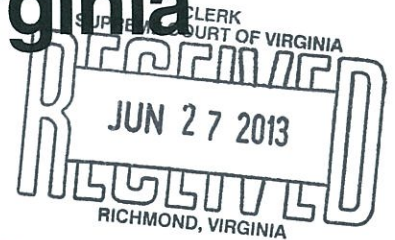


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IN THE
Supreme Court of Virginia

RECORD NOS. 130954, 130955



ELIZABETH RIVER CROSSINGS OPCO, LLC,

Appellant,

v.

DANNY MEEKS, *et al.*,

Appellees.

VIRGINIA DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

DANNY MEEKS, *et al.*,

Appellees.

APPELLEES'
ASSIGNMENTS OF CROSS-ERROR

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APPELLEES' ASSIGNMENTS OF CROSS-ERROR

Appellees, Danny Meeks et al., submit the following in response to the Petitions for Appeal filed by the Virginia Department of Transportation (VDOT) and Elizabeth River CrossingsOpCo, LLC (ERCO) and the Assignments of Error contained in each. On June 20, 2013, the Court entered an Order awarding an appeal in both cases.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellees adopt the statement of the Nature of the Case and Material Proceedings Below contained in Appellant VDOT's Petition for Appeal.

ASSIGNMENTS OF CROSS-ERROR

1. The Circuit Court erred by not granting summary judgment to Appellees on Counts 1 and 2 on the alternative ground that exacting a rate of return on private investment -- at levels agreed to by VDOT and ERCO -- through tolls imposed on users of the Downtown Tunnel/Midtown Tunnel/Martin Luther King Expressway Extension Project is an exclusively legislative function that was unconstitutionally usurped by, or unconstitutionally delegated to, VDOT. (This assignment of cross-error was preserved in the Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for summary Judgment at 10-12, 18 (3-4-13); Reply Brief in Support of Plaintiffs' Cross-

Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 1.4-5 (4-15-13); and 5-1-13 Transcript at 99-104, 109-110, 116-121 and 124-126.)

2. The Circuit Court erred by not granting summary judgment to Appellees on Counts 1 and 2 on the alternative ground that the contract by which VDOT commits to ERCO the power to exact tolls for the use of public facilities – which tolls include a return on ERCO's investment – for as long as 58 years unconstitutionally abridges the police power of the General Assembly and the sovereignty of the Commonwealth. (This assignment of cross-error was preserved in the Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 25-26; Reply Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 2, 16; and 5-1-13 Transcript at 104-105, 114-115 and 124-126.)

STATEMENT OF FACTS

The first tunnel between Portsmouth and Norfolk, the Downtown Tunnel, was authorized in 1942 and opened to traffic in 1952 as a single, two-lane tube. Ex. 2 to Brief in Support of Plaintiffs' Cross-Motion for Sum. Judg. A second crossing under the Elizabeth River, the Midtown Tunnel,

also a single, two-lane tube, was authorized in 1956 and opened to traffic in 1962. *Id.* Both facilities were financed by revenue bonds to be paid with toll revenues. Those bonds were retired in the late 1980s, and the tolls were lifted. *Id.*

As part of a federal Interstate Highway System project, a second Downtown Tunnel tube was constructed in the 1980s with direct federal and state funding. The four-lane Downtown Tunnel was taken into the Interstate Highway System as a segment of I-264, which resulted in a prohibition on any tolling of that segment as a matter of federal law. Shortly thereafter, VDOT developed plans to add a second Midtown Tunnel tube, together with major improvements at either end, including the Pinners Point Interchange and Connector Project in Portsmouth. There were no government funds available at the time to fund that undertaking. *Id.*

The General Assembly enacted the PPTA in 1995, thus providing a different method of undertaking transportation projects than direct funding from federal, state and/or local governments or debt financing through revenue bonds, double-barrel bonds or general obligation bonds. VA. ACTS 1995 ch. 647. The PPTA contemplated the infusion of private equity in transportation projects to supplement state funding and debt financing. The PPTA differed significantly from a previous legislative enactment

intended to provide a new and innovative methods of financing, constructing and operating transportation facilities: the Virginia Highway Corporation Act of 1988. That statute requires the private entity that constructs and operates the transportation facility to obtain the approval of the State Corporation Commission (SCC) before imposing user charges for the use of the facilities. VA. CODE § 56-542. The PPTA, on the other hand, does not require SCC approval of the toll rates charged by the private operator. VA. CODE § 56-556 et seq.

