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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 730938

TOWN OF CULPEPER, a Municipal Corporation

Appellant

v.

VIRGINIA ELECTRIC AND POWER COMPANY

and

NORTHERN PIEDMONT ELECTRIC COOPERATIVE, INC.

Appellees

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PETITION FOR A DECLARATORY JUDGMENT

Filed July 6, 1972

* * *

Your petitioner, the Town of Culpeper, a municipal corporation, would respectfully show unto your Honor the following facts, upon the basis of which it seeks a binding adjudication of right determining the issues presented by the facts alleged in this, its petition:

1. That petitioner is a municipal corporation, organized as a town, pursuant to the Constitution and Statutes of the Commonwealth of Virginia and at present operating under a charter originally granted by the General Assembly of Virginia on January 11, 1898 and appearing as Chapter 60 of the Acts of Assembly of 1898, which charter has subsequently been amended on numerous occasions.

2. That the defendants are public utilities chartered and organized under the laws of this Commonwealth and are and have been engaged in the generation and/or transmission, distribution and sale of electric power to customers, both public and private (including petitioner), both within and beyond the corporate limits of the Town of Culpeper.

3. That by Order entered by this Court on June 24, 1967 there was annexed to the Town of Culpeper an area of Culpeper County containing 4,313 acres, which annexation became effective at Midnight, December 31, 1967.

4. That an actual controversy exists between the plaintiff and the defendants as to the rights of the defendants to occupy and use the streets, alleys or public grounds within the area which became a part of the Town of Culpeper at Midnight on December 31, 1967, as aforesaid, without the previous consent of the corporate authorities of the Town, in accordance with the Constitution and Statutes of the Commonwealth of Virginia in such cases made and provided, the

Town of Culpeper taking the position that upon the effective date of said annexation the defendants had no authority to continue to occupy the streets, alleys or public grounds within said annexed area without the express consent of the Council of the Town of Culpeper, in accordance with the constitutional and statutory requirements, and the defendants taking a position contrary thereto.

WHEREFORE, your petitioner alleges and avers that a jurisdictional controversy exists between the Town of Culpeper and Virginia Electric and Power Company and Northern Piedmont Electric Cooperative, Inc. and respectfully requests that this Court adjudicate the respective rights of the parties hereto within the area annexed to the Town of Culpeper by virtue of the Order of June 24, 1967, as aforesaid, and to further adjudicate the rights of the parties in so far as the occupancy of the streets, alleys and publicways situate within such annexation area are concerned.

* * *

STIPULATION OF COUNSEL

Dated March 13, 1973

* * *

The Town of Culpeper (Culpeper), a municipal corporation, the Virginia Electric and Power Company (Vepco), a Public Service Corporation, and Northern Piedmont Electric Cooperative, Inc. (Northern Piedmont), a Public Service Corporation, all by counsel, for the purpose of simplifying the issues presented by the Petition for Declaratory Judgment filed in this case, hereby stipulate and agree to the following facts without further proof or certification, subject however, to the right of any party to make any legal objections thereto:

(1) That on August 29, 1966, a Motion for Annexation and Annexation Ordinance were filed by Culpeper pursuant to Virginia Code § 15.1 - 1035 for the purpose of seeking to annex 4,313 acres of Culpeper County.

(2) That on October 3, 1966, a petition to Intervene was filed by Vepco pursuant to Virginia Code § 15.1 - 1036 on the ground that the proposed annexation by Culpeper might have placed in jeopardy

Vepco's property rights in the territory sought to be annexed and Vepco's exclusive right to continue to furnish electric service in the territory allocated to it by the State Corporation Commission.

(3) That on October 12, 1966, a Petition to Intervene was filed by Northern Piedmont pursuant to Virginia Code § 15.1 - 1036 on the ground that the proposed annexation by Culpeper might have placed in jeopardy Northern Piedmont's property rights in the territory sought to be annexed and Northern Piedmont's exclusive right to continue to furnish electric service in the territory allocated to it by the State Corporation Commission.

(4) That on February 8, 1967, a Pretrial Order was entered by a Special Three Judge Annexation Court permitting Vepco and Northern Piedmont to intervene in and to be made parties to the Culpeper annexation proceeding.

