. GUY: Your Honor, I withdraw the  
24          portion of the question that would have the  
25          witness read that, and I'll rephrase the

1 question simply to ask him to describe the  
2 principle of --

3 MR. GHARTEY-TAGOE: Your Honor, we  
4 would make the same objection.

5 MR. GUY: Your Honor, Dominion  
6 Virginia Power has raised numerous questions  
7 about whether a delivery point would be  
8 forthcoming. I think it's certainly within the  
9 scope of your inquiry, if you're going to  
10 consider that issue at all, and I don't think  
11 you should, to listen to Mr. Kappatos who is  
12 certainly authoritative on this issue, to  
13 describe to you how those decisions are made and  
14 what the process is. We don't need to introduce  
15 the agreements to do that.

16 HEARING EXAMINER: I'm going to  
17 overrule the objection. While I agree that we  
18 shouldn't be reading parts and pieces of a  
19 document that everyone hasn't seen, particularly  
20 into the record, without regard to the other  
21 parts of the agreement, the agreement certainly  
22 has been regularly referred to throughout this  
23 proceeding to date, and Virginia Power certainly  
24 has its own witness that can respond to anything  
25 that we hear through this examination.

1                   So I am interested in hearing ODEC's  
2                   interpretation of the agreement as it relates to  
3                   the issues that have been raised here. And  
4                   clearly, the issue of jurisdiction -- this  
5                   Commission's jurisdiction over this agreement is  
6                   clear to me, and I believe I've made it clear.  
7                   But there is a lot of discussion about the  
8                   delivery point and how it might be resolved or  
9                   not. And so I'm going to allow this  
10                  examination.

11       BY MR. GUY: (Continuing)

12                  Q           Mr. Kappatos, without reference to the  
13                  document, would you explain the concept of native load and  
14                  its implications for joint system planning?

15                  A           Yes, yes.

16                               When -- when we negotiated this  
17                  agreement with Virginia Power was right after -- or  
18                  shortly after the wholesale competition and all these  
19                  things changing. And Old Dominion was extremely concerned  
20                  that it would continue to exist and be treated the same  
21                  way that Virginia Power would treat its other customers,  
22                  from the load side and also in providing transmission  
23                  service to us, and also from a generation side, that they  
24                  would treat and dispatch our units in the same way as they  
25                  would do their own.

1                   So this is an underlying principle  
2   that me and my counter part on the Committee, we would use  
3   in trying to resolve disputes and the like if those exist  
4   into the future. So I thought it's an important principle  
5   for Your Honor to know in making decisions in that if you  
6   were to use this contract in your deliberations and see if  
7   we were to find solutions, there is some underlying  
8   principle that we used in trying to reach conclusions, and  
9   that's one of them.

10               Q           Thank you.

11                       Mr. Kappatos, would you comment on the  
12   significance of the 150 kV voltage level to which Dominion  
13   Virginia Power has referred, as something that might be a  
14   potential issue with respect to this delivery point?

15               A           Yes.

16                       Our agreement, and I understand it was  
17   quoted here last time. I was not present, but it says  
18   that new delivery points will be at 115 kV or higher -- a  
19   new delivery point will be at 115 kV volts or higher. The  
20   reason for that is our wishes on both sides, our wish is  
21   that hopefully if we had the money and the ability, we  
22   would probably move to 115 kV and again to 230 kV. That's  
23   a reliability issue, and the lower the voltage, the worse  
24   the reliability is. So our goal is over time, to move  
25   into higher voltages to the extent that we can.

1                   So that's basically an incentive for  
2 both parties that we have agreed to, and that's what we'd  
3 like to do if we can.

4                   This is a case that you cannot do it -  
5 - or you could, but it's going to be very expensive, and  
6 will take a whole lot of time to get 115 kV to serve this  
7 load.

8                   Q           Thank you.

9                   Mr. Kappatos, based on your expertise  
10 or based on your experience as an engineer and your  
11 familiarity with the process of system planning, do you  
12 believe that there are any impediments to -- would there  
13 be any interruptions to the schedule or delays to the  
14 schedule if the Commission finds in favor of NOVEC?

15                   MR. GORDON: Objection.

16                   HEARING EXAMINER: Just a minute.

17                   Mr. Gordon?

18                   MR. GORDON: There's been no  
19 foundation established that Mr. Kappatos has  
20 knowledge of the critical path, the construction  
21 schedule, the unique project that's being  
22 constructed out there. He may know about  
23 engineering, when it comes to electricity, but  
24 I've heard no foundation on that issue.

25                   HEARING EXAMINER: I'm going to

1           overrule the objection. He does know that the  
2           Smithsonian is seeking permanent power in April  
3           of 2002, and based on his engineering background  
4           and his work with ODEC, he knows whether or not  
5           that can, from an engineering perspective, be  
6           delivered. So I'm going to overrule your  
7           objection and allow the question to be answered.

8                   THE WITNESS: I would say for both Old  
9           Dominion's side, Northern Virginia, and Virginia  
10          Power, if a decision was made by this Commission  
11          for Northern Virginia to serve the load, I think  
12          we are kind of, or have been, proven for the  
13          last 19 years that we are reasonable people, and  
14          the customer is of utmost importance to both of  
15          us.

16                   I would assume, and here I'm  
17          predicting, and as I said by knowing and having  
18          worked with Virginia Power before, that if the  
19          Commission would decide that -- was to decide  
20          that Northern Virginia should serve that  
21          delivery point, we would meet with Northern  
22          Virginia, see what is in place, how can we  
23          accommodate the customer, what is the most cost-  
24          effective way to do it. It's possible that the  
25          existing facilities will be the right thing to

1 do, and if that's the case, that's what we would  
2 do.

3 The delivery points that we have with  
4 Virginia Power sometimes we call them virtual  
5 delivery points, that is all they have is a  
6 meter at a specific point, so you use the same  
7 facilities. There is a meter -- no, actually,  
8 it's not a -- you know, one inch of a  
9 transmission line or a distribution line that we  
10 own, but there is a meter there that basically  
11 has the demarcation of Virginia Power's supply  
12 and on our side the delivery side.

13 So my belief and assumption is that if  
14 that is the case, that we should be able to  
15 resolve the issue in the best interest of the  
16 customer and the companies very soon.

17 HEARING EXAMINER: Mr. Kappatos, is  
18 the answer to the question, you don't know, it  
19 depends on a lot of variables that are -- that  
20 you're uncertain of at this time?

21 THE WITNESS: No. I am saying that I  
22 believe that we would resolve the issue very  
23 expeditiously, and if it takes to use the very  
24 same facilities, if that was the best thing to  
25 do, the only decision would be to find out where



1 a meter should be placed so that Virginia Power  
2 can send us the bill for the power that we  
3 purchase. And that would not require any  
4 additional construction.

5 MR. GUY: Thank you, Mr. Kappatos.

6 Your Honor, Mr. Kappatos is now  
7 available for cross-examination.

8 HEARING EXAMINER: All right.

9 It's a quarter to 1:00. This may be a  
10 good place to break for lunch.

11 A quarter to 1:00, let's take a little  
12 over an hour lunch break, and reconvene at 2:00  
13 o'clock.

14  
15 NOTE: A luncheon recess is taken at  
16 12:45 p.m., after which the hearing resumes its  
17 session at 2:00 o'clock p.m., as follows, viz:  
18  
19  
20  
21  
22  
23  
24  
25

1 THE BAILIFF: The Commission resumes  
2 its session. Be seated, please.

3 HEARING EXAMINER: All right. I  
4 believe we're ready to start cross-examination.  
5 Ms. Bridewell.

6 MS. BRIDEWELL: Thank you.

7  
8 CROSS-EXAMINATION

9 BY MS. BRIDEWELL: .

10 Q Good afternoon, Mr. Kappatos.

11 A Good afternoon.

12 Q Based on your earlier testimony, I was  
13 heartened that your view of the world is if we could lock  
14 the engineers in a room and allow -- keep the lawyers out,  
15 this matter would be resolved. Is that true?

16 A Yes, ma'am, that's very possible. I  
17 think so. And it might not take too long either.

18 Q It appears that the Network Operating  
19 Committee has had a number of successes in determining the  
20 disposition of new and disputed delivery points. Is that  
21 your understanding?

22 A That's correct. In fact, as I  
23 mentioned earlier, we only met once, and that was just for  
24 this particular case. We didn't believe we had the power  
25 to deal with it.

1                   Q           Now, I take it you do serve on the  
2 Network Operating Committee; is that correct?

3                   A           Yes.

4                   Q           And who are your Virginia Power  
5 colleagues on that particular committee?

6                   A           There's only two people on the  
7 committee. It's me and the Manager of Power Supply, who  
8 happens to be Bill Thompson from Virginia Power.

9                   Q           Okay. I understand that you're also  
10 very familiar with the Network Operating Agreement based  
11 on your earlier remarks.

12                  A           Yes, ma'am. I was the chief  
13 negotiator on our side when we negotiated that agreement,  
14 so I'm very familiar with it.

15                  Q           And you have seen the Network  
16 Operating Agreement, is that correct?

17                  A           Yes.

18                  Q           You would be familiar with it and  
19 could recognize it if it were presented to you?

20                  A           Yes, I would.

21                  Q           It was filed as part of an amended and  
22 restated Interconnection and Operating Agreement with  
23 Virginia Power in '97?

24                  A           Correct.

25                               MS. BRIDEWELL: Your Honor, I'd like

1 to hand this witness a document.

2 HEARING EXAMINER: All right. Make  
3 sure all counsel, especially Mr. Gordon, has a  
4 copy of it.

5 BY MS. BRIDEWELL: (Continuing)

6 Q You have before you a document that  
7 purports to be the Network Operating Agreement between  
8 Virginia Electric and Power Company and Old Dominion  
9 Electric Cooperative?

10 A Yes.

11 Q Would you take a few minutes and  
12 verify that that is what this document is.

13 A Yes, it is.

14 Q And it is dated July 29, 1997?

15 A Correct.

16 Q And was signed by Dr. James T. Rhodes  
17 and R. W. Watkins on behalf of Old Dominion Electric  
18 Cooperative?

19 A That's correct.

20 MS. BRIDEWELL: Your Honor, we would  
21 ask that this agreement be identified for the  
22 record.

23 HEARING EXAMINER: All right. It will  
24 be marked as Exhibit KNK-7.

25 MR. GUY: Your Honor, I trust this is

1 marked as a Staff exhibit, is that correct?

2 HEARING EXAMINER: Well, the record  
3 will reflect that Staff offered it, but she's  
4 asking Mr. Kappatos to, to lay the foundation  
5 for it.

6 MR. GUY: I understand. Thank you.

7 BY MS. BRIDEWELL: (Continuing)

8 Q And you referred to this document  
9 during your remarks earlier in the afternoon, did you not?

10 A Yes, some parts of it.

11 Q Yes. Specifically, on page 8, item 5,  
12 Operating Requirements, it looks like at (c), did you  
13 refer to the treatment of Old Dominion Electric  
14 Cooperative as native load under this agreement?

15 A Yes, I did. I was referring to a  
16 different agreement though. This is repeated with  
17 different words here. I was referring to the  
18 Interconnection and Operating Agreement, and that was  
19 section 6.02 of that agreement.

20 Q Okay. Does this agreement also  
21 establish the Network Operating Committee?

22 A Yes.

23 Q And at page 18, item 14, indicates the  
24 conditions or types of disputes handled by the Network  
25 Operating Committee?

1           A           Yes.

2           Q           And part of your direct testimony  
3 consists of a description of how the Network Operating  
4 Agreement resolves disputes through the Network Operating  
5 Committee, is that correct?

6           A           That's correct.

7                       MS. BRIDEWELL: Your Honor, I would  
8 ask that the Commission receive this exhibit.  
9 It has been referred to in most of the opening  
10 statements, it has been discussed from Old  
11 Dominion Electric Cooperative's viewpoint as to  
12 what specific portions of it means, and it is  
13 Staff's contention that the best evidence of  
14 this agreement is the complete text of the  
15 Network Operating Agreement.

16                      MR. GHARTEY-TAGOE: Your Honor,  
17 consistent with previous objections, we would  
18 object to that. We believe the agreement itself  
19 is irrelevant because no juris -- this  
20 Commission has no jurisdiction to resolve any  
21 dispute that the parties may have regarding that  
22 agreement or regarding what the duties and  
23 obligations and responsibilities of either party  
24 is under that agreement.

25                      HEARING EXAMINER: All right. I don't

1           --

2                   MR. GUY: Your Honor, I find myself in  
3           the position of agreeing with my colleague, that  
4           this is not relevant. However, Old Dominion,  
5           while feeling that it's not relevant to the  
6           inquiry, we're not seeking adjudication. I do  
7           not agree in joining his objection, although I  
8           agree with his reasons for it. We don't believe  
9           it's relevant, but if the Staff and you feel  
10          it's helpful, we'll concur.

11                   HEARING EXAMINER: Okay. Mr. Gordon  
12          rose first, so I'll hear from him first, Mr.  
13          Stallard.

14                   MR. GORDON: Based on your decision in  
15          the preliminary injunction, it's, it's our  
16          understanding that if there is a dispute, that  
17          it would go perhaps to FERC and then may be  
18          deferred to state court. So I'm uncertain as to  
19          the relevance of this. And the whole delivery  
20          point issue is still an issue out there  
21          regardless of the contents.

22                   HEARING EXAMINER: Okay.

23                   Mr. Stallard.

24                   MR. STALLARD: Your Honor, may it  
25          please the Court, we certainly believe that this

1 document confirms in every respect Mr. Kappatos'  
2 testimony with respect to, I believe, the  
3 delivery point. Having said that, and as we  
4 outlined in our opening statement, and as we've  
5 maintained throughout, we're fighting over this  
6 issue because it may be of interest to the  
7 Commission. But we don't believe it is  
8 relevant, and we join in Mr. Guy's objection.

9 HEARING EXAMINER: Ms. Bridewell -- I  
10 am going to overrule all of your objections. I  
11 don't disagree with your representations or  
12 arguments that this Commission does not have --  
13 that this Commission does not have jurisdiction  
14 to decide any dispute over the delivery point,  
15 but every single one of you, with the possible  
16 exception of the Smithsonian, have, have  
17 addressed this issue in great detail in your  
18 testimony. And I must agree with Ms. Bridewell  
19 that when we're talking about this agreement --  
20 and the scope of the testimony that's been  
21 prefiled and that's been offered here this  
22 morning, and that will yet be offered this  
23 afternoon -- that the best underlying evidence  
24 is the agreement itself.

25 So I'm going to allow the agreement,



1           recognizing and not disagreeing with any of your  
2           contentions that if there is a dispute about the  
3           receipt of the delivery point under this  
4           agreement or not, that it won't come here. So I  
5           am going to allow it, and Exhibit KNK-7 will be  
6           admitted into the record subject to further  
7           examination.

8                   MS. BRIDEWELL: Thank you, Your Honor.  
9           We appreciate that. And, again, our -- we're  
10          offering it only to complete the discussion that  
11          has occurred. We are not asking the Commission  
12          to adjudicate this.

13       BY MS. BRIDEWELL: (Continuing)

14               Q           If we could turn just a little bit to  
15          the Network Operating Minutes that you put in right before  
16          we broke for lunch. I'd like to ask you a few questions,  
17          if you'd look at that, please.

18               A           Okay.

19               Q           The attendees at the December 5th  
20          meeting include yourself, Bill Thompson and Ron Harris?

21               A           Correct.

22               Q           And Ron Harris is a member of the  
23          Network Operating Committee?

24               A           No, he's not.

25               Q           What is his role with respect to --

1           A           He's -- Ron Harris has been the  
2     Contract Administrator for several years. And in our  
3     committee meeting, basically, he kept minutes and, and  
4     drafted those minutes. And both me and Mr. Thompson  
5     provide our input and make sure that those reflected our  
6     discussions.

7           Q           Okay. So far, is the only action Old  
8     Dominion has taken to address the disagreement over the  
9     new delivery point requested by NOVEC at issue in this  
10    case is to request this meeting for the Network Operating  
11    Committee?

12          A           No. On August 1st, I believe, I sent  
13    a letter to Ron Harris as the Contract Administrator,  
14    expressing our concerns on Virginia Power's decision to  
15    turn the delivery point down. And we -- I believe I  
16    indicated in that letter that we would be waiting -- or we  
17    won't do anything until giving time to both parties -- and  
18    both parties meaning Virginia Power and Northern Virginia  
19    -- to work out some type of, of a settlement. There were  
20    discussions going on at that time.

21          Q           And so, this meeting has occurred, but  
22    I believe you said earlier in the morning that no action  
23    has been filed at the Federal Energy Regulatory Commission  
24    about the delivery point?

25          A           That's correct. That's correct.

1                   Q           Okay. Let's assume for the sake of  
2 argument that the Commission makes a decision in this case  
3 and decides, I don't know, that, yes, Virginia Power  
4 should serve this, hypothetically speaking. Would the  
5 Network Operating Committee then meet, or would the  
6 delivery point issue be determined to be resolved at that  
7 point?

8                   A           If the, if the decision was made that  
9 Virginia Power ought to serve the delivery point?

10                  Q           Um-hum.

11                  A           I don't believe we would meet -- I  
12 would call a meeting for the committee to go through the  
13 process, and, you know, we meet with this committee, and  
14 then there is a next step to go to the executives. And  
15 that would be to make sure that we had followed all  
16 procedural requirements. Then I would recommend to my  
17 board that we file a complaint with FERC in violating the  
18 terms of the agreement, not for that particular load,  
19 because that load the Commission decided what to do with,  
20 but the refusal of Virginia Power to provide that delivery  
21 point to us, we believe it's not in accordance with the  
22 agreement. So I would perceive that not debating the  
23 Smithsonian Center, but the action.

24                  Q           And you would anticipate, based on  
25 what you know, that that activity would take place at the

1 Federal Energy Regulatory Commission?

2 A Yes.

3 Q Okay. Let's flip it around for a  
4 second. Suppose the Commission were to decide that  
5 Northern Virginia Electric Cooperative should serve this  
6 load, and you and Bill Thompson met, and the decision was  
7 made that no, the delivery point still would not be  
8 forthcoming. What would happen under those circumstances?

9 A Well, I think that would be a big  
10 mistake on Virginia Power's part, but -- I think that  
11 would be a double mistake. One is not recognizing the  
12 agreement, and the other one --

13 MR. GUY: Your Honor?

14 HEARING EXAMINER: Mr. Kappatos.

15 THE WITNESS: I'm sorry.

16 MR. GUY: I'm sorry, Your Honor. I do  
17 have to object to this, because I think it asks  
18 Mr. Kappatos to speculate on what our litigation  
19 strategy might be. If he wants to answer a  
20 question up until the point of going through the  
21 process under the contract within the Company, I  
22 won't object to the question, but if it goes  
23 further to what we would do at FERC, or file at  
24 FERC, then I would, I would have to object.

25 HEARING EXAMINER: Ms. Bridewell.

1 MS. BRIDEWELL: Your Honor, the thrust  
2 of the question is geared to KNK-6, about a  
3 service request, would it then be channeled  
4 through the normal established delivery point  
5 request process. I'm trying to ascertain what  
6 happens if there's a stalemate on the Network  
7 Operating Committee, how does the delivery point  
8 then get activated so that service can be  
9 provided? That's what I'm after.

10 MR. GUY: As I said, Your Honor, my  
11 objection only starts where the, where the  
12 question requires the answer to go beyond the  
13 contract and the processes before any action is  
14 taken before another tribunal.

15 HEARING EXAMINER: Mr. Kappatos, you  
16 don't need to, in responding to this question,  
17 go into any litigation strategy that you might  
18 embark upon, but I would like you to answer the  
19 question with regard to the process and  
20 procedure that you would undertake.

21 THE WITNESS: Yes. I'll respond to  
22 you first based on my experience with Virginia  
23 Power, that goes back to almost 19 years. I  
24 believe that the issue would be resolved without  
25 my involvement and Bill Thompson's involvement.

1 I think the engineers would pick up from it and  
2 do what they have to do.

3 Now, your question was, what if they  
4 don't?

5 BY MS. BRIDEWELL: (Continuing)

6 Q Right.

7 A That would be a surprise to start  
8 with, because, as I said, they have resolved every issue  
9 so far. And on the service aspect of this, they have  
10 basically agreed that this type of service is a service  
11 that either party would provide.

12 Now, if they didn't, in the process of  
13 the contract, my boss and the VEPCo CEO would meet, and  
14 they would try to resolve the issue. And if not, then it  
15 would follow its legal path, whatever that is.

16 Q Litigation would begin at that point?

17 A Yes, if we so elected to do.

18 Q Okay. Thank you.

19 How long after the Commission made its  
20 decision in this case would you imagine that the Operating  
21 Committee would wait to act on the delivery point issue?

22 A What I would do probably, the same day  
23 if I could, I would call Bill Thompson and see if he wants  
24 to meet with me, or if we should allow our engineers, like  
25 we've done in the past, to work it out. I would expect

1 him to agree with me that we should let them work it out.

2 Q So the answer to my question would be,  
3 you would expect an immediate response?

4 A That's correct. I would expect their  
5 -- the Virginia Power engineers and ours to get together  
6 immediately and discuss ways to provide service to the  
7 customer without interruption.