In 1999, a private company, Hampton Roads Public-Private Development LLC, proposed to construct the second Midtown Tunnel tube, the MLK Extension and the Pinners Point project pursuant to the PPTA using tolls reimposed on the existing Midtown Tunnel and Downtown Tunnel to fund the entire undertaking. Opposition to that proposal from the City of Portsmouth was a major contributing factor in VDOT's decision not to proceed with the proposal. The Pinners Point project was ultimately constructed as a separate undertaking without resort to toll revenue financing. The City of Portsmouth contributed funds toward the cost of construction of that \$180 million project in order to avoid the need to impose tolls for its use. It was opened to traffic in September 2004.

Also during the 1990s, VDOT proposed construction of the Martin Luther King Freeway Extension in Portsmouth. That project would extend the Freeway from I-264 to London Boulevard and would complement the Pinners Point Interchange and Connector Project, which is situated a short distance to the north of the proposed MLK Extension. A lack of available funding prevented the MLK Extension Project from being constructed at that time. Ex. 2 to Br. in Sup. Of Plts' Cross-Mot. For Sum. Judg.

In 2004, the Hampton Roads Planning District Commission and VDOT hired a consultant to determine the portion of the cost of certain large highway projects, including the second Midtown Tunnel tube, that could be funded with toll revenues. The resulting consultant study, which was completed in 2005, concluded that none of the proposed projects could be financed as a stand-alone project solely through toll revenues collected for the use of each project. The consultant developed various scenarios that assumed the collection of tolls imposed on another, existing project to supplement the toll revenues to be collected on a proposed new project. Ex. 7 to Br. in Sup. of Plts' Cross-Motion for Sum. Judg. VDOT published a Request for Information pursuant to the PPTA on November 1, 2004, regarding the proposed new Midtown Tunnel tube and approaches on either side of the Elizabeth River, which VDOT labeled "the Midtown

Tunnel Corridor Project” or “the MTCP.” Ex. 8 to Br. in sup. of Plts’ Cross-Motion for sum. Judg. Three private construction firms responded. Tidewater Skanska’s Statement of Interest (SOI) emphasized the importance of including the MLK Extension project in the MTCP undertaking, as well as the need to get FHWA approval for the re-tolling of the Downtown Tunnel “so that the tolls on both tunnels could support the bond financing of the MTCP project.” Ex. 9 to Br. in sup. of Plts’ Cross-Motion for Sum. Judg. Another private construction company, Parsons, recommended in its SOI that VDOT reimpose tolls on existing facilities and expand the scope of the solicitation. Ex. 10 to Br. in Sup. of Plts’ Cross-Motion for Sum. Judg. A third company, Jacobs, noted that the Hampton Roads Transportation Planning Organization had proposed tolling both the Midtown Tunnel and existing Downtown Tunnel “to achieve the front-end revenue necessary to reduce construction cost, increase bonding and loan capacity, and reduce accrual of interest.” Ex. 11 to Br. in Sup. of Plts’ Cross-Motion for Sum. Judg.

VDOT decided in April 2005 to combine the proposed MLK Extension with a new interchange at I-264 and the proposed new tube parallel to the existing Midtown Tunnel in what it labeled “the Midtown Tunnel Corridor Project” and to pursue the combined project as a PPTA project. Ex. 12 to

Br. in Sup. of Plts' Cross-Motion for Sum. Judg. An Environmental Assessment was published for the Route 58/MLK Extension project on April 7, 2008. Ex. 13 to Br. in Sup. of Plts' Cross-Motion for Sum. Judg. VDOT did not pursue that PPTA project, but ultimately combined the proposed second Midtown Tunnel tube, the MLK Extension and the rehabilitation of the existing Downtown Tunnel and Midtown Tunnel tubes into a single PPTA project for financing purposes in its May 2008 Solicitation for Conceptual Proposals. Ex. 14 to Br. in Sup. of Plts' Cross-Motion for Sum. Judg.

