

OP. NO. 05-064

PUBLIC SERVICE COMPANIES: UTILITY FACILITIES ACT.

CONSTITUTION OF VIRGINIA: CORPORATIONS (POWERS AND DUTIES OF STATE CORPORATION COMMISSION).

Whether electric utility customer located in service territory of electric utility may obtain service from another electric utility through metering point in adjacent service territory is determination for State Corporation Commission.

The Honorable Terry G. Kilgore
Member, House of Delegates
December 15, 2005

Issue Presented

You ask whether the Pioneer Center for Business Opportunity ("Pioneer Center") located in Duffield, Virginia, which receives electric power service from the Powell Valley Electric Cooperative ("Powell Electric"), may construct a power line across the Clinch River to the service territory of American Electric Power ("American Power") and obtain electrical service from American Power instead of Powell Electric.

Response

It is my opinion that whether an electric utility customer located in the service territory of one electric utility may obtain service from another electric utility through a metering point in an adjacent service territory is a determination for the State Corporation Commission.

Background

You relate that the Pioneer Center is a network of small business incubators in the LENOWISCO Planning District with a goal of starting and expanding small businesses. The Pioneer Center has concerns regarding Powell Electric's charges for electric service. Further, you note that the Pioneer Center believes it could obtain less expensive power from American Power, which has the service territory across the Clinch River from the Pioneer Center. You indicate that an electric meter would be installed in American Power's service territory. Additionally, a power line would be installed and run across the Clinch River from American Power's service territory to the Pioneer Center in Powell Electric's service territory. Finally, you note that American Power will not perform any part of this task, but will allow the Pioneer Center to locate the meter in, and purchase electricity from, its service territory.

Applicable Law and Discussion

The Utility Facilities Act¹ establishes the framework for the State Corporation Commission to grant certificates of public convenience and necessity that authorize utilities to provide exclusive service in designated territories. Section 56-265.3 of the Act prohibits a utility from providing service unless it obtains such a certificate. The Supreme Court of Virginia has interpreted § 56-265.4 to "prohibit[] a utility from providing service in another utility's certificated service territory unless the utility proves to the Commission's satisfaction that the other utility is incapable of providing adequate service, but only after the other utility is given a reasonable time and opportunity to remedy its inadequacy."²

Article IX, § 2 of the Constitution of Virginia provides that:

Subject to such criteria and other requirements as may be prescribed by law, the [State Corporation] Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of ... electric companies.

The State Corporation Commission previously has adjudicated cases concerning which electric utility is entitled to serve a customer's load located on or near a service territory boundary. The Virginia Supreme Court, in affirming the Commission's most recent decision on this issue, summarized the Commission's precedent:

In the *Prince George Case*, a new customer began construction of a mineral processing plant on a tract of land located wholly within the certificated service territory of Prince George Electric Cooperative (Prince George). The customer, however, desired electric power service from VEPCO, and it purchased a narrow strip of land, 4,380 feet long and 30 feet wide, that just extended into VEPCO's service territory. VEPCO delivered electric power service to the customer through the narrow corridor to a point of use located in Prince George's service territory.

The Commission, after comparing the "point-of-use" and the "point-of-delivery" tests, concluded that the point-of-use test would best ensure the integrity of the certificated service territories. The Commission reasoned that the point-of-delivery test would destroy the essence of exclusive service territories by permitting customers, through manipulation of delivery points, to avoid receiving service from a utility that was allotted the territory in which the customer was located. In adopting the point-of-use test, however, the Commission made plain that the test is not absolute and stated the following:

While we do not here adopt any absolute test and will always consider the practical realities of each situation, we intend to ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.

In the *Kentucky Utilities Case*, Kentucky Utilities Company (Kentucky Utilities) served Sigmon Coal Company (Sigmon Coal)

in Kentucky Utilities' exclusive service territory. Sigmon Coal installed facilities that allowed it to connect with Powell Valley Electric Cooperative (Powell Valley) at a single consolidated delivery point located in the adjacent service territory allotted to Powell Valley. Powell Valley and Sigmon Coal subsequently constructed additional facilities that enabled Sigmon Coal to discontinue all service from Kentucky Utilities.