8 MS. BRIDEWELL: That's all I have for  
9 this witness. Thank you, Your Honor.

10 HEARING EXAMINER: Thank you.

11 Virginia Power?

12 MR. GHARTEY-TAGOE: Thank you, Your  
13 Honor.

14

15 CROSS-EXAMINATION

16 BY MR. GHARTEY-TAGOE:

17 Q Now, Mr. Kappatos, still on this  
18 December 5th meeting that you had with Mr. Bill Thompson  
19 and Ron Harris, you requested that meeting, correct?

20 A That's correct.

21 Q After the oral argument in this case?

22 A Yes, yes.

23 Q And the whole purpose of the meeting  
24 was to discuss the Smithsonian delivery point request,  
25 isn't that correct?

1                   A           That's correct.

2                   Q           Now, this, what has been marked as  
3   KNK-6, reflects the entire discussion at that meeting,  
4   isn't that correct?

5                   A           It was a long discussion. We just  
6   summarized it in these two paragraphs. But I believe we  
7   talked for about an hour or a little bit longer.

8                   Q           But you signed off on this reflecting  
9   your agreement?

10                  A           Summarizing our -- yes.

11                  Q           And you would agree with me that  
12   nowhere in these minutes does it say that if the  
13   Commission decides that NOVEC is the proper utility to  
14   serve, that Virginia Power would give NOVEC a delivery  
15   point, would you not?

16                  A           No, sir, that's not what it says.

17                  Q           Were you in the courtroom when your  
18   attorneys gave their opening statements?

19                  A           Yes, I was.

20                  Q           Now, in your testimony, I believe on  
21   page 6, you refer to another meeting, page 6, line 5.

22                  A           Yes, the August 12, 1997 meeting.

23                  Q           Was that the regular planning meeting  
24   that ODEC, NOVEC and Virginia Power have from time to  
25   time?



1                   A           I'm not sure. I was not in that  
2 meeting. My engineer that represents us with delivery  
3 points was in that meeting.

4                   Q           So everything you've got in here is  
5 based on what your engineer told you, is that what you're  
6 telling me?

7                   A           That is based on what my engineer told  
8 me, yes, sir.

9                   Q           So you don't know if, if minutes were  
10 maintained for that meeting, for example? Do you know?

11                  A           No, I don't. I would, I would dare to  
12 say that there are, I just have not looked into that. I  
13 think whether there were minutes or there were notes, at  
14 least from my engineer to the file, or somewhere -- she  
15 always does that after a meeting.

16                               MR. GHARTEY-TAGOE: Your Honor, I'd  
17 like to pass out a document and have that  
18 marked.

19                               HEARING EXAMINER: All right.

20 BY MR. GHARTEY-TAGOE: (Continuing)

21                  Q           Mr. Kappatos, have you had a chance to  
22 review this?

23                  A           You just gave them to me, sir. If  
24 you'll give me a minute, I will --

25                  Q           Sure. Take as long as you need.

1 MR. GHARTEY-TAGOE: Your Honor, while  
2 we're waiting, may we have this marked?

3 HEARING EXAMINER: For identification,  
4 the minutes of the August 12, 1997 meeting will  
5 be marked as KNK-8.

6 MR. GHARTEY-TAGOE: Thank you, Your  
7 Honor.

8 A I've read it.

9 Q If you'd turn to the fourth sheet in  
10 the packet, which I believe originally was the cover  
11 letter, would you agree it has -- it's a letter from James  
12 C. Moxley to Ed Cowell?

13 A That's what it reads. I don't know if  
14 that's the signature, but yes, James Moxley seems here to  
15 have written the letter.

16 Q It is on NOVEC letterhead, would you  
17 agree?

18 A Yes.

19 Q And it's dated October 24, 1997,  
20 correct?

21 A Correct.

22 Q And it says, "Enclosed are copies of  
23 the meeting minutes from the August 12, 1997 meeting,"  
24 correct?

25 A Yes.

1                   Q           Now, would you accept subject to check  
2   that these are, in fact, the minutes from that meeting  
3   that you refer to on page 6, line 5 of your testimony?

4                   A           Subject to check with my engineer,  
5   sir. I don't know. I mean, they are August 12th minutes,  
6   but I'm not sure --

7                   MR. GUY: Your Honor, I object. Mr.  
8   Kappatos has said he was not at the meeting.  
9   He's testified as to what happened at "a"  
10   meeting. These are minutes of "a" meeting. And  
11   how can Mr. Kappatos be asked to speculate on  
12   whether these are the minutes of "the" meeting?

13                  HEARING EXAMINER: Well, he has  
14   testified as to the content of the meeting based  
15   on what he has been told by his engineer, and so  
16   I think it's perfectly fair for the minutes to  
17   the meeting to be presented and him cross-  
18   examined over something he testified to. If you  
19   want to strike that portion of his testimony,  
20   you're certainly welcome to do that. But I  
21   believe that it's very fair and appropriate for  
22   him to be cross-examined on minutes.

23                  Now, Mr. Kappatos has said, subject to  
24   check, and I'm sure that he will check with Ms.  
25   Wood and advise you if these are not the minutes

1           for this specific meeting, as the dates match up  
2           and the parties that were apparently attending  
3           the meeting match up.

4           MR. GUY: Thank you, Your Honor.

5           HEARING EXAMINER: Do you want to  
6           strike this portion of Mr. Kappatos' testimony?

7           MR. GUY: No, Your Honor.

8           HEARING EXAMINER: All right.

9           MR. GHARTEY-TAGOE: Thank you, Your  
10          Honor.

11         BY MR. GHARTEY-TAGOE: (Continuing)

12           Q           Mr. Kappatos, one more thing. On the  
13           third sheet of this packet here, there appears to be a  
14           list of those who attended the meeting. Would you agree?

15           A           On the third or the second?

16           Q           The third, it's page 3. In the top  
17           left-hand corner, it says page 3. It says Virginia Power,  
18           ODEC and NOVEC planning meeting. Do you see that?

19           A           Yes.

20           Q           And there's a list of names on there.  
21           And there's a Cindy Wood listed there on that list?

22           A           Um-hum.

23           Q           Is she an employee, or was she an  
24           employee of ODEC in 1997?

25           A           Yes, she was.

1                   Q           Is she the engineer you were referring  
2 to?

3                   A           Yes, sir.

4                   Q           Now, Mr. Kappatos, unfortunately, this  
5 is the best copy of the minutes that I could find, and the  
6 person who gave them to me had made some handwritten  
7 notations. And, Your Honor, I'd ask that everybody just  
8 disregard those. I would concede those are not part of  
9 the minutes. But the printed -- or the writing -- these  
10 minutes do not mention the Smithsonian, do they?

11                  A           No, I have not seen it mentioned here.

12                  Q           And you agree that Mr. -- a Mr. Moxley  
13 circulated these minutes?

14                  A           Yes, it seems like he did.

15                  Q           Would you agree, subject to check,  
16 that NOVEC -- a NOVEC representative actually prepared  
17 these minutes?

18                  A           Yes, I will talk to Mr. Moxley. He's  
19 here today, so --

20                  Q           Maybe we can ask him on rebuttal.

21                  A           Yes, sir, you probably could.

22                  Q           Now, you stated in your prefiled  
23 testimony and again this morning that Virginia Power has  
24 no discretion to deny a delivery point request except with  
25 respect to technical and cost allocation issues, correct?

1                   A           Yes, sir.

2                   Q           Now, that is your interpretation of  
3 the Network Operating Agreement, correct?

4                   A           That is my understanding of the  
5 agreement.

6                   Q           There is no -- strike that.

7                               To the extent that your understanding  
8 is incorrect, or Virginia Power disputes that  
9 understanding, or to the extent there is a difference in  
10 understanding of the Network Operating Agreement, what's  
11 your understanding of who will resolve that difference?

12                   A           Well, let me first say, as I mentioned  
13 earlier, I was chief negotiator in this agreement. I know  
14 each and every word of it and I know what the intent is.  
15 Now, putting that aside, if there was a dispute of the  
16 agreement, as I mentioned earlier, that would go first to  
17 the Operating Committee, that's me and Mr. Thompson. And  
18 if we did not agree, then it would go to the executives of  
19 both companies, and they would, they would attempt to  
20 resolve the issue. And if they didn't, then you follow  
21 whatever avenues are available to you under the contract,  
22 which would probably be litigation.

23                   Q           But it wouldn't be this Commission  
24 deciding that issue, would you agree?

25                   A           No, sir, I don't think we would come

1 to this Commission for it.

2 Q Also in your testimony this morning,  
3 you indicated that the October written request for the  
4 delivery point was the culmination or the end of a process  
5 where the engineers with NOVEC and Virginia Power had  
6 worked out details concerning that delivery point. Do you  
7 recall that testimony?

8 A Yes.

9 Q And during cross-examination by Ms.  
10 Bridewell, you also said if the Commission decided that  
11 NOVEC should serve and Virginia Power chose not to give  
12 you a delivery point, that the engineers would get  
13 together to work out the technical details?

14 A Correct.

15 Q Now, if they've already worked those  
16 out, why would they need to get together again?

17 A Well, there are levels of details.  
18 Okay? The first level of detail that they worked out that  
19 I mentioned earlier is the type of -- what -- where the  
20 source of power was and what the voltage level would be to  
21 serve that delivery point. That level of detail is the  
22 first level of detail. You need to decide is it 69 kV,  
23 115, 230, or whatever.

24 Now that things actually have  
25 happened, they need to work out the details of -- you

1 know, further engineering details, which are getting down  
2 to technical issues. So there are two levels of details  
3 in the planning process. One is, like you want to build  
4 this building, and it's going to be that big, and it's  
5 going to be that, and then you get into it, and you decide  
6 the size of its rooms, where the bottom is going to be,  
7 and all that stuff. This is the details I'm talking about  
8 them working out. And, in fact, from what I heard today,  
9 Virginia Power has made all of these improvements already,  
10 I believe. The details now would be if this facility is  
11 sufficient to provide the service to the Smithsonian  
12 Institute, and if we are to place a meter, where are we  
13 going to place the meter? That's basically the detail  
14 that would be remaining.

15 Q But in other words, you're telling me  
16 that those technical, higher level of detail has not been  
17 worked out yet?

18 A Well, we haven't had the opportunity  
19 to meet and talk about those.

20 Q Now, for the other details that you  
21 claim have been worked out, do you have any documentation  
22 to show what was worked out?

23 A No, I don't, but I could send that to  
24 the Commission. To my knowledge, there has been exchange  
25 of information. We would send plans with distribution



1 lines that would feed that. We requested reliability data  
2 to determine which one of the two circuits that were  
3 possible for tapping would be the most reliable. And we  
4 found that both were of equal reliability. So we would be  
5 comfortable for Virginia Power providing the delivery  
6 point from either one of those two feeders. And I could  
7 provide that to the Commission. My engineer is at, is at  
8 leave. I would have brought her with me today, but she  
9 just had a baby, and she's home. But I can get them to  
10 you if you so wish very soon.

11 Q And you've prefiled testimony and you  
12 did not include those, did you?

13 A I just said that I did not, though we  
14 have --

15 Q Thank you. Earlier this morning, you  
16 also testified that you did not understand Ms. Buchanan's  
17 testimony regarding alternate service. Do you recall that  
18 testimony?

19 A Yes, yes.

20 Q Now, whether you understand her  
21 testimony or not, do you deny that the Smithsonian has  
22 requested normal and alternate service?

23 A My information from Virginia, Virginia  
24 Power's part is limited to all the paper that was filed  
25 here as of last week. So I know from that testimony that

1 they have requested for alternate service.

2 Q And you have no basis to disagree that  
3 the Smithsonian has, in fact, requested alternate service?

4 A No, and I don't object to that.

5 MR. GHARTEY-TAGOE: Nothing further,  
6 Your Honor.

7 HEARING EXAMINER: Okay. Mr. Gordon?

8 MR. GORDON: Thank you, Your Honor.

9 No questions.

10 HEARING EXAMINER: Mr. Stallard?

11 MR. GHARTEY-TAGOE: Your Honor, before  
12 we move on, I'd like to move for the admission  
13 of KNK-8.

14 HEARING EXAMINER: We will wait until  
15 after the examination is finished.

16 MR. GUY: I do have some redirect,  
17 Your Honor.

18 HEARING EXAMINER: All right.

19 Mr. Stallard, do you have any  
20 questions?

21 MR. STALLARD: No, Your Honor.

22 HEARING EXAMINER: All right, Mr. Guy.

23

24 REDIRECT EXAMINATION

25 BY MR. GUY:

1                   Q           Mr. Kappatos, I believe in response to  
2                   a question from Staff counsel, you agreed that the Network  
3                   Operating Committee had had many successes. Those  
4                   successes, I take it you mean were through your  
5                   subordinates, the Committee has not actually wrestled  
6                   yourselves with any of these issues?

7                   A           That is the success, yes. If we don't  
8                   meet, that means our people work things out very well.

9                   Q           Thank you. Mr. Kappatos, with respect  
10                  to two different meetings, Mr. Gharthey-Tagoe asked you  
11                  questions about minutes. Can you tell me roughly within  
12                  the last six months how many meetings that had minutes at  
13                  them you've attended, roughly?

14                  A           Of meetings I went to and have  
15                  minutes?

16                  Q           Right, after which minutes were  
17                  prepared.

18                  A           Over the last six months, I -- the  
19                  only one that had minutes between us and Virginia Power is  
20                  the one that we had on December the 5th. The only other  
21                  ones that have minutes that I have been attending is with  
22                  our board, and we have to have minutes there. But I've  
23                  had many meetings with many people and many companies that  
24                  we do not keep minutes on those.

25                  Q           Now, Mr. Kappatos, are minutes to your

1 way of thinking a complete record of every discussion that  
2 takes place at a meeting or a general summary, or even a  
3 specific summary?

4 A Normally, you try to summarize what  
5 took place in the meeting.

6 Q Would, would either of the minutes  
7 that Mr. Gharthey-Tagoe was interested in represent a  
8 transcript of the meetings that they represent?

9 A I don't know. I wouldn't think so. A  
10 transcript -- I don't know how long that meeting took. It  
11 might be five hours. That would be a book of, you know, a  
12 transcript of that.

13 Q Did you, in reviewing the minutes, see  
14 anything that contradicted -- Mr. Gharthey-Tagoe went to  
15 great pains to show that there wasn't mentioned certain  
16 things that you have already testified to. Was there  
17 anything in those minutes that contradicted your  
18 testimony?

19 A No. And it doesn't surprise me if you  
20 have the minutes that something is not mentioned in the  
21 minutes. That does not mean that it did not happen. I  
22 mean, I, I really did not assume, because it's not  
23 reflected in the minutes, that the discussion did not take  
24 place. In fact, I feel the opposite. My engineer told me  
25 -- she was present and told me what happened at the

1 meeting. So, the fact that the minutes did not include it  
2 does not persuade me otherwise.

3 MR. GUY: Thank you, Mr. Kappatos.

4 HEARING EXAMINER: Mr. Gharthey-Tagoe,  
5 do you have a further question?

6 MR. GHARTEY-TAGOE: Your Honor, may I  
7 have one question?

8  
9 . RECROSS-EXAMINATION

10 BY MR. GHARTEY-TAGOE:

11 Q Now, Mr. Kappatos, this -- the August  
12 12, 1997 meeting minutes, I think you accepted subject to  
13 check, was prepared by NOVEC?

14 A Yes.

15 Q It was distributed by NOVEC. And in  
16 1997, NOVEC knew Virginia Power was interested in serving  
17 the Smithsonian, did it not?

18 A I believe so. I've been told that  
19 both parties knew that both parties wanted to serve it,  
20 but they were nice, they didn't bring it into the  
21 discussion on trying to decide which one would be the best  
22 way to be serving.

23 Q And on an issue as important to NOVEC  
24 as that, they still chose not to include anything on that  
25 in their minutes?

1           A           Sir, Mr. Moxley is here, you can ask  
2 him. I couldn't respond to that.

3           MR. GHARTEY-TAGOE: Thank you.

4           HEARING EXAMINER: Mr. Guy?

5           MR. GUY: I don't think we have  
6 anything else, though we will check with Mr.  
7 Moxley and confirm or correct whatever Mr.  
8 Kappatos has accepted subject to check later on.

9           HEARING EXAMINER: Mr. Moxley will be  
10 coming back on rebuttal, and that would be a  
11 great time to question him then.

12          MR. GUY: Thank you.

13          HEARING EXAMINER: Thank you for your  
14 testimony, Mr. Kappatos. You may step down.

15          THE WITNESS: Thank you.

16          HEARING EXAMINER: And Exhibits 5  
17 through 8 will be admitted into the record.

18  
19                   \* \* \* \* \*

20                  WITNESS STOOD ASIDE

21  
22                  HEARING EXAMINER: Okay. I believe  
23 that concludes ODEC's testimony, correct?

24                  MR. GUY: It does. Thank you, Your  
25 Honor.

1 HEARING EXAMINER: Mr. Getchell.

2 MR. GETCHELL: Yes. I would call  
3 Rebecca H. Buchanan.

4  
5  
6  
7 REBECCA H. BUCHANAN, being called as a  
8 witness by and on behalf of Virginia Electric and Power  
9 Company, having first been duly sworn, testifies as  
10 follows, viz:

11 DIRECT EXAMINATION

12 BY MR. GETCHELL:

13 Q Would you state your full name,  
14 please.

15 A Rebecca Herrin Buchanan.

16 Q And what is your business address?

17 A 701 E. Cary Street, Richmond,  
18 Virginia.

19 Q And what is your occupation?

20 A I'm Manager of Customer Contracts and  
21 Distribution Operations Products and Services.

22 Q And, generally, what duties are  
23 associated with that title?

24 A Typically, I administer the terms and  
25 conditions of service.

1           Q           All right. Are you the Rebecca H.  
2 Buchanan who submitted prefiled testimony on November 28,  
3 2001 in this proceeding, consisting of 13 pages and nine  
4 exhibits?

5           A           Yes, I am.

6           Q           And do you have any additions or  
7 clarifications that you would like to make to that  
8 testimony?

9           A           Yes. Based on what I heard this  
10 morning, I feel compelled to perhaps clarify what I meant  
11 by that term "effectively" that seems to have caused some  
12 confusion. So if you'll bear with me a minute, I'll try  
13 to get through that and explain it best I can.

14                    If you'll turn to my direct testimony  
15 -- and what I'm going to be referring to in there is  
16 Exhibit B and Exhibit C. And I'm going to start with C.

17                    Everybody -- what I've done -- and  
18 this is not to scale. I'm not trying to show anything  
19 about boundaries or distances or anything of that nature.  
20 What I'm trying to illustrate in this graph is simply the  
21 facilities that will be put in the field by Dominion  
22 Virginia Power versus what will be put in the field by the  
23 customer, the Smithsonian, versus what would be put in the  
24 field by NOVEC, should they provide service to the  
25 Smithsonian.



1                   On the very first exhibit, under C,  
2   what I've shown is the proposed service arrangement for  
3   Dominion Virginia Power, which shows Route 50 towards the  
4   bottom of the page. And you'll see a dotted line that's  
5   running parallel to Route 50. That's our existing  
6   circuit. What we'll do is we'll extend from that circuit  
7   underground. There'll be a meter there. We'll continue  
8   on down, and right at the end of our service territory,  
9   we'll have two transformers. At that point is where we  
10   deliver to the Smithsonian. The Smithsonian is in red.  
11   They will take it from the secondary bushings of the  
12   transformer to their facility.

13                   One other point I'd like to make --  
14   and it is not on this graph -- is that there has also been  
15   talk about the ductbank that the customer has installed.  
16   All of these facilities that you see in the blue up to the  
17   transformers will be in the customer-owned and maintained  
18   ductbank. When you look at the red, which depicts the  
19   Smithsonian facilities, heading to their, to their  
20   building, that also will be in the customer-owned and  
21   maintained ductbank. So that's just further  
22   clarification.

23                   When you look back on Exhibit B, what  
24   I've done here is I've proposed what NOVEC's service  
25   arrangement would look like. And I am not trying to make

1 any presumption as far as exactly what NOVEC would do.  
2 What I have done is I have taken their delivery point  
3 request that asks for a delivery point at the service --  
4 at the territory boundary between NOVEC and Dominion, and  
5 I -- based on that, the rest of the assumptions are mine.  
6 But still, let's just say that, for instance, the delivery  
7 point request, as they've requested it, with a delivery  
8 point at the service territory boundary is approved. My  
9 understanding by the request would be that Dominion  
10 Virginia Power would once again come from their existing  
11 34.5 circuit that's running parallel to Route 50, and we  
12 would extend through the customer-owned ductbank again to  
13 the service territory boundary, which is in the proximity  
14 where you see the meter.