ERCO submitted its Conceptual Proposal on September 26, 2008. Ex. 1 to Br. in Sup. of Plts' Cross-Motion for Sum. Judg. The Virginia Secretary of Transportation at the time, Pierce Homer, approved the proposal for competitive negotiation and advanced it to the Independent Review Panel on February 16, 2009 (Ex. 18 to Br. in Sup. of Plts' Cross-Motion), stating:

Funding this project will require the retroactive tolling of three existing corridors – the I-264 Downtown Tunnel, the Rt. 58 Midtown Tunnel, and the Martin Luther King freeway connection to Rt. 164. Unlike the Dulles Greenway, the Pocahontas Parkway, and the 95/395/495 HOT lane projects, the project, as defined in the solicitation, does not provide for free travel alternatives.

The FHWA published an Environmental Assessment for the proposed Downtown Tunnel/Midtown Tunnel/MLK Extension Project on March 24, 2011, which stated: "The three components...have independent utility and were individually reviewed previously under the National Environmental Policy Act (NEPA). [They] are now being bundled as a single project for construction purposes as part of a public-private partnership...." Ex. 19 to Br. in Sup. of Plts' Cross-Motion.

The Comprehensive Agreement between VDOT and ERCO was executed on December 5, 2011. Comprehensive Agreement, *available at* <http://driveert.com/wp-content/uploads/2012/05/Comprehensive-Agreement.pdf>. The Agreement has since been amended twice. The first amendment inserted a severability clause and authorized postponement of tolling. First Amendment, *available at* <http://driveert.com/wp-content/uploads/2012/05/amendment-1-to-Comprehensive-Agreement.pdf>. The second provided for an additional deposit of \$362 million by VDOT for ERCO's benefit, adjusted the Public Fund Amount and authorized changes in tolling at the High Street ramps to and from the MLK Freeway. Second Amendment, *available at* <http://driveert.com/wp-content/uploads/2012/05/Amendment-2-to-Comprehensive-Agreement.pdf>.

VDOT and ERCO closed on the financing for the project on April 13, 2012.
Ex. 20 to Br. in Sup. of Plts' Cross-Motion.

Financing of the DT/MT/MLK Extension Project involves a complex mixture of direct state funding, a Transportation Finance & Innovation Act loan from the FHWA to ERCO, debt issued by the Virginia Small Business Financing Authority, Federal Transportation Grant Anticipation Notes issued by the Commonwealth, and ERCO equity investment. Br. in Sup. of Defs' Motion for Sum Judg. at 5-6. This financing scheme for the DT/MT/MLK Extension Project contrasts sharply with the method used to finance the construction of the initial Downtown Tunnel tube, which involved the issuance of state revenue bonds to cover the entire cost of the project secured by toll revenues imposed for the project's use. The initial Downtown Tunnel project was a self-financing project with the risk of financial failure resting solely on the bond buyers. Toll rates for the initial Downtown Tunnel project were set at a level that would assure the payment of debt service. Va. Acts 1942 ch. 130. Toll rates for use of the DT/MT/MLK Extension Project, on the other hand, will be set from time to time at different levels to meet several objectives, including a return on ERCO's investment, inflation, congestion management and retirement of debt incurred by the Commonwealth and ERCO.

ARGUMENT

I. The Circuit Court erred by not granting summary judgment on Counts 1 and 2 on the alternative ground that authorizing a rate of return on private investment to be collected through tolls is an exclusively legislative function that can be neither delegated to VDOT nor usurped by it.