The Commission ruled that Kentucky Utilities should serve all of Sigmon Coal's facilities. The Commission concluded that, if Sigmon Coal had been "allowed to avoid its electric provider based on manipulation of its delivery point, the protection and certainty that the Utility Facilities Act was designed to provide to territorial grants would be diminished, if not significantly eroded."^{3]}

The Virginia Supreme Court also considered the State Corporation Commission's decision concerning which utility was entitled to provide service to a new, large museum facility.⁴ Approximately two-thirds of the entire site on which the museum complex was located within Dominion Virginia Power's certificated service territory.⁵ Additionally, however, approximately 95% of the main building was in Northern Virginia Electric Cooperative's (NOVEC) certificated service territory, and it was projected that over 95% of the electric service load would be located in NOVEC's certificated service territory.⁶ The Supreme Court has affirmed the Commission's determination that Dominion was entitled to provide electric service to the museum complex.⁷ The Court noted the Commission's observation that "[u]nlike the customer in *Prince George*, the [museum] did not manipulate its land purchase to reach into [Dominion Virginia Power's] service territory to place a meter."⁸ As noted by the Court, however, the Commission has not adopted any absolute test for resolving service territory disputes, but instead the Commission considers the practical realities of each situation.⁹ The Supreme Court clearly has stated that "the Commission, as the tribunal informed by experience, is required to exercise its broad discretion in order to fashion a fair, reasonable, and practical resolution of the issue" in cases such as this.¹⁰

Prior opinions of the Attorney General defer to the interpretation of the law by an agency charged with administering the law unless the agency interpretation clearly is wrong.¹¹ The Virginia Constitution grants broad powers and authority to the State Corporation Commission.¹² The Virginia Supreme Court notes that "[t]he Commission has the opportunity to know the ability and experience of the utility corporation, and the circumstances in the territory sought by it. We cannot sit as a board of revision to substitute our judgment for that of matters within the province of the Commission."¹³ Prior opinions consistently conclude that the Attorney General declines to render official opinions when the request requires the interpretation of a matter reserved to another entity.¹⁴

Conclusion

Accordingly, it is my opinion that whether an electric utility customer located in the service territory of one electric utility may obtain service from another electric utility through a metering point in an adjacent service territory is a determination for the State Corporation Commission.

¹Va. Code Ann. §§ 56-265.1 through 56-265.9 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

²N. Va. Elec. Coop. v. Va. Elec. & Power Co., 265 Va. 363, 368-69, 576 S.E.2d 741, 744 (2003).

³*Id.* at 369-70, 576 S.E.2d at 744-45 (citations omitted).

⁴See *id.* at 366-67, 576 S.E.2d at 742-43.

⁵See *id.* at 366, 576 S.E.2d at 742.

⁶*Id.*

⁷*Id.* at 372, 576 S.E.2d at 746.

⁸*Id.* at 371, 576 S.E.2d at 745 (alteration in original).

⁹*Id.* at 370-71, 576 S.E.2d at 744-45.

¹⁰*Id.* at 372, 576 S.E.2d at 746.

¹¹See 1999 Op. Va. Att'y Gen. 3, 5 and opinions cited therein; see also 2002 Op. Va. Att'y Gen. 308, 311 (concluding that since Department of Taxation is agency responsible for matter relating to situs of gross receipts and apportionment, Attorney General must defer such determinations to Department).

¹²See Va. Const. art. IX, § 2 (granting Commission power to regulate rates and service of electric companies); § 3 (granting Commission powers to administer oaths, compel witnesses, punish for contempt, and enforce compliance with orders); § 4 (providing that only Virginia Supreme Court has jurisdiction to review actions of Commission); see also Va. Code Ann. § 12.1-12 (Michie Repl. Vol. 1999) (authorizing Commission to regulate rates and service of electric companies); § 56-6 (LexisNexis Repl. Vol. 2003) (granting Commission authority to act as court of record for public service corporation grievances); § 56-35 (LexisNexis Repl. Vol. 2003) (granting Commission power and duty to supervise, regulate, and control public service companies).

¹³Va. Gas Distrib'n Corp. v. Washington Gas Light Co., 201 Va. 370, 375, 111 S.E.2d 439, 443 (1959).

¹⁴See Op. Va. Att'y Gen.: 2003 at 99, 102; 2002, *supra* note 11, at 312 n.21; 2001 at 65, 68; 1987-1988 at 69, 72.

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