15 I am now making an assumption that  
16 NOVEC would want to -- and they would have to answer this  
17 -- I'm not trying to put words in their mouth -- this is  
18 just simply an illustration -- that they would come from  
19 the delivery point there at the boundary, and that they  
20 would want to be in their service territory, and they will  
21 have some sort of transformation. Whether it's one  
22 transformer, two, or three, I don't know. Virginia Power  
23 is proposing two. I do know NOVEC will have to have  
24 transformation, simply because they're going to have to  
25 transform the voltage from 34.5 to the customer's

1 requested 13.2. And then there will have to be a meter on  
2 the other side of that transformation such that, that  
3 NOVEC would be able to bill the Smithsonian. And then  
4 NOVEC -- and then the Smithsonian would pick up from  
5 NOVEC's transformation, delivery meter point, whatever you  
6 want to call it, from there, and head to their building.

7 So when I said effectively, all I  
8 really meant by that was Dominion was still going to have  
9 to do the extension from the 34.5 circuit along Route 50  
10 up to the service territory boundary. And then the  
11 primary difference between the two scenarios is that NOVEC  
12 would then be providing the transformation that would be  
13 necessary to provide the customer with the voltage they  
14 wanted, and they would, I assume, have to have metering  
15 such that they could do revenue billing. That's really  
16 all I meant by that. And I apologize if I've offended  
17 NOVEC by making too many presumptions as to how they may  
18 do something. But that was it.

19 Q Okay. Now, did you hear testimony  
20 earlier today that the ductbanks are partially in Virginia  
21 Power's territory and partially in NOVEC's territory?

22 A I believe so.

23 Q Is that true of any part of the  
24 ductbank through which Virginia Power plans to provide  
25 service?

1 A No, sir.

2 Q Did you hear Mr. Kappatos' testimony  
3 earlier that practicality might require using Virginia  
4 Power's transformers and pads?

5 A Yes.

6 Q All right. Are those pads in Virginia  
7 Power's territory or in NOVEC's territory?

8 A Today, they are installed in Virginia  
9 Power's territory..

10 Q All right. And the -- again, the  
11 ductbank is in Virginia Power's territory to the extent  
12 that Virginia Power is going to use it?

13 A Yes.

14 Q Okay. All right. With those  
15 additional comments, do you adopt as being correct your  
16 previously filed testimony?

17 A Yes, I do.

18 Q Can you summarize that testimony?

19 A Sure. My testimony explains why  
20 Dominion Virginia Power believes it has a right to serve  
21 the Smithsonian. Dominion Virginia Power has always  
22 maintained its right to serve the Smithsonian, and the  
23 Smithsonian has made clear its preference to be served by  
24 Dominion Virginia Power. In fact, the Smithsonian has  
25 requested service. Further, we have planned to serve this

1 load and stand ready to provide electric service in  
2 accordance with the customer's request. The Smithsonian  
3 has already installed the duct system and the transformer  
4 pads in Dominion Virginia Power's service territory.  
5 Also, the Smithsonian requires that Dominion provide  
6 normal and alternate service, and Dominion Virginia Power  
7 has the existing facilities with sufficient capacity  
8 available to provide both normal and alternate service to  
9 the Smithsonian.

10 With respect to the standard for  
11 determining which utility has a right to serve, my  
12 testimony explains that in a case as this, where without  
13 manipulation, the customer's property straddles the  
14 boundary of the two utilities, and the bulk of such  
15 property is in our territory, and all or some portion of  
16 each point of use of the customer's facility is in our  
17 territory, we believe the customer's choice should  
18 prevail.

19 The alternative of having two  
20 providers serve the same building is impractical.  
21 Honoring the customer's choice in light of the  
22 practicalities of the case is more consistent with the  
23 concept of exclusive territories than would be the case  
24 if the Commission ousted one provider from providing  
25 service as a matter of law.

1                   Q           Let me ask you one other question in  
2 light of today's testimony. Have you had occasion to make  
3 inquiry to determine what Virginia Power's understanding  
4 is as to whether or not there have been engineering  
5 agreements up to this point on providing a connection  
6 point?

7                   A           Yes, I have.

8                   Q           And what did those inquiries reveal?

9                   A           I have asked everyone that has been  
10 involved in those planning meetings over the course of the  
11 last few years, or that could have possibly been involved  
12 in a discussion related to a delivery point request with  
13 respect to the Smithsonian, and to my knowledge, from what  
14 I can find, no one has any record of conversations or  
15 discussions as far as the planning or engineering or  
16 technicalities of providing a delivery point to NOVEC for  
17 the Smithsonian.

18                   MR. GETCHELL: Thank you.

19                   I offer the witness for cross-  
20 examination.

21                   Oh, I'd move the admission also at the  
22 appropriate point of the --

23                   HEARING EXAMINER: We will mark Ms.  
24 Buchanan's testimony as Exhibit RHB-9, and admit  
25 it into the record subject to cross-examination.

1 Mr. Smith?

2 MR. SMITH: Thank you, Your Honor.

3

4 CROSS-EXAMINATION

5 BY MR. SMITH:

6 Q Good afternoon, Ms. Buchanan. I'm  
7 Wayne Smith. I'm going to be asking you a few questions  
8 on behalf of the Commission Staff this afternoon.

9 First, I may very well have missed  
10 something -- and I'm sure that you or your counsel will  
11 correct me if I have -- but you're not a licensed engineer  
12 in Virginia, are you?

13 A I am not.

14 Q You're not a licensed surveyor in  
15 Virginia, are you?

16 A No, I am not.

17 Q And you're not licensed to practice  
18 law in Virginia or any other jurisdiction, are you?

19 A No. I am a CPA though --

20 Q I will let the --

21 A -- if we want to get to the  
22 certifications, and a Certified Energy Manager.

23 Q And I don't believe you are involved  
24 in the deliberations and meetings with Mr. Thompson of  
25 your company concerning the Network Operating Committee,

1 are you?

2 A In general, no.

3 Q Thank you. I'm unsure about what the  
4 Customer Contracts Department does. Are you involved in  
5 the solicitation of customers and negotiating contracts  
6 with the customers, or does your office take over  
7 responsibility after a contract has been executed?

8 A We don't solicit customers. If there  
9 is a request for service at Dominion Virginia Power, and  
10 the characteristics are such that we need to, we need to  
11 execute a contract with a customer, a purchase of  
12 electricity agreement, then my group becomes involved.

13 Q When does a contract become necessary?

14 A There can be varying reasons.  
15 Typically, what we're looking at is the amount of  
16 facilities, the size of the customer, if there are  
17 peculiar arrangements, facilities charges, alternate  
18 service, those type conditions would require a contract.

19 Q Now, with a jurisdictional customer,  
20 one of these contracts might address issues that are not  
21 covered in a particular rate schedule or the terms and  
22 conditions approved by this Commission, but it would not,  
23 it would not contradict them, would it?

24 A Absolutely not.

25 Q Now, what about a non-jurisdictional



1 customer, do you -- the contract, what sorts of things  
2 does the contract cover, the same sorts of items?

3 A It does. With a federal customer,  
4 it's somewhat different in that they have the GSA Area-  
5 Wide Agreement, so theirs looks very different.

6 Q Does your company have a contract with  
7 the Smithsonian for the Air and Space Museum addition?

8 A We have executed the GSA Area-Wide  
9 Agreement with them. And that -- I guess I should go  
10 further to say that's with the federal government, and I  
11 believe what they submit upon request for service is  
12 called the Exhibit A, to be more precise.

13 Q Does this Exhibit A provide for the  
14 Smithsonian paying any of the costs of extending the line  
15 from Route 50, the pads and so forth, or are those costs  
16 going to be recovered through the rates and charges for  
17 services?

18 A They don't have to pay anything up  
19 front for the line extension. The revenue that we  
20 anticipate receiving from the customer covers the line  
21 extension costs.

22 Q If you will turn now to your  
23 Attachment C. Would you explain to us where Virginia  
24 Power will put its alternate service to the Smithsonian  
25 complex. I assume this is the primary. Where is the

1 alternate going to be?

2 A Yes, it's right there at Route 50,  
3 where you see the DVP Existing 34.5 kV Circuit running  
4 parallel. There are actually two circuits there, and one  
5 circuit will be used for a primary and the other circuit  
6 will be used for the alternate. And when I say primary,  
7 for Dominion Power lingo, that would be what we call the  
8 normal service.

9 Q Do those two 34.5 kV circuits connect  
10 to the same substations?

11 A I don't know the answer to that.

12 Q Do you know if those 34.5 circuits  
13 connect to the same transformers?

14 A You mean back at the substation  
15 itself?

16 Q Yes.

17 A Well, no, I don't. I don't know if  
18 they go back to the same substation or not. And they  
19 would have to if they were at the same substation  
20 transformer.

21 Q To help us understand a bit about  
22 this, if you would turn to Mr. Trott's -- I believe I  
23 pronounced his -- if I mispronounced his name, I apologize  
24 -- his B, which I assume will be offered into evidence in  
25 a few minutes.

1                   First, let me ask you this: Is --  
2 have you ever seen his Exhibit B before?

3                   A           Yes.

4                   Q           So you're somewhat familiar with what  
5 he's attempting to --

6                   A           Yes, I am.

7                   Q           Could you orient us to how your  
8 schematic in C would sort of fit onto his B? Do you  
9 follow my question?

10                  A           How my Exhibit C fits with his B?

11                  Q           Yes.

12                  A           Okay. If you take a look at Mr.  
13 Trott's Exhibit B -- and we'll just use the big picture --  
14 if you look at the southernmost part of the building, the  
15 base museum building, from there you would go due south to  
16 Route 50.

17                  Q           Thank you. Are the two transformers  
18 shown in your C, that will be installed in your schematic,  
19 are they going to be new transformers, or refurbished  
20 transformers, transformers pulled out of inventory?

21                  A           No.

22                  Q           Have they been ordered?

23                  A           Yes.

24                  Q           Was the transformer installed in  
25 November?

1           A           No.

2           Q           Do you know whether these transformers  
3 could be used any place else in the Virginia Power system  
4 if they were not installed in this location?

5           A           They could be used anywhere that we  
6 have 34.5, where a customer requests a transformation to  
7 13.2. It's not overly common, but anywhere that situation  
8 would arise, they could certainly be used.

9                   MR. SMITH: I have no further  
10 questions. Thank you.

11                   HEARING EXAMINER: All right. Mr.  
12 Gordon, do you have any questions?

13                   MR. GORDON: If I may have the Hearing  
14 Examiner's indulgence.

15                   (Pause)

16                   I have no questions. Thank you, Your  
17 Honor.

18                   HEARING EXAMINER: All right. Mr.  
19 Guy?

20                   MR. GUY: Thank you, Your Honor.

21

22                   CROSS-EXAMINATION

23 BY MR. GUY:

24           Q           Ms. Buchanan, I must confess my  
25 curiosity is a little bit peaked about what it is that you

1 do. I understood you to say that you administer the terms  
2 and conditions of service. What type of service is that?

3 A Electric service, basically.

4 Q I appreciate that. My understanding  
5 is limited, but not, not that limited.

6 A Right. I have a department with  
7 approximately 16 folks. I am primarily responsible for  
8 managing the day-to-day activities of those individuals.  
9 I'm responsible for the terms and conditions of electric  
10 service which are filed with the State Corporation  
11 Commission. I would also administer the terms and  
12 conditions of service outside of the strict jurisdiction,  
13 if you will, because we have county, muni customers within  
14 Virginia, we also have federal customers. I'm also  
15 responsible for our line extension plan, any of our  
16 commercial operations guidelines, any policies and  
17 procedures associated with administering the terms and  
18 conditions of service, the facilities charge plan.

19 Q Do you do retail and wholesale  
20 service?

21 A No, I'm not involved with wholesale at  
22 all. I'm strictly within the distribution business  
23 itself.

24 Q So you do distribution facilities.  
25 What about retail energy service?

1           A           No, I'm not involved with that at all.  
2       That's the part that's confusing. I am absolutely within  
3       the Distribution Company.

4           Q           Okay. So you, you provide solely  
5       distribution services, that's, that's your bailiwick and  
6       what you do? You don't, you don't do any wholesale, you  
7       don't do any transmission?

8           A           No, no.

9           Q           You don't do any power supply?

10          A           And I can understand the confusion,  
11       because it's Distribution Operations, Products and  
12       Services, and that lends itself to some confusion, even  
13       within our own company. I always say I'm the regulated  
14       piece.

15          Q           Okay, thank you. That does help me  
16       understand this a little bit better. I'm still puzzled by  
17       your, your description of being the effective distribution  
18       provider, because, obviously, you understand something  
19       about distribution service.

20          A           Yes, sir.

21          Q           Is it your position then that wherever  
22       a transmission provider, whether it's Virginia Power or  
23       someone else, provides a delivery point, they are  
24       providing distribution facilities?

25          A           Say that one more time.

1                   Q           Is it your position that by -- do I  
2 understand you correctly that by virtue of providing a  
3 delivery point, Virginia Power, as a transmission  
4 provider, is going into the distribution business? Is  
5 that -- I'm trying to understand the distinction between a  
6 transmission facility, a transmission service, a delivery  
7 point, and distribution service.

8                   A           You're getting at the -- the wholesale  
9 delivery point is what you're talking about?

10                  Q           Well, Old Dominion has requested a  
11 wholesale -- has requested a transmission delivery point,  
12 which you have characterized as making Virginia Power  
13 effectively the distribution provider. I'm trying to  
14 understand what you mean by that.

15                  A           Okay, right. Perhaps more is being  
16 read into it or applying it outside of this specific case  
17 that we're looking at. What I'm looking at is the  
18 Smithsonian case, where Dominion Virginia Power would be  
19 required to make a distribution line extension to the  
20 service territory boundary whether we serve the  
21 Smithsonian directly or NOVEC serves the Smithsonian.  
22 That is really in a nutshell all I meant. And I don't  
23 intend for that to be taken outside of context in relation  
24 to other customers or other delivery points.

25                  Q           Well, it's -- I guess it's hard for me

1 to ignore the context. Do you have any idea how many  
2 delivery points Old Dominion has from Virginia Power?

3 A I do not.

4 Q So you wouldn't have any idea of how  
5 many similar situations there are like this?

6 A Where we provide a delivery point, a  
7 distribution delivery point to ODEC so they can deliver to  
8 the customer?

9 Q I'm sorry, a transmission delivery  
10 point.

11 A Are you talking about --

12 Q This is a request for transmission  
13 service.

14 A Right. Are you using transmission in  
15 terms -- because that's what's written on the request, or  
16 because of the voltage, or -- I guess when I hear that, I  
17 think above 69 kV on transmission, but --

18 Q So you're using distribution service  
19 simply to denote a lower voltage?

20 A When I use the term distribution, yes,  
21 I'm specifically saying it's distribution voltage.

22 Q So you're not making the argument that  
23 what is a -- what your lawyers have argued is a wholesale  
24 transmission service subject to an agreement that's  
25 regulated by FERC, you're not making the argument, I hope



1 -- and I'm glad if that's the case -- that you're  
2 providing a distribution service?

3 MR. GETCHELL: I'm sorry, I need to  
4 object on two grounds. One is, it's  
5 inappropriate to ask the witness what her  
6 lawyers have argued, because that's for the  
7 Commission to know. Secondly, I object to the  
8 question because it's incomprehensible.

9 (Laughter)

10 HEARING EXAMINER: Mr. Guy, I  
11 understand --

12 MR. GUY: The comprehensibility of the  
13 question may deal with the comprehensibility of  
14 the subject matter. I'm trying to get at a  
15 concept that I'm frankly having a hard time  
16 understanding. And I'll rephrase the question,  
17 if that will help. But I haven't had much  
18 success in getting an answer to the question.

19 HEARING EXAMINER: I think I  
20 understand where you're going, and it's an  
21 appropriate line to pursue, but why don't you  
22 rephrase the question, and, you know, try to not  
23 connect too many things.

24 MR. GUY: My apologies to the witness.  
25 I will try to ask shorter, more comprehensible

1 questions.

2 BY MR. GUY: (Continuing)

3 Q Are you, on behalf of Virginia Power,  
4 taking the position that the delivery point service  
5 requested by Old Dominion is a distribution service?

6 A No.

7 Q You are only saying that it's a low-  
8 voltage, and by describing it as a distribution service,  
9 you're referring to that lower voltage?

10 A Yes.

11 Q Thank you. Let me ask you a couple  
12 questions, if you don't mind, about the GSA Area-Wide  
13 Agreement. Can you tell me, tell me what that is? I'm  
14 not familiar with it.

15 A I'm not overly familiar with it  
16 myself, but the GSA Area-Wide Agreement is our agreement  
17 with the federal government under which we will provide  
18 electric services.

19 Q Let me ask you to refine that again.  
20 Is that power and distribution, or just distribution?

21 A I believe it's bundled at this point.

22 Q Okay. You -- excuse me a moment.

23 (Pause)

24 In response to questions from Mr.

25 Browder -- from Mr. Smith, and in your testimony, you talk

1 about alternative service. That service is -- you've now  
2 described as being from two separate circuits.

3 A Yes.

4 Q And you've raised questions about  
5 whether Old Dominion might need a second delivery request  
6 -- delivery point request to provide alternate service as  
7 well.

8 A Are you referring to a certain section  
9 within my testimony right now?

10 Q I don't have the reference, but let me  
11 ask you whether you believe that Old Dominion needs to  
12 file, needs to file an additional request for a delivery  
13 point, or whether a second delivery point would be  
14 necessary to provide alternate service.

15 A I'm going to have to speculate on what  
16 ODEC may or may not want to do. All I know is is that we  
17 asked an interrogatory question of NOVEC as to how they  
18 would provide an alternate, and they said it was  
19 irrelevant and immaterial. So I personally don't know if  
20 they plan on asking us for a second delivery point, or if  
21 perhaps they're planning on coming from their existing  
22 distribution infrastructure that's a little over a mile  
23 away.

24 Q Okay, thank you. In your testimony,  
25 you've asserted that the lead time requested by NOVEC and

1 Old Dominion for a delivery point request was not  
2 sufficient. What would be sufficient?

3 A You're talking about the actual formal  
4 document itself, once it is submitted, or the planning  
5 process that Mr. Kappatos --

6 Q Well, your testimony was that there  
7 wasn't sufficient time between the delivery point request  
8 --

9 A . Right.

10 Q -- and the requested service date. I  
11 believe that's what your testimony was.

12 A That's exactly -- do you want me to --  
13 I can find it if you --

14 Q That's all right. What would be a  
15 sufficient amount of time?

16 A For this particular request?

17 Q Sure.

18 A I need to back up a little bit.

19 Q Go ahead.

20 A As I indicated in the earlier part  
21 when I made some clarifications, the planning process has  
22 never taken place yet for this. So --

23 Q I'm sorry, your testimony was that you  
24 had not found anyone who participated in a planning  
25 process.

1           A           And there's nothing in the minutes to  
2     indicate that that's ever taken place over the course of  
3     '97 and '98. So, I, I guess from that perspective, I  
4     would think that when that request came in, we would still  
5     need to determine from our engineers and NOVEC's engineers  
6     good utility practice and to work out those requirements.  
7     If those had all been worked out, perhaps two weeks would  
8     have been sufficient time to respond.

9           Q           So you'd be prepared to say for the  
10    sake of argument that if the, if the preliminary work had  
11    been done, the technical negotiations had occurred, and  
12    the engineers had met, they worked out what was the  
13    appropriate voltage level and stuff like that, it would  
14    only take -- really, two weeks wouldn't be an unreasonable  
15    amount of time?

16          A           I'm speculating, but I don't, I don't  
17    think so, if it all had been worked out in advance. As  
18    far as us responding to it. I don't know that anything  
19    could have been constructed in the field during that time  
20    frame, but --

21          Q           Are you familiar with any other  
22    circumstances where there were delivery point requests on  
23    such a short or shorter time frames?

24          A           I believe that it was mentioned in, I  
25    believe it was Mr. Moxley's rebuttal testimony and in his,

1 and in his prefiled testimony, where he spoke about one  
2 where we responded within five weeks. And I believe NOVEC  
3 calls that New Baltimore.

4 Q Okay, thank you. Assuming for the  
5 sake of argument that the Commission found for NOVEC and  
6 ordered -- they either ordered or Virginia Power agreed to  
7 transfer the facilities, would there be any reason from  
8 your perspective that with that transfer of facilities  
9 from Virginia Power to NOVEC or Old Dominion, as  
10 appropriate, it wouldn't be possible to provide service  
11 virtually with no interruption?

12 MR. GETCHELL: I object to the form of  
13 the question. Anything is possible. This is  
14 not a request based on hypothetical facts in  
15 evidence. He's attempting to fashion a  
16 hypothetical question without having the facts  
17 on the record, and then he's saying, is it  
18 possible, which means it's irrelevant, because  
19 anything's possible.

20 MR. GUY: Your Honor, the only  
21 hypotheses are ones that have been proposed  
22 throughout this proceeding today. If the  
23 Commission finds one way or the other, and if  
24 the Commission orders one remedy or another,  
25 those are the only hypotheses in these

1           questions. If this witness has expertise with  
2           respect to implementing distribution service,  
3           that's her responsibility in her contractual  
4           area, and I think it would be helpful to know  
5           what her answer to the question is.