Ratemaking is an exclusively legislative function. *APCO v. Com.*, 216 Va. 617, 625-26, 221 S.E.2d 872, 878 (1976). That function cannot be delegated to an agency, such as VDOT, which does not possess legislative power. *See id.* Under the Virginia constitutional system, only elected legislators and members of the State Corporation Commission (SCC) can exercise true legislative power. *See Marshall v. No. Va. Transp. Auth.*, 275 Va. 419, 435, 657 S.E.2d 71, 79 (2008); *City of Lynchburg v. C & P Tel. Co.*, 200 Va. 706, 712, 107 S.E.2d 462, 467 (1959); *Bd. of Superv'rs v. VEPCO*, 196 Va. 1102, 1109, 87 S.E.2d 139, 144 (1955). Indeed, the SCC is unique and was established with true legislative power in the 1902 Constitution for the purpose of regulating, and establishing the rates that can be charged by, railroads and other public service companies. *See* A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 969-70 (1974). The SCC exercises true legislative power even when it is assigned jurisdiction by the General Assembly over public service companies that

the Constitution does not explicitly assign to the jurisdiction of the SCC. *Bd. of Superv'rs v. VEPCO*, 196 Va. 1102, 1109, 87 S.E.2d 139, 144 (1955).

ERCO is a public service company that has been authorized by the PPTA and the Comprehensive Agreement to operate a state-owned facility and to provide a public service. *See Boulevard Bridge Corp. v. City of Richmond*, 203 Va. 212, 214, 123 S.E.2d 636, 638 (1962); *Gruber v. Com.*, 140 Va. 312, 322, 125 S.E.2d 427, 430 (1934). The purpose and effect of the establishment of the SCC was to place all public service companies under the supervision of that agency. The Highway Corporation Act, pursuant to which the Dulles Greenway toll road was authorized, provides: "The [SCC] shall have the power to regulate the [toll road] operator under this title as a public service corporation." VA. CODE § 56-542(B). The toll rates charged by toll road operators under that statute must be authorized by the SCC. VA. CODE § 56-542(D). When the PPTA was enacted in 1995, the General Assembly amended a predecessor statute, the Qualifying Transportation Facilities Act of 1994, which provided that a toll road operator would be "treated as a public service corporation or public utility" and that its toll rates would be authorized and regulated by the SCC. Va. Acts 1994 ch. 855. The 1995 legislation enacting the PPTA eliminated

the role of the SCC in ratemaking under that statute. Va. Acts 1995 ch, 647.

The return on investment of a private company that charges user fees to the public cannot be authorized by contract, as it has been in this case. *Town of Victoria v. Victoria Ice, Light & Power Co.*, 134 Va. 134, 155-56, 114 S.E. 92, 98-99 (1922). During the proceedings below, the Circuit Court failed to address Appellees' argument that the delegation of ratemaking for private toll road operators to public entities other than the SCC was an unconstitutional delegation of legislative power, particularly when the delegation permits ratemaking by contract.

At the May 1, 2013, hearing and in briefs, Appellees urged the trial court to invalidate the tolling provisions of the PPTA and the Comprehensive Agreement on the ground that VDOT cannot exercise the legislative power to establish the rates of a public service company. Appellees were entitled to summary judgment on Counts 1 and 2 based on the decisions of this Court which have consistently held that ratemaking is a purely legislative function that cannot be delegated by the General Assembly to any entity other than the SCC. The failure to grant relief on that basis was error.

II. The Circuit Court erred by not granting summary judgment on Counts 1 and 2 on the alternative ground that the contract by

which VDOT commits to ERCO the power to exact tolls for the use of public facilities – which tolls include a return on ERCO’s investment – for as long as 58 years unconstitutionally abridges the police power of the General Assembly and the sovereignty of the Commonwealth.

The Comprehensive Agreement provides that ERCO would be entitled to operate the Project for a period in excess of 50 years, exacting financial charges from users at rates established by that contract throughout that period. Included in the financial charges is an amount for ERCO’s return on investment which is established upon the execution of the Comprehensive Agreement and is not subject to modification by VDOT during the term of the contract. The Comprehensive Agreement also entitles ERCO to receive substantial damages if the Commonwealth or its localities construct certain transportation facilities that would compete with the Project during the term of the contract.