6                   HEARING EXAMINER: I'm going to  
7           overrule the objection and allow the question.  
8           If you want him to rephrase it --

9                   THE WITNESS: Or repeat it, please.

10          BY MR. GUY: (Continuing)

11                 Q           Assuming that the Commission finds  
12           that NOVEC should serve the customer, and assuming that  
13           part of that ruling executes a transfer of facilities, of  
14           the Old Dominion -- I'm sorry -- of the Virginia Power  
15           facilities, is there any reason from an engineering  
16           perspective why that can't be a smooth transfer without  
17           any interruption of service?

18                 A           When you say the transfer of  
19           facilities, what I'm thinking now, you're talking about  
20           the transformers themselves, and perhaps even some primary  
21           conductor. We're not talking about the delivery point any  
22           longer, is that right?

23                 Q           Yes, that's right.

24                 A           We're only talking about the  
25           facilities that would be in the field?

1 Q The whole package.

2 A And this is similar to what happened  
3 in RGC, as far as --

4 Q Exactly, just like that.

5 A If the Commission were to order  
6 Dominion Virginia Power to do that, I see no reason why we  
7 wouldn't comply with that order, similar to what we did in  
8 RGC.

9 Q I assume you'd comply. The question  
10 is whether that would cause an interruption or delay in  
11 service.

12 A And we're not talking about the  
13 delivery point now, we're talking about just Virginia  
14 Power facilities serving the customer?

15 Q We're talking about if they did  
16 exactly what they did in Prince George.

17 A Right. We wouldn't have to disrupt  
18 power to do that.

19 Q Thank you. Let me ask you one more  
20 question, or one more series of questions. And I'm in  
21 some respects a dumb old utility guy, but people ask me to  
22 think outside the box and come up with new approaches in  
23 the new market. And maybe you can help me to do that.

24 Lots of witnesses, including yourself  
25 and witnesses for NOVEC and others, have, have asserted --



1 and I've heard this my entire career -- that it just  
2 doesn't make sense for two providers to serve the same  
3 customer. Can you tell me why that's the case?

4 A I would say primarily, you've got  
5 duplication of facilities, number one, because they both  
6 would provide their own transformation and their own  
7 conductors.

8 Q I'm sorry to interrupt, but maybe we  
9 could work with that one first. The Smithsonian has  
10 requested alternate service, so that duplicate facilities  
11 is something that they would value, isn't it?

12 A Yes, it is.

13 Q Okay. So what would be the other  
14 reasons?

15 A No -- let me back -- I thought you  
16 said two different utilities serving the same customer.

17 Q I did.

18 A But then you mentioned something about  
19 an alternate, and I want to make sure I understand how  
20 that's relevant to the two separate utilities serving the  
21 customer, because I'm, I'm losing you.

22 Q You said, you said one of the reasons  
23 not to have two utilities serve is duplication of  
24 facilities.

25 A Yes, sir.

1 Q Redundancy?

2 A Yes.

3 Q I take it the reason to have alternate  
4 service is precisely to have redundancy and duplication of  
5 facilities.

6 A Well, not really. The reason a  
7 customer would want alternate service is simply because  
8 their -- either their process, or in the Smithsonian's  
9 case, perhaps the artifacts or the materials that will be  
10 inside the building can't tolerate an outage.

11 Q Right. And for that --

12 A And flop, if you will, to the  
13 alternate.

14 Q And for that reason, Dominion Virginia  
15 Power is proposing actually to serve them from two  
16 different circuits?

17 A Yes, sir.

18 Q And I take it those circuits are  
19 duplicative?

20 A Well, they're separate and distinct  
21 circuits, and we would hope that whatever caused the first  
22 circuit to fail, what we would call the normal circuit,  
23 wouldn't cause the alternate to fail. It would be -- it's  
24 somewhat of an insurance policy, if you will, for the  
25 customer that has sensitivity to outages.

1 Q I think I understand. Thank you very  
2 much.

3 A Okay.

4 MR. GUY: That's all, that's all the  
5 questions I have, Your Honor.

6 HEARING EXAMINER: All right.

7 NOVEC?

8 MR. STALLARD: Thank you, Your Honor.

9

10 CROSS-EXAMINATION

11 BY MR. STALLARD:

12 Q Good afternoon, Ms. Buchanan. My name  
13 is Brad Stallard, and I have some questions.

14 Could you describe for me, please, the  
15 role you played in the development or implementation or  
16 operation of the Network Operating Agreement between Old  
17 Dominion and Virginia Power?

18 A The actual negotiation of the  
19 agreement itself?

20 Q Correct.

21 A None.

22 Q How about its implementation as far as  
23 how it works on a day-to-day basis and its operation?

24 A I can tell you how I am involved.

25 Q Okay.

1           A           If that -- because I'm not sure I'm  
2 going to answer your question.

3           Q           That might get us there a lot quicker.

4           A           Okay. How I would become involved is  
5 if it's in the planning stage of providing a delivery  
6 point that would be at the distribution voltage. And I  
7 don't want to get us confused now back on that other track  
8 we were on as far as it not being a delivery point  
9 request. I'm in the distribution business, so I am not  
10 involved in anything requiring transmission voltage  
11 facilities or delivery points. But to the extent a  
12 distribution delivery point would be required, then the  
13 gentleman that Mr. Kappatos mentioned several times, Ed  
14 Cowell, works for me, and that's how I would become  
15 involved in such an activity.

16           Q           So have you played any role in the  
17 process of responding to ODEC delivery point requests in  
18 Northern Virginia?

19           A           For this specific request?

20           Q           This one or any of them.

21           A           If it involved a distribution voltage  
22 level, then I may or may not become involved, depending on  
23 where it's located or if there are issues outstanding, or  
24 --

25           Q           Do you remember a time when you did

1 get involved in a particular ODEC request for a delivery  
2 point?

3 A This one primarily.

4 Q When were you brought in this process?

5 A Into the contracts process, or into  
6 the ODEC --

7 Q Into the process of this dispute.

8 A I was -- I came into this position  
9 during this year, so I became actively engaged in the  
10 Smithsonian delivery point request, I'd say, in February  
11 of this year. Prior to that, my role -- I was still in  
12 the Department, but I was not the manager of the group.  
13 So my role was somewhat less then.

14 Q Who was the manager at that time?

15 A Harold Payne.

16 Q Who is Bill Thompson?

17 A He is the Manager of, I believe it's  
18 Bulk Power.

19 Q Are you aware of his responsibilities?

20 A With respect to this Network Operating  
21 Agreement, I am.

22 Q Now, in your testimony, you discuss  
23 the Prince George and Mineral Sands --

24 A Yes, sir.

25 Q -- proceeding, and you also discuss

1 the Kentucky Utilities case. What was your involvement in  
2 those cases?

3 A None.

4 Q Have you ever talked to Gus Kappatos  
5 about this case, about delivery point issues or anything?

6 A No, sir.

7 Q Have you ever talked -- spoken with  
8 Jim Moxley before?

9 A Only once.

10 Q And was it -- with reference to this  
11 case.

12 A Yes.

13 Q And when did you speak with Mr.  
14 Moxley?

15 A Let's see. I believe that was  
16 6/28/01.

17 Q Now, in your testimony, when you  
18 discussed the Prince George, Mineral Sands and the  
19 Kentucky Utilities case, you obviously discussed them in  
20 great detail. Is it fair to say you're familiar with the  
21 Commission's ruling in those cases?

22 A I've read both of them, yes.

23 Q Well, are you prepared to discuss the  
24 Court's decision today?

25 MR. GETCHELL: I object to that

1 question. She certainly sponsored a position of  
2 the Company with respect to those cases that has  
3 been reached with the advice of counsel, and I  
4 don't object to her testimony being cross-  
5 examined. On the other hand, if he's asking to  
6 examine her as a lawyer, then I would object.

7 HEARING EXAMINER: She has already  
8 testified in response to Mr. Smith's cross-  
9 examination that she is not a lawyer. You can  
10 certainly cross-examine her, Mr. Stallard, on  
11 the prefiled testimony and her position on the  
12 different tests, but she is not prepared to give  
13 a legal opinion.

14 MR. STALLARD: Okay.

15 BY MR. STALLARD: (Continuing)

16 Q Well, let's start from the beginning.  
17 On page 2 of your testimony, you say, "...there are no clear  
18 rules to determine which utility has the [legal] right to  
19 serve a customer..."

20 MR. GETCHELL: There's no question  
21 pending that I'm aware of.

22 MR. STALLARD: I'm waiting for her to  
23 turn to that, Your Honor.

24 THE WITNESS: Oh, I'm there.

25 Q (Continuing) And that's your

1 testimony, is that correct?

2 A Yes, sir.

3 Q Are you familiar with Virginia Code  
4 Annotated Section 56-265.3 and 265.4?

5 A Yes, I am.

6 Q Has Dominion Virginia Power ever  
7 invoked the provisions of 55 -- 56-265.4 in this case?

8 A Can you tell me what that --

9 MR. GETCHELL: I'm sorry, I didn't  
10 hear the question.

11 Q Has Dominion Virginia Power ever  
12 invoked the provisions of 56-265.4 in this case?

13 A And that is the -- I don't have those  
14 directly in front of me, but I believe those are the  
15 sections -- that is the section dealing with whether the  
16 incumbent utility has, has -- can reasonably serve or  
17 something of that nature. I can't remember the exact  
18 terminology.

19 Q Correct. Have you ever invoked that  
20 provision?

21 A How is that provision relevant?

22 Q No, ma'am, have you ever invoked it?  
23 Have you ever asserted before this Commission in a  
24 proceeding that Northern Virginia Electric Cooperative was  
25 inadequate to serve this customer?



1                   A           No, no.

2                   Q           Now, you profess you're familiar with  
3 the Mineral Sands case. Can you describe the holding in  
4 that case?

5                               MR. GETCHELL: Objection. That's a  
6 legal term, the holding.

7                               HEARING EXAMINER: Well, Ms. Buchanan  
8 talks right here on page 2 about, about the  
9 case, so we're walking a real fine line here,  
10 Mr. Getchell. She has some legal testimony in  
11 here, so I'm going to let Mr. Stallard go a  
12 little into it.

13                              MR. GETCHELL: I just wanted to  
14 clarify my position for you, and that is that I  
15 am not objecting to her testifying about her  
16 company's understanding of what those cases  
17 mean, as reflected in her testimony, or her  
18 understanding. But when you start asking her  
19 technical terms, like what's the legal holding,  
20 you're asking a lawyer's question.

21                              HEARING EXAMINER: Mr. Stallard?

22                              MR. STALLARD: Do you want me to  
23 respond to his objection?

24                              HEARING EXAMINER: No, I want you to  
25 rephrase the question.

1 MR. STALLARD: I will.

2 BY MR. STALLARD: (Continuing)

3 Q Let me just ask you in general, what  
4 was the Commission's decision in the Prince George  
5 Electric Cooperative case?

6 A My understanding is that they did not  
7 adopt any absolute test, that they will always consider  
8 the practical realities of a situation. And they pretty  
9 much threw out the delivery point because of manipulation  
10 by the customer. I don't know if that's what you're  
11 looking for. That's my non-legal understanding.

12 Q Okay. And yet you state there's no  
13 absolute test and that the practical realities of each  
14 situation will be considered, right?

15 A That's what the Commission said..

16 Q Do you recall the remainder of what  
17 the Commission said?

18 A They want to maintain "...the integrity  
19 of service territories embodied in the Utility Facilities  
20 Act"; "...intend to ensure that our decisions enforce the  
21 Code's requirement of strong protection for the exclusive  
22 service territories of utilities in Virginia."

23 Q There you go. That's the remainder of  
24 that statement, isn't that true?

25 A Yes. Yeah, I can read the whole thing

1 in its entirety if that would help.

2 Q No, ma'am, I just asked you to read  
3 the remainder of that statement. That's all.

4 Now, you discussed the three tests  
5 applied in the case addressing electric utility  
6 territorial disputes: the point of use test, point of  
7 delivery test, and the geographic load center test. And  
8 you maintain that in this case the point of delivery test  
9 should be considered. Do you recall what the Commission  
10 had to say about the point of delivery test in this case?

11 A In the RGC case?

12 Q Yes.

13 A They, I believe, dismissed the point  
14 of delivery test because of manipulation on the customer's  
15 part; that if customers were allowed to manipulate by  
16 buying land or -- which is exactly what happened in RGC --  
17 that that really wasn't fair.

18 Q So is it your recollection that the  
19 only reason they dismissed the point of delivery test was  
20 because of customer manipulation?

21 A From my reading of the case, that's  
22 what I took away, is that the reason they dismissed it was  
23 because of manipulation.

24 Q Do you recall the Commission stated,  
25 "...there is little support for the point of delivery test"?

1                   A           I think so. Let me make sure I have  
2 it.

3                               Yes, that's right.

4                   Q           Do you recall that the Commission  
5 wrote, "...we have not been made aware of any jurisdiction  
6 with a statutory scheme similar to Virginia's, providing  
7 for exclusive service territories, that has adopted the  
8 point of delivery test"?

9                   A           Yes.

10                  Q           Do you recall the Commission saying,  
11 "...the point of delivery test allows the essence of  
12 exclusive service territories to be destroyed..."? Page 18.

13                  A           Yes, yes.

14                  Q           And do you recall the Commission  
15 writing, "...the point of delivery test...does not comport  
16 with the protection afforded to certificated service  
17 territories by Virginia law"?

18                  A           Yes.

19                  Q           So would you agree then that they  
20 stated more reasons for rejecting that test than customer  
21 manipulation?

22                  A           Yes, they did.

23                  Q           Now, let me talk to you about customer  
24 manipulation, if I may, Ms. Turner (sic). And if you  
25 would, please, it might be helpful to turn to your

1 exhibits. And I apologize, I said Ms. Turner. Ms.  
2 Buchanan. I'm sorry.

3 Now, in B and C to your testimony, the  
4 attachments there, you described what you think is the  
5 method which Dominion and NOVEC would serve the customer,  
6 is that right?

7 A Yes, I did.

8 Q Okay. And you said the ductbank was  
9 entirely customer-owned?

10 A Yes.

11 Q From your point at which you get  
12 service off of the circuit, 35.4 (sic) kV, all the way to  
13 where the customer plugs the line into the box to  
14 distribute electricity, that's, that's the ductbank and  
15 that's customer-owned?

16 A Yes.

17 Q So would you agree then that the  
18 customer is taking a cord and running it through NOVEC's  
19 territory across the line through Dominion's territory and  
20 hooking it into the circuit?

21 A No, sir.

22 Q That's not what the customer is doing?

23 A No, they're, they're accepting  
24 delivery where I show our transformers. Is it B or C?  
25 C. Where the red --

1           Q           And you put your transformers on your  
2 side of the line, is that right?

3           A           Yes, sir.

4           Q           And it was a conscious decision on  
5 your part?

6           A           Sure.

7           Q           Because you recognize the importance  
8 of territorial integrity?

9           A           Sure.

10          Q           So you put them on your side so that  
11 no one could criticize you for putting them in NOVEC's  
12 territory?

13          A           Yes. We're going to -- if we're going  
14 to provide service, it's going to be in our service  
15 territory.

16          Q           All right. It's an important thing,  
17 territorial integrity. Do you agree? You have a  
18 territory you want to protect.

19          A           Absolutely, it's important.

20          Q           Okay. Now, from where you put this,  
21 the power, you'll agree, crosses over the boundary line  
22 and into NOVEC's territory. And if I understand your  
23 testi -- or the, the distinction you're making in this  
24 case is that Dominion Power is not running that line, it's  
25 the customer that's running that line, even though it's

1 the same common ductbank on both sides of the line, is  
2 that correct? Or do I misinterpret your testimony? If I  
3 do, please tell me where I'm wrong.

4 A No, the Smithsonian is running their  
5 conductors from the building to the delivery point.

6 Q Okay. Now, it's the common ductbank  
7 though? That was my question.

8 A Common?

9 Q Customer-owned ductbank all the way.

10 A Well, right. But what happens where  
11 the transformers and the deliveries are, there will be  
12 places where the conduits come up, and there will be clear  
13 demarcations between where we're going to end and where  
14 they will begin.

15 Q Okay. Now, when the line reaches the  
16 building and gets into a box, it's going to be distributed  
17 internally, correct?

18 A Yes.

19 Q On one set of circuits through the  
20 whole building?

21 A I don't know how many circuits, but,  
22 yes, sir, basically, it's going to provide electricity to  
23 that building.

24 Q And part of the reason for advocating  
25 one utility to serve the whole building is that you don't

1 want to have to have multiple boxes on each side of the  
2 boundary line, and you don't have to have separate  
3 circuits internally. Is that the reason that you would  
4 not want to split the building?

5 A Those would be some of the reasons you  
6 would not want to do it.

7 Q Inefficiencies?

8 A Sure.

9 Q Well, in this case, have you evaluated  
10 where the building is located?

11 A With respect to?

12 Q The boundary line.

13 A Our surveyor has.

14 Q Do you know where the boundary is?

15 A I know what the surveyors have found.

16 Q Have you been to the site?

17 A No, I have not.

18 Q Okay. And you know where your  
19 surveyor places the line with respect to the boundary  
20 going through the building?

21 A Yes. You're talking about his Exhibit  
22 B?

23 Q Yes.

24 A I'm familiar with his exhibit.

25 Q Okay, in Mr. Trott's testimony. And



1 in looking at that exhibit, would you agree with me that  
2 there's a whole lot more to the left of the line than to  
3 the right of the line?

4 A Yes.

5 Q Have you calculated percentages?

6 A Based on this Exhibit B?

7 Q Yes.

8 A No, I have not.

9 Q If you accept the premise of the  
10 Commission's decision that under Virginia law and the  
11 statutes enacted by our General Assembly, that the  
12 requirement of strong protection for exclusive territories  
13 of utilities is important public policy, if 95 percent of  
14 the load was in one of the utilities' service territories  
15 or the other, what do the practical realities of that  
16 situation suggest to you?

17 A I would have to know more about it. I  
18 can't base a decision simply on geographic load center.  
19 But I would say, based just on your -- what you proposed,  
20 I would say you now have two utilities that each have a  
21 lawful right to serve that customer. I can say that.

22 Q So you agree in this case that NOVEC  
23 has a lawful right to serve this customer?

24 A Absolutely. It splits the boundary.  
25 I mean, that's the essence.

1           Q           Okay. Let me ask you a little bit  
2 about your testimony regarding customer choice. And you  
3 argue very forcefully in your testimony that customer  
4 choice should control. I believe you also said that in  
5 your statement. Do you believe that this statement and  
6 this advocacy of this policy is inconsistent with the  
7 Commission's finding that current legislation that allows  
8 expanded customer choice in certain prescribed ways does  
9 not eliminate the requirement of exclusive service  
10 territories?

11           A           No. I -- what I'm saying with  
12 customer choice is that because we have a property that  
13 straddles the boundary, there has been no manipulation by  
14 that customer whatsoever, it just so happens that's what  
15 happens with this parcel of property, you have two  
16 utilities that each have a lawful right to serve that  
17 customer. Then that's where I'm saying you do embrace  
18 RGC, and you say that we do need to consider the practical  
19 realities who can better serve, and also what is the  
20 customer's preference. Because, it's like you said,  
21 whenever you get into the delivery point type issue,  
22 you're going to end up ousting one utility or the other.  
23 So that's really all I'm saying, it's --

24           Q           Well, if -- isn't it true that since  
25 you're advocating customer choice in this case, that it's

1 especially pretty handy since the customer has already  
2 clearly expressed its choice? That's a pretty handy test  
3 to adopt when the customer has said they want you, right?

4 MR. GETCHELL: Objection;  
5 argumentative.

6 HEARING EXAMINER: That is  
7 argumentative.

8 And, Mr. Stallard, it's 3:30. Do you  
9 have a lot of cross-examination left, or should  
10 we go ahead and take a break at this time?

11 MR. STALLARD: Your Honor, probably  
12 let's take a break. It might be another 15 or  
13 20 minutes.

14 HEARING EXAMINER: All right. Let's  
15 go ahead and take a ten-minute recess.

16  
17 NOTE: A recess is taken at 3:30 p.m.  
18 The hearing reconvenes at 3:50 p.m., and resumes  
19 as follows, viz:

20  
21 THE BAILIFF: The Commission resumes  
22 the session. Be seated, please.

23 HEARING EXAMINER: All right. Mr.  
24 Stallard.

25 MR. STALLARD: Thank you, Your Honor.

1 BY MR. STALLARD: (Continuing)

2 Q Ms. Buchanan, I don't have a huge  
3 number of remaining questions, but I would like to  
4 conclude with a few.

5 In your testimony, I can't tell you  
6 where, but you suggest that it would be wasteful now to  
7 allow NOVEC to serve this customer. Do you recall that  
8 testimony?

9 A I don't. I'm sorry. Wasteful?

10 Q Yes.

11 (Pause)

12 A Oh, I found it. Page 3, No. 6.

13 That's where the term wasteful is used.

14 MR. GETCHELL: Objection. It  
15 mischaracterizes the testimony to say it would  
16 be wasteful for NOVEC to provide --

17 HEARING EXAMINER: The testimony  
18 speaks for itself, and we have it in front of us  
19 now. And I concede that the testimony reads,  
20 "It would be wasteful and imprudent for two  
21 utilities to serve a single customer's  
22 property."

23 BY MR. STALLARD: (Continuing)

24 Q Here's my question, ma'am: You are  
25 familiar with the Kentucky Utilities case and the fact

1     that --

2                   MR. GETCHELL: I object to the  
3                   examination on Kentucky Utilities. That's not  
4                   in her testimony.

5                   HEARING EXAMINER: She does refer only  
6                   to Prince George, Mr. Stallard.

7                   MR. STALLARD: In that case, Your  
8                   Honor, I withdraw the question.

9                   HEARING EXAMINER: Thank you.

10                  BY MR. STALLARD: (Continuing)

11                  Q           Ms. Buchanan, let me ask you about  
12                  this alternate circuit. In your testimony, you say, "To  
13                  my knowledge, NOVEC has not responded to the Smithsonian's  
14                  request for an alternate source of electric service."  
15                  Page 6, lines 1 and 2. Do you see that testimony?

16                  A           Yes, I do.

17                  Q           Could you tell me how it is that NOVEC  
18                  would be able to respond under the circumstances that  
19                  exist at the present time to request for an alternate  
20                  source of electric service?

21                  A           I'm sorry, how NOVEC would respond?

22                  Q           Yes. You said NOVEC has not responded  
23                  to the Smithsonian's request for an alternate source of  
24                  electric service. How would NOVEC go about doing that at  
25                  the present time?

1           A           Well, I would think they would have to  
2     be thinking about how would they provide an alternate  
3     service. Where would that source come from? Would it  
4     come from their existing distribution infrastructure, or  
5     would they ask for a delivery point from Dominion Virginia  
6     Power? Or there may be other avenues they have to  
7     explore. I really don't know.

8           Q           Are you aware of their many requests  
9     for technical information?

10          A           I'm aware of the testimony that speaks  
11     to that, Mr. Moxley's testimony.

12          Q           Are you aware of what information has  
13     been provided to NOVEC?

14          A           I know that we provided them  
15     everything that we have.

16          Q           You only became involved in this case  
17     in February of this year.

18          A           No, sir, I came into this position  
19     around February of this year and took a lead role. I did  
20     have a secondary role and was very much involved in the  
21     case in the background prior to that point.

22          Q           Then I take it you're aware of the  
23     negotiations and discussions that have occurred in 1999  
24     and 2000, up through 2001, concerning this dispute and its  
25     possible resolution?

1                   A           Negotiations between NOVEC and  
2   Dominion Virginia Power?

3                   Q           Dominion Virginia Power.

4                   A           I'm aware that discussions have taken  
5   place.

6                   Q           Well, you suggest that NOVEC has been  
7   dilatory. As a matter of fact, you state that in your  
8   testimony, that NOVEC has been dilatory. Is it your  
9   suggestion that NOVEC should have filed an action with the  
10   Commission sooner, or should NOVEC have tried to work out  
11   the dispute like it did?

12                  A           I guess where I'm coming from when I,  
13   when I say that, is as early as 1999, we had written  
14   correspondence to NOVEC where it was clear that we were  
15   dealing with the Smithsonian, that we were going to  
16   provide service and work with the Smithsonian, yet we  
17   didn't receive anything back from them on that.

18                  Q           You're not suggesting that NOVEC  
19   didn't let it be known of its intent and interest in  
20   serving the Smithsonian facility, are you?

21                  A           Known to Dominion?

22                  Q           Yes.

23                  A           We knew.

24                  Q           Okay. Now, this letter in 1999, was  
25   that the January 25th -- I'm so used to getting up, Your

1 Honor. I apologize. Is that the January 25, 1999 letter  
2 you're talking about?

3 A Yes.

4 Q Well, in that letter, did you break  
5 the sword and throw down the gauntlet and declare war on  
6 NOVEC?

7 A No, sir. I don't have the letter to  
8 pull out in front of me, but I believe it's the one that  
9 says we have adequate facilities, that two-thirds of the  
10 site is in DVP territory, and that NOVEC was copied. Is  
11 that the letter you're referring to?

12 Q That's correct.

13 A Okay. That's the one I was, I was  
14 thinking of.

15 Q It was letting the Smithsonian know  
16 that you were in a position to serve the facility?

17 MR. GETCHELL: Objection, Your Honor.

18 The letter speaks for itself.

19 MR. STALLARD: Your Honor, I think  
20 this is cross-examination. I'm allowed to  
21 paraphrase. There's nothing improper about  
22 that. I agree, the letter speaks for itself,  
23 but I'm allowed to paraphrase in my questioning.

24 MR. GETCHELL: There are very, very  
25 severe limits on how much you can paraphrase



1                   about a document, even in cross-examination.

2                   HEARING EXAMINER: Mr. Getchell, I'm  
3                   going to overrule your objection, and I am going  
4                   to allow cross-examination on the letter.

5                   MR. STALLARD: Thank you, Your Honor.

6 BY MR. STALLARD: (Continuing)

7                   Q           Ms. Buchanan, but you agree it just  
8                   essentially advised the Smithsonian that you have  
9                   facilities available, is that correct?

10                  A           Yes.

11                  Q           Now, later, in February of 2001, the  
12                  letter you mention in your testimony, which says to Mr.  
13                  Weisman that you're responding to the request for  
14                  electrical service, and that would have been nine months  
15                  ago or so, ten months, whatever it's been, earlier this  
16                  year, correct?

17                  A           Yes.

18                  Q           And you copied Mr. Moxley on that?

19                  A           Yes.

20                  Q           And then, in April of this year, you  
21                  wrote Cynthia Bothwell, who is an engineer at ODEC -- and  
22                  when I say you, I don't mean personally you, I mean  
23                  Dominion Virginia Power -- and advised them that you're  
24                  not going to -- we're not going to provide you with a  
25                  delivery point, correct?

1                   A           Yes, yes.

2                   Q           Now, this building is going to be  
3 built in 2003, correct?

4                   A           No, sir.

5                   Q           I'm sorry, completed in 2003.  
6 December of 2003 is the scheduled completion date?

7                   A           Okay, yeah. I was just thinking about  
8 the permanent service.

9                   Q           . Basically two years from now. And you  
10 don't have to provide permanent service until April of  
11 2002, according to all the testimony. And, in fact, you  
12 submitted an affidavit earlier this year following the  
13 preliminary injunction hearing which said it would take  
14 approximately ten days to install permanent service,  
15 correct?

16                  A           Yes.

17                               MR. GETCHELL: Objection. There were  
18 about three questions in there.

19                               HEARING EXAMINER: I guess you were  
20 nodding your affirmative response to, to some of  
21 these parts, but the most recent question was  
22 relative to the affidavit.

23                               MR. STALLARD: Correct, Your Honor.  
24 It was just that she said it would take ten days  
25 to put permanent service in.

1 THE WITNESS: Yes, I did say that,  
2 yes, in the affidavit.

3 BY MR. STALLARD: (Continuing)

4 Q And discussions continued up through  
5 the summer, would you agree, until they reached an impasse  
6 in approximately July or August?

7 A Between NOVEC and Dominion Virginia  
8 Power, yes.

9 Q Correct. And then this action was  
10 filed on September 17th, assuming the record reflects  
11 that. I believe that's the date, correct?

12 A That you filed the petition?

13 Q Yes.

14 A I'll check it, but I'm not sure. I  
15 don't have that date memorized.

16 Q Okay.

17 (Pause)

18 A Yes.

19 Q So can you tell me in this process  
20 where NOVEC has been dilatory?

21 A In dealing with Dominion Virginia  
22 Power or with the Smithsonian?

23 Q Ma'am, it's your testimony. You said  
24 NOVEC was dilatory, so you describe how we've been  
25 dilatory. I'm asking you to explain, given these facts

1 and this time line, how we've been dilatory.

2 A Well, in 1999, we notified NOVEC in  
3 written correspondence that we had adequate facilities to  
4 serve. You read the letter. Two-thirds of the site was  
5 on our service territory. We didn't hear anything at that  
6 point from NOVEC. Mr. Moxley throughout his prefled  
7 testimony said -- talks about how many times they were  
8 rebuffed from the Smithsonian, and the Smithsonian, I  
9 guess, was showing clear preference for us to serve. My  
10 understanding is from my staff, any conversations between  
11 Mr. Moxley and my staff, we always asserted that we  
12 intended to serve the Smithsonian, and we worked with the  
13 Smithsonian continuously from '96 to the present day in  
14 providing service. So we've been in the forefront all  
15 along that we were going to do this and moving forward.

16 Q So instead of --

17 A I mean, that's my opinion on it.

18 Q Okay. Instead of making inquiries and  
19 trying to resolve the case, is it your testimony that  
20 NOVEC should have gone to the Commission in 1999 when they  
21 got that letter and filed this complaint?

22 A I don't know what NOVEC should have  
23 done, sir.

24 Q Well, you're accusing them of being  
25 dilatory, Ms. Buchanan.

1           A           I think coming in as late as they did  
2 to file their complaint when service is imminent --

3           Q           Okay. You're familiar with all the  
4 other disputes that have occurred on delivery point issues  
5 and boundary issues in Northern Virginia, I take it?

6           A           Not all of them, no, but some, yes.

7           Q           Have they all been resolved?

8           A           No.

9           Q           They haven't all been resolved?

10          A           Not satisfactorily.

11          Q           Have any other boundary disputes been  
12 brought to the Commission like this one?

13          A           Not that I'm aware of. Generally, the  
14 disputes are worked out amongst the parties ahead of time.

15          Q           Dominion sent a letter in 1999  
16 advising the Smithsonian that it had service available on  
17 Route 50. It copied Mr. Moxley in a letter in February,  
18 2001. And five months after the request for delivery  
19 point, it sent a letter denying a delivery point.

20                      HEARING EXAMINER: Is that a question?

21                      MR. STALLARD: Yes, I'm coming to  
22 that.

23          Q           (Continuing) You would agree with me  
24 that that's not exactly operating in good faith, wouldn't  
25 you?

1                   MR. GETCHELL: Objection;  
2                   argumentative.

3                   MR. STALLARD: Your Honor, if she's  
4                   accusing us of being dilatory, I think this is a  
5                   fair line of inquiry.

6                   MR. GETCHELL: But that's the whole  
7                   point of the argumentative objection. We're not  
8                   supposed to just sit here and abuse each other.

9                   MR. STALLARD: Your Honor, I'm not  
10                  trying to abuse her. They have made assertions  
11                  in this case for months about our activities,  
12                  and I think this is a fair inquiry. I'm not  
13                  trying to abuse her.

14                  HEARING EXAMINER: Ms. Buchanan has  
15                  testified that NOVEC has been dilatory in  
16                  waiting too long, and I think that's a fair line  
17                  of inquiry to go through the lines of response  
18                  to communications and ask how, how they have  
19                  been dilatory and what they should have done.

20                  MR. GETCHELL: And I didn't object to  
21                  any of that. What I've objected to is the  
22                  pending question, which is simply, didn't VEPCo  
23                  act in bad faith in making that argument.  
24                  That's just -- that comes under the  
25                  argumentative objection.

1 HEARING EXAMINER: Mr. Stallard.

2 MR. STALLARD: Your Honor, I'll move  
3 on. Thank you.

4 HEARING EXAMINER: All right.

5 MR. STALLARD: I just have a couple  
6 more questions.

7 BY MR. STALLARD: (Continuing)

8 Q You talk about this alternate service.  
9 If I understood your testimony, you don't know whether the  
10 alternate line that you have going through the ductbank  
11 from the 34.5 kV circuit really provides an alternate  
12 source, or at least a dependable alternate source? Based  
13 on your testimony today, you have no firsthand knowledge  
14 of that, isn't that fair to say?

15 A Well, during the break, I had the  
16 opportunity to call my staff, and I did get a little bit  
17 of an update on the alternate service. I believe it was  
18 Mr. Smith that asked me questions earlier. And those  
19 circuits today do go back to the Sully Substation. But we  
20 have the new Walney Substation that should be ready for us  
21 to switch one of the circuits over to Walney in about six  
22 months.

23 Q Ma'am, you've acknowledged, I believe,  
24 that the point of use test focuses on the location of the  
25 facilities.

1           A           Yes.

2           Q           And you've questioned why it's good  
3 policy or even unlawful to oust Dominion Virginia Power  
4 from any part of its service territory.

5           A           Yes, I did -- in my testimony? Yes.

6           Q           And isn't that exactly what you're  
7 advocating by asking the Commission to award this customer  
8 to Dominion Virginia Power?

9           A           . No, sir, it's not. I'm suggesting  
10 neither utility should be ousted. We both have a lawful  
11 right to serve the customer.

12                   MR. STALLARD: No further questions,  
13 Your Honor.

14                   HEARING EXAMINER: Before Mr. Getchell  
15 examines you on redirect, you and Mr. Stallard  
16 had quite a few discussions on the location of  
17 the permanent facilities relative to the service  
18 boundary. I'm curious about where the existing  
19 temporary facilities are. Are they in NOVEC's  
20 territory?

21                   THE WITNESS: No, ma'am, they're all  
22 within Dominion Virginia Power.

23                   HEARING EXAMINER: Are they  
24 approximately in the same configuration as you  
25 identified on Attachment C?



1 THE WITNESS: We do come from the  
2 circuits on Route 50, but it's an overhead line,  
3 whereas what I'm showing on mine is all through  
4 a ductbank. And I think it was about 17 poles  
5 we had to extend through our service territory  
6 to provide them temporary service.

7 HEARING EXAMINER: And then the  
8 Smithsonian picks it up at --

9 THE WITNESS: It's to their site.  
10 It's just on our side up closer to their site.  
11 So as you look at your paper right there, it's  
12 going to be on the right side coming up.

13 HEARING EXAMINER: On the right side  
14 coming up?

15 THE WITNESS: Yes.

16 HEARING EXAMINER: I understand. All  
17 right. Thank you.

18 Mr. Getchell?

19 MR. GETCHELL: I have no --

20 HEARING EXAMINER: Oh, I'm sorry. Mr.  
21 Smith.

22 MR. SMITH: The witness has apparently  
23 gotten some information to answer a question I  
24 posed to her earlier. With your leave, I would  
25 like just to nail this down about the circuits

1 and so forth.

2 HEARING EXAMINER: Certainly. Go  
3 ahead, Mr. Smith.

4 MR. SMITH: Thank you.

6 FURTHER CROSS-EXAMINATION

7 BY MR. SMITH:

8 Q Ms. Buchanan, following up on  
9 something you said just a couple of moments ago, the  
10 existing 34.5 circuits you show on B and C, am I correct  
11 in assuming that that is -- that this currently is in a  
12 double-circuit configuration on one side of Route 50?

13 A Yes, sir.

14 Q And presently, both circuits go to the  
15 Sully Station?

16 A Yes.

17 Q But at some point in the future, as  
18 construction permits, one of the circuits will be switched  
19 to this new Longley Station?

20 A Walney, yes.

21 Q I'm sorry?

22 A Walney.

23 Q Walney?

24 A Is the way I understood it. Yes.

25 Q So that approximately -- or by the

1 time the Air and Space Museum addition were opened, the  
2 normal would go to one of the substations and this  
3 alternate would go to the other substation, providing two  
4 feeds?

5 A Yes, sir.

6 MR. SMITH: Thank you. I have no  
7 further questions. I just wanted to clarify  
8 that.

9 HEARING EXAMINER: Mr. Getchell?

10 MR. GETCHELL: No redirect, Your  
11 Honor.

12 HEARING EXAMINER: All right.

13 MR. STALLARD: Your Honor?

14 HEARING EXAMINER: Yes, Mr. Stallard.

15 MR. STALLARD: I have one question.

16 HEARING EXAMINER: One?

17 MR. STALLARD: I promise, one.

18 HEARING EXAMINER: I'll give you a  
19 third try at redirect.

20  
21 FURTHER CROSS-EXAMINATION

22 BY MR. STALLARD:

23 Q Ma'am, in your testimony, you say that  
24 the agreement does not create an obligation for Dominion  
25 to provide a delivery point, speaking of the Network

1 Operating Agreement.

2 A Let me make sure I'm looking at the  
3 specific section that you are.

4 Q Yes, ma'am, page 13, question 23 --  
5 answer 23.

6 (Pause)

7 A Okay.

8 Q Can you direct us to where in the  
9 Network Operating Agreement it says that Dominion has no  
10 obligation to provide a delivery point?

11 A I think so.

12 (Pause)

13 If you'll bear with me a minute, I'm  
14 going to have to read.

15 (Pause)

16 The section that I would use for that  
17 typically is where they're talking about future delivery  
18 points, and it says the "Transmission provider may propose  
19 appropriate modifications to Transmission Customer's  
20 plans; however Transmission Provider will not require  
21 unreasonable modifications to Transmission Customer's  
22 plans. It is the intent of the Parties that the number,  
23 capacity, and location of future delivery points will  
24 result from a planning process using Good Utility Practice  
25 and neither Party shall request changes or additions which

1 would not be in accordance with this concept," which  
2 basically says to me right there that the parties need to  
3 agree on good utility practice, and one can't dictate over  
4 the other, I don't believe. They have to find some type  
5 of common ground.

6 MR. STALLARD: Will you allow a  
7 follow-up question, Your Honor?

8 HEARING EXAMINER: Go ahead. Go  
9 ahead, Mr. Stallard.

10 BY MR. STALLARD: (Continuing)

11 Q Have -- is Dominion using good utility  
12 practice in this case?

13 A That process has not been gone through  
14 here. That's what we've said all along. We've -- that  
15 has never taken place in the field between our engineers  
16 and their engineers to determine good utility practice.

17 Q I understand, but my question is: Is  
18 Dominion Virginia Power using good utility practice?

19 A With respect to?

20 Q With respect to getting the line off  
21 the circuit and getting power to this customer.

22 A The customer is in our service  
23 territory, and they have requested service from us, and  
24 we're responding to that request for, for service. Maybe  
25 I'm not understanding your question.

1           Q           Is there anything about the way  
2 Dominion Virginia Power is doing this that is not  
3 consistent with good utility practice?

4           A           No, sir.

5           Q           So then if NOVEC does the same thing  
6 that you're doing, then doesn't it follow that NOVEC is  
7 practicing good utility -- using good utility practices?

8           A           If they were to extend from their  
9 existing infrastructure?

10          Q           No, ma'am, if they got a delivery  
11 point off this line and did exactly what you're doing.

12          A           It's kind of like the chicken and the  
13 egg. Right now, there's no load for them to serve. And  
14 to my knowledge, they have no request for electric  
15 service.

16          Q           But other than this provision about  
17 good utility practices, that -- you're not aware of any  
18 other provision in this agreement that governs or allows  
19 Dominion Virginia Power to deny a delivery point, isn't  
20 that correct?

21          A           I just know --

22                   MR. GETCHELL: Excuse me, before you  
23 answer, let me object again for the record.

24                   Here the document does speak for itself, and to  
25 ask a non-lawyer if there's anything else in

1           this agreement that supports our position is, I  
2           think, improper.

3                   MR. STALLARD: Your Honor, in general,  
4           I would agree. Her testimony interprets the  
5           agreement. And I did not ask her that question  
6           with respect to any provision. I said your  
7           testimony is that this is the provision you rely  
8           on and there's not any other provision. That  
9           was my question. So I was asking her, is there  
10          another provision, not to interpret it.

11                   HEARING EXAMINER: Okay. Ms.  
12          Buchanan, is there another provision?

13                   THE WITNESS: Well, I'm not an  
14          attorney, so here's where I'm going to get into  
15          trouble. This agreement does speak for itself,  
16          as the attorney says, but, yes, I do rely on our  
17          practices on how we've operated with NOVEC and  
18          ODEC in the past on delivery points. So when I  
19          look to that process, I can say that, yes, there  
20          are other circumstances or things that come into  
21          play that aren't directly written in here, and  
22          those are strictly just based on historical,  
23          what has transpired between the two companies.

24          BY MR. STALLARD: (Continuing)

25                  Q           Sure. And then you acknowledge that,

1 historically, this is the only case ever under this  
2 agreement that you've ever denied a delivery point?

3 A No, sir, it is not. That's incorrect.

4 MR. STALLARD: No further questions.

5 MR. GETCHELL: Well, for the third  
6 time, I didn't get to do it, so --

7  
8 REDIRECT EXAMINATION

9 BY MR. GETCHELL:

10 Q You were asked whether there were  
11 other points on which you might rely with respect to this  
12 question of whether or not there's an absolute right to  
13 demand a delivery point. And I'm not going to try to  
14 point out every possibility to you, but would you look at  
15 page 15, about the fourth line down.

16 A Yes.

17 Q Do you see the sentence, do you see  
18 the sentence, "Future delivery points will be established  
19 at 115 kV or higher, except in those cases where the  
20 Network Operating Committee, consistent with Good Utility  
21 Practice, determines that service at lower voltage levels  
22 is appropriate and Transmission Provider shall not  
23 unreasonably withhold service at such lower voltage  
24 levels"?

25 A Yes, I see that.



1           Q           Is that something that you might rely  
2 on?

3           A           It would certainly come into the  
4 equation, yes.

5           Q           And are there general planning and  
6 good utility practice concepts embedded throughout Section  
7 8.4?