This Court’s decision in *Town of Victoria* not only established that ratemaking of a public service company by a municipality instead of the SCC is unconstitutional, but also held that a contract setting the rates that a public service company charges the consuming public is an unconstitutional abridgement of the police power of the Commonwealth. 134 Va. at 155, 114 S.E. at 98-99; *see Com. v. VEPCO*, 214 Va. 457, 461, 201 S.E.2d 771, 774 (1974) (“[I]f the state grants a municipality the

power to enter into an inviolable agreement fixing utility rates for the consuming public, an unconstitutional abridgement of the police power would result.”). Even when authorized by statute, contracts are subordinate to the reserved power of the Commonwealth to prescribe rates. *Town of Victoria*, 134 Va. at 155, 114 S.E. at 98-99. The police power cannot be bartered away, not even by the legislature itself.

Southern Ry. Co. v. Com., 124 Va. 36, 58, 97 S.E. 343, 349 (1918).

Because the General Assembly cannot contract away the Commonwealth’s sovereign power, it cannot delegate that prerogative to a state agency. *Id.*

Only the General Assembly can authorize payments from the state treasury. VA. CONST., art. X, § 7. The Constitution also provides: “The police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged.” VA. CONST., art. IX, § 6. State agencies are not empowered to commit the General Assembly to an obligation to pay damages for its future exercise of its police power, as provided in the Comprehensive Agreement, to surrender control over the state highway system, to prohibit the modification of the rates charged by public service companies or to inhibit the General Assembly’s ability to respond to changing conditions. *See Blackwood Coal & Coke Co. v. Old Dominion Power Co.*, 151 Va. 52, 61, 144 S.E. 439, 442 (1928)(contracts

concerning rates of public service companies are subject to the sovereign power of the Commonwealth); *Town of Victoria*, 134 Va. at 149, 114 S.E. at 97 (same); *Southern Ry. Co.*, 124 Va. at 58, 97 S.E. at 349 (control of public highways cannot be contracted away).

Contract provisions that surrender or abridge the police power of the Commonwealth are unconstitutional and invalid. See *Terry v. Mazur*, 234 Va. 442, 457, 362 S.E.2d 904, 911 (1987). The Court quoted Judge Cooley in *Mumpower v. Housing Auth.*, 176 Va. 426, 441, 11 S.E.2d 732, 737 (1940):

[T]he state cannot barter away, *or in any manner abridge or weaken*, any of those essential powers which are inherent in all governments, and the exercise of which *in full vigor* is important to the well-being of organized society, and that contracts to that end are void upon general principles.

CONSTITUTIONAL LIMITATIONS at 400 (7th ed. 1888)(emphasis added).

“Abridge” is not the equivalent of “surrender.” The former term means to reduce in scope, diminish or shorten in duration or extent. MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* <http://www.merriam-webster.com/dictionary/abridge>. The latter term means to yield to the power, control or possession of another upon compulsion or demand; to give up completely or agree to forego especially in favor of another. *Id.*, *available at* <http://www.merriam-webster.com/dictionary/surrender>.

The Comprehensive Agreement plainly diminishes and limits the police power of the Commonwealth by establishing the rates that ERCO can charge the public for the term of the contract and by obligating VDOT to pay damages if it constructs highways that it deems to be necessary and in the public interest. This abridgement violates the constitutional principle that the legislature cannot delegate the power to abridge the sovereignty to state agencies or local governing bodies. Appellees urged the trial court in briefs and orally at the May 1, 2013, hearing to invalidate the tolling provisions of the PPTA and the Comprehensive Agreement on this basis. The Circuit Court's failure to grant summary judgment on this ground was error.

CONCLUSION

For the foregoing reasons, Appellees' Assignments of Cross-Error should be granted.

Respectfully submitted,

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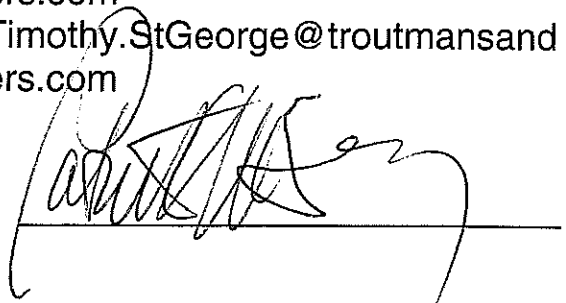
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A handwritten signature in black ink, appearing to read "George A. Somerville", is written over a horizontal line. The signature is stylized and cursive.