8           A           Absolutely.

9           MR. GETCHELL: That's all I have.

10           HEARING EXAMINER: All right. Ms.

11 Buchanan, thank you for your testimony. You may  
12 step down.

13

14                   \* \* \* \* \*

15                   WITNESS STOOD ASIDE

16

17           HEARING EXAMINER: Now, Mr. Stallard,  
18 I've let you ask a multi-part one question.

19           MR. STALLARD: I'm sorry, Your Honor.  
20 I'm sorry.

21           MR. GETCHELL: We do have a  
22 housekeeping matter.

23           HEARING EXAMINER: Yeah, let's go off  
24 -- let's go ahead and go off the record a  
25 minute.

1                   NOTE: At this point, a discussion is  
2                   had off the record.

3  
4                   HEARING EXAMINER: Let's go back on  
5                   the record. If we find that it's going too  
6                   long, you know, then we'll just have to stop and  
7                   come back tomorrow.

8                   We had a discussion off the record  
9                   about how long we thought we might take with the  
10                  next witness, and to determine whether or not to  
11                  continue proceeding this afternoon. And we have  
12                  decided to move forward.

13                  So, Mr. Gordon, if you would like to  
14                  call your witness.

15                  MR. GORDON: I'm going to call Mr.  
16                  Justin Estoque to the stand. Go ahead up to the  
17                  witness stand.

18  
19  
20  
21                  JUSTIN ESTOQUE, being called as a  
22                  witness by and on behalf of Virginia Electric and Power  
23                  Company, having first been duly sworn, testifies as  
24                  follows, viz:

25                  DIRECT EXAMINATION

1 BY MR. GORDON:

2 Q Mr. Estoque, can you please state your  
3 full name for the record.

4 A My name is Justin Estoque.

5 Q And what is your business address?

6 A My address is 750 9th Street, N.W.,  
7 Washington, D.C.

8 Q Is that with the Smithsonian  
9 Institution?

10 A Yes, sir.

11 Q And are you the same Justin Estoque  
12 who submitted pre-prepared testimony seven pages long with  
13 two exhibits?

14 A Yes, I am.

15 Q And were you involved or supervised  
16 the preparation of that testimony?

17 A Yes, I was.

18 Q And do you have any additions to that  
19 testimony?

20 A No, I don't.

21 Q And do you have any additions to the  
22 testimony based on the things you've seen today in this  
23 courtroom?

24 A No additions.

25 Q Actually, my understanding was you did

1 have additions to the testimony, comments that you wanted  
2 to make.

3 I guess one of the things I'd like to  
4 do is we brought a videotape for display, and I'd like to  
5 add that to your testimony. And with the Hearing  
6 Examiner's permission -- and I'm hoping that the video  
7 machine -- I see there's a new one -- is available -- I'd  
8 like to have Mr. Estoque walk us through. It's basically  
9 a virtual tour that lasts about four and a half minutes  
10 that was prepared, as I said in my opening statement, for  
11 other purposes, but we thought it would be a helpful  
12 visual aide for you just to get a sense of what the museum  
13 is about and essentially its importance to our country.

14 HEARING EXAMINER: Let's go ahead and  
15 mark Mr. Estoque's direct testimony as Exhibit  
16 JE-10, and admit the prefiled testimony subject  
17 to cross-examination.

18 Before we play the video, I understand  
19 there are objections.

20 MR. GUY: Your Honor, counsel was kind  
21 enough to show the video, and it's an  
22 interesting promotional piece, but it's entirely  
23 irrelevant to the proceedings here. It doesn't  
24 go to who's the proper certificated provider.  
25 It doesn't have any evidentiary value

1           whatsoever. And we would object to its  
2           introduction. It's only four minutes, but we  
3           think it would be a waste of four minutes and an  
4           unnecessary diversion. It's a nice museum. We  
5           know that. We don't think it's necessary to  
6           watch this videotape.

7                     HEARING EXAMINER: All right.

8                     Mr. Stallard.

9                     . MR. STALLARD: Your Honor, we concur.  
10           And may I add, just obviously, we don't know how  
11           it was prepared. I don't know how it purports  
12           to meet with the actual construction, whether  
13           there are changes, whether it's accurate, you  
14           know. It's a 3-D rendition. It's sort of an  
15           inside view of the facility. Whether in fact  
16           the facility is actually going to be this way,  
17           no one has represented to us. So that's the  
18           problem I have with it.

19                    HEARING EXAMINER: All right.

20                    Staff?

21                    MS. BRIDEWELL: Your Honor, we are not  
22           interposing an objection to it. We have  
23           screened it. There is some merit to it in terms  
24           of how it shows the building, how they will  
25           interconnect and so forth, and it may have value

1 in that sense. But we are not objecting to its  
2 admission.

3 HEARING EXAMINER: All right.

4 MR. GETCHELL: We, of course, would  
5 oppose the objection on the grounds that it's  
6 demonstrative evidence. There will be testimony  
7 subject to cross-examination to link it up with  
8 what's actually going to be on the ground. And  
9 it is, I think, helpful to visualize what this  
10 facility is for a whole lot of reasons.

11 MR. STALLARD: Your Honor, if they  
12 will lay that foundation prior to its  
13 admissibility and do this explanation, maybe  
14 that part of my objection would be alleviated.  
15 That's truly my concern. I think it's a nice  
16 video.

17 HEARING EXAMINER: Well, let's, let's  
18 go ahead and watch the video. I'll take your  
19 objections under advisement for the moment. And  
20 we can watch the video, go through the  
21 examination, and then come back to the --  
22 whether or not to strike it from the record.

23 MR. GORDON: I'm going to ask Mr.  
24 Estoque to take us on a, a narrative through it.  
25 There is no voice-over, but he is the Project

1           Manager, as I'll elicit that testimony as well.

2           MR. STALLARD: Your Honor, this is  
3           specifically what I told Mr. Gordon yesterday  
4           that I would object to strenuously. This is not  
5           included in his testimony. I don't know what  
6           he's going to say relative to this dispute, and  
7           that I do have a serious problem with. We were  
8           not given advance notice of this particular  
9           aspect. .It will speak for itself.

10          HEARING EXAMINER: Let's go ahead and  
11          watch the video without the narrative, and then  
12          we can go through examination after we watch the  
13          video in terms of what it represented, and it  
14          will be much easier for the counsel to object to  
15          specific questions if they're objectionable or  
16          not.

17          MR. GORDON: May I ask one question of  
18          Mr. Estoque just to lay the groundwork --

19          HEARING EXAMINER: Certainly.

20          MR. GORDON: -- of what the video was  
21          prepared for, and that sort of thing, as we go  
22          into it so you understand?

23          BY MR. GORDON: (Continuing)

24                 Q           Could you explain to the Hearing  
25          Examiner, you know, why the video was prepared and who

1 it's been shown to in the past.

2 A Of course. The video was prepared  
3 about a year ago or two, and the purpose of the video was  
4 to, to show prospective donors and stakeholders in this  
5 museum what the museum would look like. It was based on  
6 architectural drawings, and an artist, a media company,  
7 took those electronic CAD drawings and created from those  
8 a three-dimensional depiction of the museum, which you see  
9 on the boards, and then it was turned into an animated  
10 video. So it's based on accurate drawings.

11 HEARING EXAMINER: One other thing  
12 before we start. It's going to be very hard for  
13 our court reporter to transcribe a video. So  
14 I'm going to, recognizing that we have  
15 outstanding objections as to its admissibility,  
16 I'm going to go ahead and mark it as JE-11, so  
17 we have a reference to it, whether it's admitted  
18 later or not.

19 MR. GORDON: Thank you, Your Honor.

20  
21 NOTE: At this point, the video is  
22 shown.

23  
24 HEARING EXAMINER: All right. Mr.  
25 Gordon, do you want to go ahead and ask some of



1                   your questions, additional questions?

2                   MR. GORDON: Sure. I only wish our  
3                   entertainment portion lasted longer.

4                   (Laughter)

5 BY MR. GORDON: (Continuing)

6                   Q            You've seen this video before, haven't  
7                   you?

8                   A            Yes, I have.

9                   Q            And the video portrayed exhibits in  
10                  the museum, is that correct?

11                  A            Yes, it has.

12                  Q            And are you familiar with what's going  
13                  to be in the museum?

14                  A            I'm familiar with some of the  
15                  exhibits. I'm not an aircraft, avionics -- aviation  
16                  expert, I'm a Project Manager for construction, but I do  
17                  have a sense of the importance of the national collection  
18                  that would be housed in this building.

19                  Q            Okay. And what is your sense of what  
20                  the purpose is of this building?

21                  A            Well, there's several purposes for  
22                  this building. It's a major exhibition facility for the  
23                  national collection of the National Air and Space Museum  
24                  to supplement the museum on the National Mall. It will  
25                  also include a restoration, a restoration laboratory or

1 hangar for the public to view priceless artifacts being  
2 restored. It will have collection storage, classrooms,  
3 and archives, a large-format theater, such as an IMAX  
4 theater, restaurants and retail stores.

5 Q And what's the significance of the  
6 restoration facility?

7 A The significance of the restoration  
8 facility is that it allows the artifacts that are now  
9 housed in sub-standard facilities in Suitland, Maryland to  
10 be transferred to a state-of-the-art hangar, where they  
11 can receive the attention that they deserve and also be on  
12 view by the visiting public.

13 Q And are you aware as to the condition  
14 of some of these artifacts in Suitland right now?

15 A I am generally aware that they are not  
16 receiving the attention that they should. They are  
17 basically stored in World War II era metal buildings, some  
18 of which are not conditioned and not accessible to the  
19 public. And they are often not receiving the proper  
20 temperature and humidity that they should in order to  
21 preserve their life.

22 Q Are you aware of the number of  
23 visitors that the Air and Space Museum on the Mall  
24 receives annually?

25 A On the Mall, the Air and Space Museum

1 is -- or has been one of the most visited, if not the most  
2 visited, museum in the world. At times, the visitation  
3 has exceeded 10 million visitors annually.

4 Q And are you aware of the Smithsonian's  
5 projection for how many visitors the annex out at Dulles  
6 Airport is projected to receive once it opens?

7 A The Hazy Center expects to receive  
8 between three and four million visitors a year.

9 Q And you saw that there are three  
10 boards -- and if I may move over to the boards which are  
11 out.

12 HEARING EXAMINER: Do you need the  
13 easel back over there, or are you going to take  
14 --

15 MR. GORDON: Yeah, may I put this on  
16 the easel over there with your permission?

17 HEARING EXAMINER: Sure. As you both  
18 talk about this picture, try to remember that  
19 we're transcribing the hearing.

20 THE WITNESS: Sure.

21 Q (Continuing) And can you describe  
22 what this picture depicts? It looks similar to something  
23 that was in the video.

24 A This picture depicts the main hangar,  
25 aviation hangar, which is the half cylinder that you saw

1 in the video. It's the largest hangar in the complex.  
2 It's over two and a half football fields high, ten stories  
3 -- excuse me -- two and a half football fields long, ten  
4 stories high. This is where all our aviation artifacts in  
5 the building will be on public display, which include 200  
6 aircraft, such as the SR-71 Blackbird reconnaissance  
7 aircraft, which is still the fastest aircraft in  
8 existence, Boeing 707 prototype, the B-29 Super Fortress  
9 Enola Gay, and the Phantom F-4 fighter, among others.

10 Q And you said before that there were  
11 pictures done by artists. Is this one of the pictures  
12 that was done by an artist or one of the architects?

13 A Yes, it is.

14 Q And what was the purpose of this  
15 picture initially? I know we brought it in here, but what  
16 was the initial purpose?

17 A The initial purpose primarily was to  
18 provide a visual representation for potential donors.

19 Q There are two other pictures which are  
20 up front here. Can you please describe what this shot is  
21 of.

22 A This shot is of the building  
23 approaching from the north along the main entry roadway.  
24 The semi-circular hangar you can see on the right, which  
25 is the same as the interior of the shot that's behind, the

1 round structure right next to it is the IMAX theater. The  
2 tower is a viewing platform for viewing aircraft taking  
3 off and landing from Dulles Airport, which is adjacent,  
4 and also a possible exhibit such as an air traffic control  
5 exhibit.

6 Q Could you please explain what this  
7 depicts.

8 A This depicts the space hangar which is  
9 on the west side of the building, of the main hangar, and  
10 it will house approximately 135 space artifacts. And the  
11 one you see right here is the space shuttle Enterprise,  
12 which is presently in the Smithsonian's collection.

13 Q And was this shot and also the  
14 previous shot that we were looking at two things we also  
15 saw in the video?

16 A Yes, those were. We took a virtual  
17 tour in the video through both of these spaces.

18 Q In your pre-prepared testimony, you  
19 testified that the Air and Space Museum was being  
20 constructed, among other things, to prevent further  
21 deterioration of the world's most valuable and  
22 irreplaceable collection of aviation and space flight  
23 artifacts. Are you familiar with the testimony I'm  
24 referring to?

25 A Yes, I am.

1                   Q           And would the space shuttle Enterprise  
2 be among those?

3                   A           Absolutely, definitely.

4                   Q           And would the other spacecraft and  
5 aircraft that you detailed in your testimony a few minutes  
6 ago also be among those?

7                   A           Yes, they would.

8                   Q           Okay. And would the various aircraft  
9 that we saw in this video, which was a virtual tour, also  
10 be among those?

11                  A           Yes, they would. We have to be very  
12 careful about how we depict these aircraft because there  
13 are aviation experts out there who know details, such as  
14 markings and colors, and if they're potential donors, we  
15 don't want to turn them off by misrepresenting aircraft.

16                  Q           Are you familiar with the term  
17 Trekkie?

18                  A           I believe I am.

19                  Q           Are there people out there who follow  
20 these aircraft as much as a Trekkie would follow the Star  
21 Trek?

22                  A           Even closer.

23                  Q           Do you recall that last week, you took  
24 me on a tour of the land where the Smithsonian annex is  
25 going to be built -- or is being built?

1                   A           Yes, I did.

2                   Q           And is the electrical power  
3   infrastructure visible from a ground tour as it currently  
4   exists right now?

5                   A           Essentially, no, it's not, it's  
6   primarily underground. There are a few ducts that are  
7   stubbed out that extend above the ground a few inches, but  
8   you would have to know on the 176-acre site where those  
9   are and look for them in order to see them.

10                  Q           Now, you've heard this term "alternate  
11   service," and it seems to have various different meanings,  
12   depending on who you ask. What's your understanding as  
13   the Project Manager of that term?

14                  A           I use the term "alternate power  
15   source." We have normal power source and alternate power  
16   source. And this is standard practice in all of the  
17   museums at the Smithsonian. And my understanding is that  
18   the alternate power source provides power from a different  
19   source that would be available should the normal source  
20   come down for whatever reason. This is very important for  
21   the Smithsonian because our artifacts, the national  
22   collection, is highly dependent on continuous and  
23   continual environmental conditions, which is served, of  
24   course, by the power. These artifacts could be  
25   irreparably damaged if, for example, power went off in the

1 middle of the summer or the middle of the winter, and the  
2 temperature and humidity levels swung beyond the  
3 acceptable limits.

4 Q And you've also heard some discussion  
5 about NOVEC's ability to provide electricity should the  
6 Commission rule in its favor in these proceedings. Do you  
7 have an understanding of their ability to do that?

8 A I have no understanding of their  
9 ability.

10 Q Do you think that there would be  
11 problems if there would be a switch from Virginia Power to  
12 NOVEC?

13 MR. STALLARD: Objection, Your Honor.  
14 Without foundation, this is highly speculative,  
15 plus it's a very vague question.

16 MR. GORDON: It was already in the  
17 prefiled testimony, so there is a foundation.  
18 It's also in the prefiled testimony that Mr.  
19 Estoque is the Project Manager on the site.  
20 I'll be happy to go through what his  
21 responsibilities are.

22 HEARING EXAMINER: No, I think -- I  
23 don't think that's the foundation that Mr.  
24 Stallard is taking objection to. I think it's  
25 the foundation for being in a position to



1           testify as to the effect of switching -- would  
2           that be correct, Mr. Stallard?

3                   MR. STALLARD: Yes, Your Honor.

4                   HEARING EXAMINER: -- from Virginia  
5           Power to NOVEC.

6                   MR. STALLARD: I don't know whether he  
7           has the technical expertise, or if not the  
8           technical expertise, the ability to know about  
9           NOVEC and what happens in the circumstance,  
10          anything, even a layman person's firsthand  
11          knowledge to testify.

12                   And, by the way, may I say, Your  
13          Honor, I'm not familiar with the Commission  
14          practice on this standpoint, but obviously, his  
15          testimony was submitted. And I'm presuming that  
16          just because someone submits it doesn't make it  
17          automatically admissible in the sense that it is  
18          to be given legal and probative effect, that the  
19          Hearing Examiner and the Commission will account  
20          for any evidentiary problems that may exist.

21                   HEARING EXAMINER: And, certainly,  
22          that testimony has not been subject to cross-  
23          examination yet.

24                   Mr. Gordon, I would ask you to lay  
25          some foundation as to Mr. Estoque's ability to

1           testify as to the effect of switching from  
2           Virginia Power to NOVEC before you ask him other  
3           questions.

4                       MR. GORDON: Sure.

5   BY MR. GORDON: (Continuing)

6           Q           Could you explain your  
7           responsibilities as Project Manager for the construction  
8           project and how it relates to the electric power.

9           A           Certainly. As Project Manager, I'm  
10          responsible for insuring that the project remains on  
11          schedule, under budget and within a scope of design and  
12          construction that meets the Museum's needs.

13          Q           And does that include the electrical  
14          power?

15          A           It includes all aspects of  
16          construction, including electrical power, yes.

17          Q           And have you sat here today listening  
18          to the testimony of the various witnesses who've come  
19          forward?

20          A           Yes, I have.

21          Q           And have you read through the pre-  
22          prepared testimony?

23          A           Yes, I have.

24          Q           And are you generally familiar with  
25          the disputes in this matter?

1                   A           Yes, I am.

2                   Q           And do you have a point of view as the  
3 Project Manager, who has responsibilities, as to the  
4 effect of a switch from Virginia Power to NOVEC?

5                   MR. STALLARD: Your Honor, same  
6 objection. Him listening to testimony doesn't  
7 give him a factual foundation or a technical  
8 foundation to express such opinion.

9                   HEARING EXAMINER: All right. I am  
10 going to allow the question as long as it's  
11 followed by how -- you know, how he comes to  
12 know it would affect the schedule.

13                  Q           (Continuing) Go ahead and answer.

14                  A           As I mentioned before, part of my  
15 responsibilities is to insure that the Museum opens on  
16 time and within the budget. Actually, of the two -- of  
17 those two particular parameters, the on-time parameter is  
18 more important for us. We have promised our donors and  
19 our constituency that we will be opening on the centennial  
20 of flight, which is December 2003, and have structured our  
21 construction schedule accordingly to make sure that that  
22 date is met. And as such, we're very sensitive to changes  
23 in that construction schedule. We try to keep changes to  
24 a minimum.

25                               If we were asked to switch to another

1 service provider for electric service, we fear that much  
2 of the groundwork, infrastructure, planning and so on,  
3 engineering for the provision of those -- of that electric  
4 service to this building would have to be reexamined and  
5 possibly parts of it would have to be reinstalled  
6 according to different requirements. If that were to be  
7 the case, then our construction contractor would not be  
8 able to meet his construction schedule, which provides for  
9 hookup in April 2002 for the first piece of equipment. In  
10 that case, that would delay subsequent tasks in his  
11 schedule and jeopardize the opening date.

12 Q Let me ask you to take a look at  
13 Attachment B to your prefiled testimony, assuming you have  
14 it up there with you on the witness stand. And can you  
15 describe for the Hearing Examiner what Attachment B is.

16 A Attachment B is an excerpt from the  
17 construction contractor's detailed construction schedule  
18 showing the various tasks that he has planned to do in  
19 order to make, make construction completion date. Like I  
20 said, it's an excerpt, so it doesn't show everything, it  
21 just shows tasks that include -- and I'd like to point  
22 this out to you -- the star on the left near the bottom,  
23 where it says "power connections @ AHU C-10, C-11." Now,  
24 AHU stands for air handling unit, and those are two air  
25 handling units, C-10 and C-11, that need to be connected

1 on -- no later than April 4, '02, which is the date shown  
2 on the early finish.

3 Q Is this -- an early start date, can  
4 you describe for the Hearing Examiner what an early start  
5 date and what an early finish date is. There are two  
6 dates there.

7 A The early start and early finish date  
8 are -- that spans the time within which the contractor can  
9 do that particular task. So the start of March 29, '02  
10 means it can actually start that work, but must finish by  
11 April 4th.

12 Q And is the date that the transformer  
13 will arrive also on this critical path?

14 A I don't have that particular date on  
15 this sheet. However, it has been worked into the  
16 construction schedule and right now appears in February  
17 '02 for that transformer to be delivered.

18 Q And if the power is not hooked up by  
19 early April of '02, what would the consequences be?

20 A There are several consequences for  
21 this. The first one I did mention, that the opening date  
22 would be jeopardized, and that, that has severe  
23 consequences, because it's a one -- once-in-a-lifetime,  
24 actually unique opportunity to celebrate the centennial of  
25 flight. And if we, if we miss that, we've missed a

1    tremendous educational opportunity for the visiting  
2    public, especially the young people, of this country. In  
3    addition, this would prolong the deterioration of the  
4    national collection, which I mentioned is stored in  
5    substandard conditions. It would also cause donors to  
6    lose confidence in this particular project, as well as for  
7    other Smithsonian projects. We've promised the donors  
8    that we plan to have this facility open to the public at  
9    that date. And, finally, if this causes the construction  
10   to be delayed just -- even a few days, this could result  
11   in monetary losses from contractor delay claims. Our  
12   contract and agreement with the contractor stipulates that  
13   we provide power to them according to the schedule which  
14   will meet the opening date requirements.

15                    MR. STALLARD: Your Honor, I renew my  
16                    objection and move to strike that entire  
17                    testimony. As Mr. Getchell so articulately said  
18                    earlier, anything is possible. These are highly  
19                    speculative events that may occur. Certainly,  
20                    if he has a crystal ball and can share with us  
21                    the name of his seer, then, you know, perhaps we  
22                    can find out if there's a basis for this. But  
23                    otherwise, it's all speculative, and we'd move  
24                    to strike.

25                    HEARING EXAMINER: I'm going to

1           overrule your objection. Clearly, the testimony  
2           indicates that these are possibilities, fears,  
3           possible things that can occur. And I fully  
4           expect you to cross-examine the witness when you  
5           have an opportunity as to the other side of the  
6           possibilities, that it may not have any adverse  
7           effect on the schedule. So I'm going to  
8           overrule your objection.

9                     MR. GUY: Your Honor, I would object  
10           on the grounds of relevance. The question here  
11           is whose territory this lies in. None of this,  
12           none of the pictures, or the cartoons, or his  
13           testimony address that issue.

14                    HEARING EXAMINER: You may sit down,  
15           Mr. Guy. I'm going to overrule your objection,  
16           too.

17                    And I might as well go ahead and  
18           address the video at this time. I've heard  
19           enough to overrule the objections to relevancy.  
20           The customer of this facility and the use of  
21           this facility, as well as the construction  
22           schedule here, are, are arguably relevant to the  
23           timing of the power requirements and the need  
24           for alternate power. And most certainly, it is  
25           clear that this testimony -- the customer -- the

1 nature of the customer and this testimony is  
2 relevant to one of the arguments that has been  
3 raised and will be briefed, and that goes to the  
4 practical realities that Virginia Power has  
5 argued here. Whether you agree with it being a  
6 practical reality that needs to be considered or  
7 not, clearly, it has been argued in this case,  
8 and this testimony is relevant to that argument.  
9 And I know you all agree to that as well. So  
10 I'm going to overrule the objections, allow the  
11 video and allow this testimony.

12 Mr. Gordon.

13 MR. GORDON: If I may have just a  
14 moment to consult my notes and also one of the  
15 other parties.

16 (Pause)

17 I'm going to move the admission of the  
18 prefiled testimony as well. And as much as I'd  
19 really love to leave our posterboards behind,  
20 I'm told by Mr. Estoque that these are his only  
21 copies. I'd be happy to see if we could get  
22 some additional ones made for the purposes of  
23 the Commission, if you would so desire.

24 HEARING EXAMINER: You indicated that  
25 these pictures depict in still form several



1 frames on the video, and we do have the video as  
2 an exhibit, so I don't think that will be  
3 necessary.

4 Ms. Bridewell?

5 MS. BRIDEWELL: Yes, Your Honor. We  
6 would just note that this was tied closely in  
7 with the video, and while they are beautiful,  
8 would appear to be cumulative, in fact, with the  
9 video already offered.

10 HEARING EXAMINER: Right. All right.  
11 Exhibits 10 and 11 will be admitted subject to  
12 cross-examination.

13 And if -- you have nothing further?

14 MR. GORDON: This is the prefiled  
15 testimony. I'm not sure if that, if that got  
16 admitted or not.

17 HEARING EXAMINER: That was Exhibit  
18 10, admitted subject to cross.

19 MR. GORDON: Okay.

20 HEARING EXAMINER: All right. Mr.  
21 Smith?

22 MR. SMITH: Thank you, Your Honor.

23

24 CROSS-EXAMINATION

25 BY MR. SMITH:

1                   Q           Good afternoon, sir. I am Wayne  
2     Smith. I'm going to be asking you a few questions on  
3     behalf of the Staff this afternoon.

4                               First, let me follow up on your  
5     comments about preservation of the aircraft collection.  
6     And more specifically, my question goes to how much risk  
7     the Smithsonian is willing to run. As you've testified,  
8     you want a normal source of electricity and an alternate  
9     source in case of a power outage so that, as I understand,  
10    primarily environmental control could be maintained?

11                  A           Yes, sir.

12                  Q           Now, you were present when Ms.  
13    Buchanan testified. You understand that under Virginia  
14    Power's proposal for service, at least as has been  
15    presented so far in this hearing, your normal source would  
16    be one 34 kV line, and the alternate source will be  
17    another 34.5 kV line on the same supporting structures.

18                  A           I understand from previous testimony  
19    that they would come from two different substations.

20                  Q           Well, yes, they would come from two  
21    different substations, but the lines that actually  
22    approached your service entrance for your facility, they  
23    would be on supporting structures, one on one side, one on  
24    the other side.

25                  A           I'm not clear what supporting

1 structures you're talking about.

2 Q Poles, towers.

3 A We've -- maybe I can just answer the  
4 question by explaining what we've planned for, which is a  
5 ductbank that includes a provision for an alternate  
6 circuit, an alternate power source, an alternate  
7 conductor.

8 Q Well then, you agree though that the  
9 overhead lines will enter that ductbank at some point?

10 A That's correct.

11 Q And these overhead lines will come on  
12 supporting structures, towers, poles, whatever.

13 A I don't know how the overhead lines  
14 would come through. All I know is what we planned on our  
15 property.

16 Q Well, let me ask it this way then:  
17 The Smithsonian is willing to run the risk of an ice storm  
18 taking out both circuits?

19 A We're not willing to run any risk that  
20 we can avoid, and so we've done the best we could by  
21 providing for underground service which would not be as --  
22 wouldn't be affected so much by ice storms, and, secondly,  
23 to have normal and alternate service running underground.  
24 We can't dictate what's going to go --- what's going to  
25 happen beyond our property line, so I'm not aware that we

1 have any kind of say in that matter.

2 Q Well, let me ask it -- let me ask the  
3 question another way. In -- as I understand, there is a  
4 con -- Ms. Buchanan has testified that there's a contract  
5 between Virginia Power and with the General Services  
6 Administration, and, ultimately, along with your  
7 institution. Are you familiar with that?

8 A I'm not familiar with the contract.

9 Q In the plan for your structure, as I  
10 understand it -- well, let's try it another way.

11 There's been a lot of testimony about  
12 the ductbank. What is the ductbank? Please just answer,  
13 what is the ductbank?

14 A The ductbank is a concrete underground  
15 structure which holds a number of different conduits,  
16 which are the PVC pipes that were originally alluded to  
17 for carrying electrical service, low-voltage, high-  
18 voltage, whatever it is that the ductbank is designed to  
19 carry. And one of the things it's designed to carry is  
20 power for normal and alternate service.

21 Q How many of these ductbanks are there  
22 going to be?

23 A I'm sorry, I didn't hear the question.

24 Q How many of these ductbank structures  
25 are there going to be?

1                   A           There is essentially a single ductbank  
2                   that goes from Route 50 all the way to the manholes near  
3                   the building. However, there's an interruption in that  
4                   ductbank at the property line where the transformers would  
5                   go.

6                   Q           So under this contemplated structure,  
7                   the -- both the normal and the alternate power source will  
8                   come through that ductbank?

9                   A           We wanted to provide for that  
10                  possibility, yes.

11                  Q           Would you turn now to Ms. Buchanan's  
12                  Exhibit, I guess, B -- excuse me -- C.

13                               Can you see it, sir?

14                  A           Yes, I can.

15                  Q           Is that an accurate depiction of what  
16                  you contemplate the service being?

17                  A           In general terms, yes.

18                  Q           Obviously, you're familiar with the  
19                  site. Ms. Buchanan testified that currently, there are, I  
20                  believe, 17 supporting structures, poles, that are  
21                  bringing the temporary power into the site. Does that  
22                  sound about right to you?

23                  A           I haven't counted them, but I can  
24                  believe that there are that many.

25                  Q           And do you understand that the power

1 source for this temporary service supported on the poles  
2 comes from the existing 34.5 kV circuit?

3 A I would presume so.

4 Q And it's your understanding that the  
5 permanent service when brought in by April of next year  
6 will come from the same 34.5 kV circuit?

7 A It's my presumption, yes.

8 Q And you're indifferent as to those  
9 circuits beyond the metering point?

10 A I wouldn't say I'm indifferent. I  
11 don't know what the Smithsonian policy is or what kind of  
12 agreements would, would govern for those facilities beyond  
13 our property line.

14 Q The south end of the hangar building -  
15 - I believe in the video, there was a view of it from the  
16 north, so I'm saying the opposite end, the south end --  
17 that end of the hangar building will be closest to the  
18 interconnection with the Dominion Virginia Power  
19 facilities?

20 A That end is closest to the power  
21 source, yes.

22 Q Approximately how far is the south end  
23 of the hangar building from, from U.S. Route 50?

24 A Without having an accurate measurement  
25 in mind, I would guess approximately a half a mile.

1                   Q           Now, does your property line for the  
2 complex, does it extend all the way to the Route 50 right-  
3 of-way?

4                   A           That's my understanding.

5                   Q           Now, you have mentioned that the --  
6 you've described the ductbank, and if I'm not mistaken,  
7 you said -- you described it as a structure that extends  
8 underground for some period -- for some distance, and then  
9 comes to the surface where transformers will be installed,  
10 and then continues underground where there's access from  
11 the surface. Describe it, please.

12                  A           The ductbank -- the concrete part of  
13 the ductbank is totally underground, and it houses the  
14 conduit for carrying the power. And the conduit has to  
15 eventually come -- make a right turn and come up above  
16 ground in order to allow the conductors to connect to the  
17 transformers and other equipment.

18                  Q           Has that ductbank been completed?

19                  A           Yes, it has.

20                  Q           Approximately how far from the south  
21 end of the hangar building does this right angle that you  
22 just described come up to the -- to bring the conductors  
23 up to the transformers?

24                  A           I'd say about a quarter mile or a  
25 little bit over that approximately.

1                   Q           So let me be sure -- I appreciate that  
2     you're, you're making some estimates, just approximations.  
3     So we have U.S. Route 50, and there's approximately a  
4     quarter mile of the Smithsonian property, part of this 176  
5     acres, then we have the future site for the transformers,  
6     and then another approximate quarter a mile until we get  
7     to the south end of the hangar. Have I described it  
8     fairly --

9                   A           Those are approximate distances, but,  
10    yes, that's basically --

11                  Q           Yes, I understand. I'm just trying to  
12    get -- to lay out a general configuration.

13                               Is there anything planned to be around  
14    those transformers, any other facilities, structures,  
15    anything like that?

16                  A           There are no other facilities right  
17    adjacent to it.

18                  Q           Now, if the ductbank was -- is already  
19    constructed, then, obviously, it was designed sometime in  
20    the past. Do you know why it goes a quarter mile, comes  
21    to the surface, then goes down again another quarter mile?

22                  A           I don't know the exact reason why.  
23    From the testimony I've heard today, it seems to me that  
24    since we were expecting Virginia Power to provide power  
25    for us, that we would make sure that the pads, transformer



1 pads and other parts of the infrastructure were completed  
2 within their service territory and according to their  
3 requirements.

4 Q Now, I believe your academic  
5 background was architecture.

6 A That's correct.

7 Q All right. You know, based on, on  
8 your professional training, could you think of any reason  
9 why those transformers and the, the pads couldn't have  
10 been significantly closer to the south end of the hangar  
11 building?

12 A From an architectural-engineering  
13 point of view, I don't know any other reason why they  
14 couldn't have been closer.

15 Q As an architect and in your experience  
16 with building, obviously, there would be some aesthetic  
17 considerations, some safety considerations, service  
18 considerations. How close do you think those transformers  
19 could be to the south end of the building as a general  
20 matter of design?

21 A Those transformers could be fairly  
22 close to the south end of the building from an  
23 architectural-aesthetic point of view and an engineering  
24 point of view if they were appropriately shielded from  
25 public view, for example.

1                   Q           Yes. Obviously, I'm sure you're very  
2 concerned about the appearance of the building,  
3 understandably.

4                               If you will turn for a moment to Mr.  
5 Trott's -- what will be offered as his Exhibit B in the  
6 booklet, sir. That's his rendering of the locations and  
7 so forth.

8                               Are you with me, sir?

9                   A           Yes, I am.

10                  Q           Thank you. We have been referring to  
11 the hangar building. Have I been correct in using that  
12 term to describe what he has marked on his diagram as Base  
13 Museum Building?

14                  A           Yes, you are.

15                  Q           Thank you. His rendition -- if you  
16 will look now at the somewhat larger -- well, let me ask  
17 you this: Do you think, based on your knowledge of the  
18 project, sir, that this is an accurate representation of  
19 what the facility will be, what it will look like when it  
20 -- or how it will be arranged when it's completed?

21                  A           I can't vouch for the absolute  
22 accuracy and precision of the drawing. However, I can say  
23 without a doubt that it is a good representation of the  
24 building for the purposes of which this drawing was put  
25 together.

1           Q           I see. Let me rephrase my questions,  
2 or try again about this reliability issue. And I don't  
3 wish to make it difficult for you. I just want to be sure  
4 that I understand, and ultimately the Commission  
5 understands, what you, the customer -- or the customer's  
6 representative want.

7                       Now, the -- most of the -- the point  
8 at which the Dominion Virginia Power electric lines, the  
9 circuits, go underground will be at some point on this  
10 176-acre tract. I'm assuming that there will be some  
11 transition structure to take them from overhead to where  
12 they enter the conduits. I don't think they can just go  
13 at a right angle. I'm assuming they're going to have to  
14 go down at an angle. I mean, this is part of the plan.  
15 This is going to be someplace down in that area between  
16 the hangar building and Route 50. So it's your  
17 understanding that there will be -- the lines will be  
18 overhead and then they'll go underground at that point?

19           A           From the testimony that's submitted,  
20 that's my understanding, yes.

21           Q           And you're looking -- your  
22 specification is that there be two separate circuits that  
23 come in at that point underground?

24           A           If that's the best place that we could  
25 -- if that's the best place that Virginia Power, or the

1 best configuration that Virginia Power offers us for two  
2 separate power sources, then that will be fine. There may  
3 be others that we're not aware of. But that's what we  
4 wanted to plan for in case that were the, the solution.

5 Q Well, if I understand from your  
6 testimony, it's too late to change and make your schedule.

7 A I'm sorry, what's too late to change?

8 Q It's too late to change that  
9 configuration -- or you're fearful that it's too late to  
10 change that configuration.

11 A Are you asking me if it's too late to  
12 change the ductbank design?

13 Q Yes, the ductbank design and the entry  
14 into the ductbank.

15 A Yes, we would not want to change that..

16 Q Now, sir, I gather, based on your  
17 work, you certainly have some familiarity with the weather  
18 encountered in Northern Virginia, winter weather, and you  
19 may have had some personal experience or certain  
20 observations of the ice storms we've had.

21 A Yes, I have.

22 Q Now, assuming that we had an ice  
23 storm, if, because of icy conditions, whatever manner of  
24 climatic conditions beyond the Company's control, the  
25 circuit providing the normal feed were lost, it's then

1 your expectation that the alternate source would continue  
2 to provide sufficient power to your facility?

3 A That's what we would hope for, yes.

4 Q How much risk is -- is the Smithsonian  
5 willing to run the risk that it might lose both circuits?

6 A That's a risk the Smithsonian accepts.

7 Q Would the Smithsonian be interested,  
8 or would the Smithsonian want to explore alternate  
9 arrangement of the circuits that might reduce that risk  
10 and in planning stages?

11 A We would want to explore all  
12 possibilities of risk reduction. If you're talking about  
13 risk of power loss -- there are other risks, too, like I  
14 mentioned, such as the risk to our opening date.

15 MR. SMITH: Yes, sir. Thank you, sir.

16 I have no further questions.

17 MR. GETCHELL: On the schedule, I was  
18 next. I have just three.

19 HEARING EXAMINER: He's your witness  
20 though. I mean, this is an odd kind of  
21 arrangement. Mr. Gordon produced him, but --

22 MR. GETCHELL: The only question --

23 HEARING EXAMINER: -- I assumed you  
24 were just --

25 MR. GETCHELL: The only questions that

1           were suggested to me were by -- because of what  
2           Staff said. I'm just trying to clarify his risk  
3           issue. And I am on the scheduling order as a  
4           cross-examiner.

5                       HEARING EXAMINER: All right.

6  
7                       CROSS-EXAMINATION

8 BY MR. GETCHELL:

9           Q           Just three questions quickly. Mr.  
10          Smith asked you whether or not that the two lines on Route  
11          50 would be held by the same poles for some distance. Do  
12          you remember that?

13          A           Yes.

14          Q           Okay. Do you know, in fact, when the  
15          circuits go to two different substations, for what  
16          distance they'll be on the same poles?

17          A           No, I don't.

18          Q           All right. And has, in fact, Virginia  
19          Power ever refused to consider or discuss with you how  
20          long it would be on the same pole, what distance it would  
21          be on the same pole?

22          A           I'm not aware that we've had those  
23          discussions.

24          Q           Okay. And if -- and, in fact, in the  
25          ducts, are the two lines, that is the normal and the

1 alternative, in different pipes set within concrete?

2 A Yes, they are.

3 MR. GETCHELL: That's all I have.

4 HEARING EXAMINER: You count a little  
5 better than Mr. Stallard, but I think I counted  
6 four and not three.

7 (Laughter)

8 Mr. Guy?

9 MR. GUY: Your Honor, I won't give you  
10 a number, but I do promise to be as brief as I  
11 can.

12

13 CROSS-EXAMINATION

14 BY MR. GUY:

15 Q Mr. Estoque, my name is Jim Guy. I'm  
16 a lawyer for Old Dominion Electric Cooperative and the  
17 Electric Cooperative Association here in Virginia.

18 Would you please describe for me the  
19 location of the retail space, maybe in reference to  
20 Exhibit B of Mr. Trott's testimony, where the retail space  
21 is going to be, how much that is. I know it's a compound  
22 question. I'm trying to, trying to be brief here. I just  
23 want to know where and how much.

24 A The retail space would be located  
25 approximately where the "v-i-c-e" of the service word is

1 on that bottom right-hand sketch.

2 Q The v-i-c-e? Okay. And is that going  
3 -- do you anticipate that's a super version of the gift  
4 shop at the Air and Space Museum on the Mall, or are you  
5 going to have lots of other retailers there?

6 A We presently have planned for  
7 operation by the Smithsonian Business Center, so it would  
8 be one, one store.

9 MR. GUY: Okay, thank you. That's all  
10 I have, Your Honor.

11 HEARING EXAMINER: While we're on this  
12 drawing, this drawing attached to Mr. Trott's  
13 testimony has a big hatch mark rectangle that  
14 says Future Phases. Is that just reserved for  
15 anything that might come along, or do you have  
16 some particular plans for phased construction  
17 out into the future?

18 THE WITNESS: Your Honor, that --  
19 where it says Future Phases represents parts of  
20 the building that have been completely designed,  
21 have been actually contracted for with our  
22 general contractor, and as alternates, and will  
23 be executed as soon as the museum raises the  
24 money for those. And they've been telling me  
25 continuously for the last several weeks that



1           we're ready to go for those, don't plan on not  
2           doing them, we should plan on doing those future  
3           phases.

4                   HEARING EXAMINER: All right. Thank  
5           you.

6                   Mr. Stallard, it's time for your  
7           questions.

8                   MR. STALLARD: Thank you, Your Honor.

9  
10                   CROSS-EXAMINATION

11           BY MR. STALLARD:

12                   Q           Mr. Estoque, good afternoon. I will  
13           make my best efforts to be brief. I just want to make  
14           sure that I understand the relationship between what  
15           you're referring to here in the photographs. If I may,  
16           Your Honor?

17                   HEARING EXAMINER: Yes.

18                   Q           (Continuing) This first photograph,  
19           you indicated that was the main hangar, and that would be  
20           this part right here (indicating)?

21                   A           Correct.

22                   Q           And dimensionally, how -- what are the  
23           dimensions of that portion? I believe you said it was two  
24           and a half football fields long.

25                   A           Yes, it's about two and a half

1     football fields long and ten stories high. I don't have  
2     the exact numbers in front of me.

3             Q             The space hangar, would that be the  
4     part that sort of goes straight back here (indicating)  
5     that maybe looked like it was --

6             A             Correct, it is.

7             Q             And this is the restoration facility  
8     in this part back here (indicating)?

9             A             That's correct.

10            MS. BRIDEWELL: Your Honor, for the  
11     record, could we get more specific of what "back  
12     here" means?

13            MR. STALLARD: I apologize.

14            HEARING EXAMINER: It's going to be  
15     very hard to decipher in the transcript, so --

16     BY MR. STALLARD: (Continuing)

17            Q            The first thing, the Base Museum  
18     Building is described as the hangar -- and this is Mr.  
19     Trott's Exhibit B -- and that's depicted in the first long  
20     photograph that Mr. Estoque mentioned. The future phases  
21     part at the very top below "at Footings (Typ.)," there's  
22     sort of a --- in the back of the building, there's a little  
23     extrusion right there. That long part, as I understand,  
24     is the space hangar, is that correct?

25            A            That's correct.

1           Q           And then below that, which would be --  
2 I guess this is north-south -- south of that, where it  
3 says Future Phases, that's the restoration facility?

4           A           Well, actually, part of the rest of  
5 that is the restoration facility. There are other parts  
6 to the future phases of that related to archives,  
7 collection storage, and so on.

8                   MR. STALLARD: Your Honor, may I get  
9 this exhibit over here just for a moment,  
10 please, the first exhibit that we had, which was  
11 Mr. Moore's?

12                   HEARING EXAMINER: Oh, certainly.

13          Q           I want to take the liberty of turning  
14 this this way, because I think the orientation of these  
15 photographs has been this way.

16                   My question for you is: As far as the  
17 physical plant is concerned -- I'll say physical plant,  
18 I'll describe it as the portions that you will use to  
19 heat, cool, provide with hot water, whatever those types  
20 of things are -- where in the property -- where are those  
21 items in this photograph? Or this is the -- let me --  
22 well, you can look through this and see, but this is the  
23 PHR&A site plan, 2000. Can you describe where those items  
24 would be?

25          A           The main central utility plant would

1 be actually part of the initial award, which is not future  
2 phase, and that's located -- actually, if you'll look on  
3 Exhibit B, it's actually easier to see.

4 Q Okay.

5 A Which is where it says Future Phases,  
6 and then on the bottom right-hand corner, there's a yellow  
7 part. That's actually not future, that's current. And  
8 that's the central utility plant. And there are also four  
9 air handling unit areas which serve various parts of the  
10 building scattered around the main hangar.

11 Q What is the -- including future  
12 phases, what is the total square footage of the facility?

13 A 760,000.

14 Q What is the square footage of the IMAX  
15 theater?

16 A I'm not -- I don't have that number  
17 exactly.

18 Q You are, sir, an architect?

19 A Architect by training, yes.

20 Q And are you a Badger's fan?

21 A A Badger's fan?

22 Q Wisconsin.

23 A Wisconsin? That's where I got my  
24 master's.

25 (Laughter)

1                   Q           Was your undergraduate degree in  
2           architecture as well?

3                   A           It was in mathematics.

4                   Q           Do you have a specialty of any type of  
5           architecture?

6                   A           My specialty right now is project  
7           management.

8                   Q           Have you been a practicing architect?

9                   A           I have not been a practicing  
10          architect, no.

11                  Q           You began as Project Manager here  
12          sometime in the year 2000 at the facility, I believe,  
13          according to your resume.

14                  A           For this particular facility, yes.

15                  Q           What studies have you commissioned  
16          that would evaluate what is involved in the transfer of  
17          electric service from Dominion Virginia Power to NOVEC?

18                  A           Are you asking what kinds of  
19          consultant studies have we commissioned or --

20                  Q           Correct.

21                  A           We haven't commissioned any  
22          consultants to study that for us.

23                  Q           So you've not done any consulting.  
24          Have you consulted with any electrical engineers?

25                  A           We've consulted with our electrical --

1       excuse me -- our general contractor and their electrical  
2       subcontractors, as well as our construction managers, who  
3       are all under contract to the Smithsonian to provide us  
4       this facility and its various services.

5                   Q           Do you know what is involved in the  
6       transfer of service from one utility to another?

7                   A           I don't know all of the things that  
8       are involved. However, I am familiar with what kinds of  
9       construction-related work would need to be considered.

10                  Q           Do you know in this case if the  
11       Commission were to rule that NOVEC was the rightful  
12       provider of electrical service, and the Commission ordered  
13       transfer of service, what would have to be accomplished to  
14       transfer that service?

15                  A           Based on my experience in construction  
16       projects, I, I would suppose that there would be quite a  
17       bit of reexamining of the existing engineering that has  
18       gone into and existing planning that has gone into the  
19       infrastructure that we plan for electrical power right  
20       now. I understand that NOVEC isn't totally familiar with  
21       our facilities, so they would have to go through our plans  
22       and specifications, confirm the infrastructure, and, for  
23       example, transformers that were planned for serving us,  
24       and rework the delivery point area to make sure that their  
25       meters and transformers were included, which, therefore,

1 would require us, even after that were all done, to make  
2 those modifications starting with negotiating with  
3 Virginia Department of Transportation, VDOT, for getting  
4 the contractor back on site to do that work again, modify  
5 the contract to do that. And we are fearful that this  
6 would all take so much time that would push back our April  
7 2nd deadline for connections.

8 Q How many transfers of electrical  
9 service from one utility to another have you personally  
10 been involved in?

11 A None.

12 Q How many have you designed in terms of  
13 deciding from an engineering standpoint what needs to be  
14 done?

15 A I haven't designed any.

16 Q You're assuming then that the delay  
17 will be caused by VDOT's involvement with the ductbank?  
18 Is that your concern, that something is going to have to  
19 be changed there?

20 A My concern is that there are a number  
21 of different parties involved in changing this agreement  
22 for the power service provider, a number of different  
23 people who would be involved to make sure that the  
24 infrastructure that was planned and designed and installed  
25 in accordance with one service provider would meet then

1 the requirements of the second one. And all of this takes  
2 time in my experience, which I have a lot of in doing  
3 these kinds of changes. Also, it costs money.

4 Q Well, let's start from the beginning.  
5 If you don't have to pay any money for any of the changes,  
6 then is that an easier choice for you, if it doesn't cost  
7 you any money, the Smithsonian?

8 A As I mentioned before, time is of the  
9 more critical nature here.

10 Q Do you know how long, if any time,  
11 service would have to be interrupted to effect a transfer?

12 A I don't know how long service would be  
13 interrupted, no.

14 Q For example, you don't know if they  
15 could work in one night to transfer service technically?

16 A Who would "they" be?

17 Q NOVEC, NOVEC.

18 A No, I don't know how long NOVEC would  
19 take.

20 Q You indicate in your testimony that  
21 you prefer Dominion Virginia Power because, one, you don't  
22 want to be served by two utilities. If the Commission  
23 presumably solves that problem, then if that concern is  
24 alleviated, would that be a positive for you? You're  
25 happy as long as you're not served by two utilities?



1           A           Yes, our preference is not to be  
2 served by two utilities.

3           Q           And you talk about the completion of  
4 infrastructure that's already begun, and you have an April  
5 2002 date for installation of permanent power, correct?

6           A           Correct.

7           Q           And as long as the transfer does not  
8 interfere with that schedule, and your concerns are met,  
9 then does that satisfy the fears that you have in this  
10 case?

11          A           That kind of question, hypothetical  
12 question, is not addressing our main concern. Our main  
13 concern is that we don't believe that a transfer of power  
14 service that you mentioned is an easy and a quick thing.  
15 It's going to take enough time in my experience for  
16 getting the changes made on an engineering, as well as an  
17 installation/construction point of -- perspective that it  
18 would jeopardize our construction schedule.

19          Q           You've heard the testimony from Mr.  
20 Moxley that it's a fairly simple -- this is a fairly  
21 simple installation. And you know that Dominion Power's  
22 own employee said permanent infrastructure installation  
23 takes ten days. And, in fact, your own construction  
24 schedule says start date, March 29; complete April 4. So  
25 it's a five-day process, correct?

1           A           Well --

2                   MR. GORDON:  Objection; compound  
3           question.

4                   MR. STALLARD:  I'm sorry, one at a  
5           time.

6           Q           You're aware of all those facts?

7           A           Our construction schedule shows it's a  
8           five-day process to connect.  That's what it says, it says  
9           to connect those air handling units.  It has nothing to do  
10          with redoing transformer pads, ductbank connections, or  
11          any of that.

12          Q           Well, I understand that your  
13          experience in general says this is more complicated, but  
14          could you explain to me how transferring service is going  
15          to suspend your construction schedule on the project,  
16          assuming there's no interruption in service?  I'll add  
17          that proviso.

18          A           If we were directed to plan on NOVEC's  
19          being our service provider, what we would have to do is  
20          allow NOVEC engineers to look at all of our plans and  
21          specifications.  That would take time.  We would have to  
22          confirm the design of our ductbank and the stub-ups and  
23          the transformer pads, or as is shown in the testimony  
24          here, make the modifications.  Those modifications would  
25          have to be sent to VDOT for VDOT to modify their contract

1 with their construction contractor, which is not our  
2 construction contractor. Then they would have to be  
3 remobilized, brought back on site to do these changes, and  
4 all that would take more than just a few days.

5 Q How many assumptions are you making in  
6 that prophecy that you predict is going to occur if this  
7 transfer occurs?

8 MR. GORDON: Objection; argumentative.

9 HEARING EXAMINER: I think it's fair  
10 to define the assumptions that go into -- that  
11 underlie the conclusion. So I think instead of  
12 how many, if you can describe the, the  
13 assumptions that you've made in reaching the  
14 conclusion that it would take a number of days  
15 to go through all that.

16 A What I just said is based on the  
17 typical procedures that we use whenever we make changes.

18 Q Let me ask you these specific  
19 questions then, Mr. Estoque: Have you spoken with NOVEC  
20 about what would be involved in transferring service?

21 A No, I haven't.

22 Q Have you spoken with NOVEC regarding  
23 its technical requirements for transferring service?

24 A No, I haven't.

25 Q Have you spoken with NOVEC regarding

1 its ability to provide alternative service?

2 A No, I haven't.

3 Q Have you spoken with NOVEC regarding  
4 its ability to meet your schedule?

5 A No, I haven't.

6 MR. STALLARD: No further questions,  
7 Your Honor.

8 HEARING EXAMINER: All right.

9 Mr. Gordon?

10  
11 REDIRECT EXAMINATION

12 BY MR. GORDON:

13 Q A few minutes ago, you were asked to  
14 detail the changes that would be needed should NOVEC  
15 become the power provider. Did you include the issue of  
16 alternate service in your testimony?

17 A No, I didn't. That's a separate  
18 issue.

19 Q And what, what would have to be done  
20 if it were changed to NOVEC with regard to alternate  
21 service?

22 A I don't know how NOVEC would provide  
23 that. We would still want that and expect that from any  
24 service provider. But that's something which I don't know  
25 how they would provide.

1                   Q           You testified when Mr. Smith was  
2 asking you questions that you did not -- when I say you,  
3 the Smithsonian -- did not want to change the ductbank  
4 design. Why is that?

5                   A           A change in ductbank design, again,  
6 would take all the time and effort that I just mentioned.

7                   Q           Your qualifications have been  
8 discussed. If you could take a look at what is Attachment  
9 A to your prefiled testimony. And you identify this as  
10 being your resume?

11                  A           Yes, I do.

12                  Q           And you'll note there's -- page 2 kind  
13 of got messed up when it got printed out, is that correct?

14                  A           Yes, page -- actually, it should show  
15 that page 1 and 2 prints on the same page.

16                  Q           And during the cross-examination by  
17 one of the other attorneys, he elicited the fact that you  
18 started on this project in the year 2000. When did you  
19 start at the Smithsonian?

20                  A           I started in -- approximately 12 years  
21 ago, 1989.

22                  Q           You testified that you were basing  
23 some of your conclusions about the delay on your  
24 experience as a Project Manager. What is that experience?

25                  A           I've been Project Manager for this

1 job, which is the largest job in the entire Smithsonian at  
2 this point, \$300 million construction project. Previous  
3 to this, I was Project Manager for the entire security  
4 system modernization -- security system modernizations for  
5 the entire Smithsonian, all, all of its museums on the  
6 Mall and in Panama. And prior to that, I was the Project  
7 Manager for the National Museum of the American Indian,  
8 also which is being built on the National Mall, as well as  
9 Suitland, Maryland. That is approximately a \$200 million  
10 effort, both of those American Indian facilities.

11 Q You mentioned that some of your  
12 conclusions were reached in talking to the general  
13 contractor, construction managers and electrical  
14 subcontractors. What are some of the conclusions that  
15 you've reached in doing your inquiry about this issue of  
16 the change from NOVEC -- I'm sorry -- from Virginia Power  
17 to NOVEC?

18 A I'm sorry, I didn't understand the  
19 question. What are some of the issues --

20 Q Yeah, excuse me, let me strike that  
21 and rephrase it. I think it was a little confusing.

22 You mentioned that your thoughts and  
23 concerns about delay in the construction project were  
24 based on inquiries that you have made to the general  
25 contractor, the construction managers and the electrical

1 subcontractors. What did your inquiry about that issue  
2 reveal?

3 A Our inquiry -- well, first of all, I  
4 should say that the -- all of those people that you  
5 mentioned, our construction contractor, our subs, our  
6 construction manager, they're all part of our construction  
7 team, located all on the same site. We work together to  
8 make sure that this project happens according to the  
9 requirements of the Smithsonian. As this dispute became  
10 more and more real, I consulted with them on a regular  
11 basis to find out how this would affect our construction  
12 schedule. And they told me -- and I believe them -- that  
13 this --

14 MR. STALLARD: Excuse me, Your Honor,  
15 I have an objection. It's obviously hearsay.  
16 We can't ask them, they're not here, so it's  
17 pretty blatant hearsay.

18 HEARING EXAMINER: Mr. Getchell?

19 MR. GETCHELL: Yes. This witness was  
20 cross-examined on the issue of what  
21 investigation he made to support his  
22 understanding. Now, he shouldn't be allowed to  
23 repeat the conversations he had, because that  
24 would be hearsay, but he can certainly testify  
25 as to what went into his conclusion. So he can

1 say that based on these inquiries, he formed an  
2 opinion based on that information.

3 MR. STALLARD: That's fine, but he's  
4 getting ready to say they said. So, it's one  
5 thing to describe the inquiry he made, it's a  
6 totally different matter to --

7 MR. GETCHELL: The inquiry he made and  
8 then the conclusion he reached based on that  
9 inquiry..

10 HEARING EXAMINER: Mr. Estoque, do you  
11 understand the difference in what we were just  
12 discussing? You can, you can talk about who you  
13 consulted and the conclusion that you reached,  
14 but we will not allow you to say George told me  
15 and what George told you. Okay?

16 Proceed.

17 THE WITNESS: How did you know his  
18 name was George?

19 (Laughter)

20 BY MR. GORDON: (Continuing)

21 Q Would you tell us the conclusions that  
22 you reached based on your inquiry concerning this issue  
23 that you were discussing, and the issue being the  
24 potential for delay if NOVEC becomes the electrical  
25 provider.



1           A           In our experience in this project and  
2 my experience in other projects, any change like this that  
3 is on the right -- any change like this that is right at  
4 the start of a construction task has great potential to  
5 disrupt that task. We've had to deal with numerous  
6 changes on this building, and every one has resulted in  
7 either a cost increase or a schedule delay, every single  
8 one. And -- every single major change, let's put it that  
9 way. And this I would consider a major change. And I  
10 confirmed with our consultants and our construction  
11 contractor that we cannot afford to risk this kind of a --  
12 this kind of change would have the same kind of adverse  
13 effect.

14           Q           You said at the beginning of the  
15 construction task. Explain how this is the beginning of  
16 the construction task so that the Hearing Examiner can  
17 understand that in the construction world.

18           A           Well, in general, I meant that -- the  
19 beginning of the effort to connect these air handlers,  
20 that we're right now ordering and ready to receive the  
21 switch gear, electrical switch gear next month. February  
22 is when the transformers would arrive. And we have to  
23 have that all in place before the electrical power is  
24 turned on in April.

25           Q           For the purposes of the record, what

1 does the air handler do for the building?

2 A Air handlers are the main equipment  
3 for providing conditioned air to the building.

4 Q So heat and air conditioning?

5 A Heated and cooled air, yes.

6 Q And humidify the air or dehumidify the  
7 air?

8 A The humidification may not be in place  
9 yet.

10 Q Eventually, that will be part of the  
11 air handlers?

12 A Yes.

13 MR. GORDON: Thank you, Your Honor. I  
14 have no further questions.

15 HEARING EXAMINER: All right. Thank  
16 you.

17 Mr. Estoque, thank you for your  
18 testimony. The museum looks like it's going to  
19 be an impressive facility, and we're all looking  
20 forward to visiting it someday.

21 THE WITNESS: And you're all invited.  
22 Thank you, Your Honor.

23 HEARING EXAMINER: Thank you. You may  
24 step down.

25

\* \* \* \* \*

WITNESS STOOD ASIDE

HEARING EXAMINER: All right. Before we adjourn for the day, let me ask, in terms of determining when we start again in the morning, are the NOVEC folks coming down -- driving back, or are they staying over?

MS. NOLTE: They are driving back, Your Honor.

HEARING EXAMINER: So your preference would be to start at 10:00 again, or 9:30?

MS. NOLTE: 10:00.

MR. STALLARD: 10:00, Your Honor.

HEARING EXAMINER: All right. We will reconvene at 10:00 in the morning.

One other thing that I would ask Virginia Power to produce in the morning, there's been a lot of discussion about the -- what's involved in the transfer of facilities and service, and I think the record would be well-served to learn a little bit more about what was involved in the transfer of the facilities and service in the RGC Sands case. So I would like Virginia Power to bring with you

1           in the morning to put on the stand somebody from  
2           Virginia Power who can offer that testimony and  
3           talk about what was involved, how long it took,  
4           and, you know, a little bit about the reality of  
5           that transfer.

6                   MR. GETCHELL: Could I take a minute  
7           to find out whether or not such a person is  
8           available, or -- and I would make a -- make one  
9           cautionary remark, and that is, I think that  
10          here, what is going to be involved in the  
11          change, if one were made, that impacts the  
12          public interest and the practicalities is from  
13          the Smithsonian's standpoint. I don't know how  
14          much it is from the utility's standpoint. I do  
15          know that, certainly, the RGC customer and the  
16          Smithsonian don't seem to be comparable. So --

17                   HEARING EXAMINER: Certainly, there  
18          are differences, but, but I think this record  
19          would be well-served to hear a little bit about,  
20          you know, the case, and what happened after the  
21          case concluded, and how it was affected, and how  
22          long it took, recognizing that there are  
23          differences. And, certainly, you know, if you  
24          refuse to bring the witness --

25                   MR. GETCHELL: Oh, we wouldn't refuse,

1           it's just I don't know on this notice who's  
2           around who knows that, particularly if we're  
3           starting at 10:00. I mean, could we have --

4                   HEARING EXAMINER: Virginia Power has  
5           lots of folks over there, and I know you can  
6           find somebody if Virginia Power wants to, and so  
7           --

8                   MR. GETCHELL: Well, we will do the  
9           best that we can by 10:00 to, to address that.

10                   HEARING EXAMINER: Okay. Certainly,  
11           we can take Mr. Trott first, but, you know, but  
12           it's not a hard question, because it's just a  
13           report of fact in our fairly recent past.

14                   MR. GETCHELL: Right.

15                   HEARING EXAMINER: And it involves a  
16           case that has been discussed extensively here.

17                   MR. GETCHELL: We're not reluctant to  
18           do it. We'll just -- we'll do our best to do  
19           it.

20                   HEARING EXAMINER: All right. Is  
21           there anything further that we need to take up  
22           before we adjourn for the day?

23                   Mr. Gordon.

24                   MR. GORDON: Yes, Your Honor, there  
25           is. I just wanted to raise the same concern. I

1           also very much appreciate that Mr. Estoque was  
2           taken out of order. He's going to be going back  
3           up to his job up at Dulles Airport and isn't  
4           going to be available tomorrow. So the issues  
5           of the comparisons is something that concerns me  
6           between the two projects.

7                     HEARING EXAMINER: Well, he's very  
8           welcome to come back. You know, we tried to  
9           accommodate him tonight so he didn't have to,  
10          but, but he's certainly welcome to come back.

11                    MR. GORDON: Okay. Also, I just want  
12          to make it clear that he is going to be  
13          departing so that all the parties understand  
14          that.

15                    HEARING EXAMINER: All right. We will  
16          reconvene at 10:00 in the morning.

17  
18                    NOTE: The hearing is adjourned at  
19          5:54 p.m. and continued to 10:00 o'clock a.m.,  
20          December 12, 2001.

CERTIFICATE OF COURT REPORTERS

We, Karen B. Tubbs and Susan E. Moser, court reporters with Associated Reporters, Official Court Reporters for the State Corporation Commission, Richmond, Virginia, hereby certify that we were the court reporters who took down and transcribed the matter herein, when heard on December 11, 2001, before the Honorable Deborah V. Ellenberg, Chief Hearing Examiner for the State Corporation Commission, Richmond, Virginia.

We further certify that the foregoing transcript is a true and accurate record of the testimony and other incidents of the hearing herein, taken down and transcribed by us to the best of our ability.

Given under our hand this 11th day of January, 2002.



Karen B. Tubbs  
Official Court Reporter



Susan E. Moser  
Official Court Reporter