(5) That on May 16, 1967, Culpeper and Vepco entered into an Agreement, a true copy of which is attached hereto as Exhibit A. Under the Agreement identified as Exhibit A, Vepco agreed, *inter alia,* to withdraw as a party to the annexation proceeding and Culpeper agreed, *inter alia,* to grant Vepco a five-year franchise to furnish electric service to that portion of the annexed area in which it was then authorized by the State Corporation Commission to furnish electric service. The Agreement provided that neither party waived any rights with respect to the disputed question of whether Vepco may continue to serve in the annexed area without an electric franchise.

(6) That on May 16, 1967, Culpeper and Northern Piedmont entered into an Agreement, a true copy of which is attached hereto as Exhibit B. Under the Agreement identified as Exhibit B, Northern Piedmont agreed, *inter alia,* to withdraw as a party to the annexation proceeding and Culpeper agreed, *inter alia,* to grant Northern Piedmont a five-year franchise to furnish electric service to that portion of the annexed area in which it was then authorized by the State Corporation Commission to furnish electric service. The Agreement provided that neither party waived any rights with respect to the disputed question of whether Northern Piedmont may continue to serve in the annexed area without an electric franchise.

(7) That on June 24, 1967, an Order was entered by a Special Three Judge Annexation Court annexing 4,313 acres of Culpeper County to Culpeper, which annexation became effective at midnight on December 31, 1967.

(8) That at the time said annexation became effective Vepco and Northern Piedmont were furnishing electrical service within the annexed area pursuant to certificates of public convenience and necessity granted to them by the State Corporation Commission of Virginia pursuant to § 56 - 265.3 of the Virginia Code. A true and authentic copy of the certificate, including all then-effective amendments and associated maps and correspondence, authorizing service by Vepco is attached hereto and marked as Exhibit C. A true and authentic copy of the certificate, including all then-effective amendments and associated maps and correspondence, authorizing service by Northern Piedmont is attached hereto and marked as Exhibit D. Vepco furnishes electric service only in the territory for which it holds a certificate, and Northern Piedmont furnishes electric service only in the territory for which it holds a certificate. The certificated territories of Vepco and Northern Piedmont together constitute the entire annexed area.

(9) That at the time said annexation became effective Vepco and Northern Piedmont owned electric distribution facilities within said annexed area. The location of the facilities of Vepco is shown on the map of the annexed area attached hereto and marked as Exhibit E, and the location of the facilities of Northern Piedmont is shown on the map of the annexed area attached hereto and marked as Exhibit F. These facilities were constructed and maintained on private property within said area pursuant to private easement agreements and, in those locations where they crossed streets or otherwise were located within street boundaries, pursuant to agreements and permits from the State Highway Department. True and authentic copies of such easement agreements held by Vepco are attached hereto and collectively marked as Exhibit G. True and authentic copies of such easement agreements held by Northern Piedmont are attached hereto and collectively marked as Exhibit H. True and authentic copies of such agreements and permits from the State Highway Department held by Vepco are attached hereto and

collectively marked as Exhibit I. True and authentic copies of such agreements and permits from the State Highway Department held by Northern Piedmont are attached hereto and collectively marked as Exhibit J.

(10) That as of December 31, 1971, Vepco had in the annexed area 992 customers to which it was serving electricity, and that the original cost of facilities in the annexed area to serve those customers, located as shown on Exhibit E, aggregated $751,815; that as of December 31, 1971, Northern Piedmont had in the annexed area 389 customers to which it was serving electricity and that the original cost of facilities in the annexed area to serve those customers, located as shown on Exhibit F, aggregated $231,885. Vepco and Northern Piedmont also have substantial investment outside of the annexed area that is required to serve customers within the annexed area.

(11) That attached hereto and marked as Exhibit K are true and authentic copies respectively of the Report of the Commissioner in Chancery, dated October 4, 1968, in the case of the *Town of Front Royal* v. *Potomac Edison Company of Virginia,* Chancery No. 1811, the Decree entered June 19, 1969, by the Honorable Rayner V. Snead, Judge Designate, in the case of the *Town of Front Royal* v. *Potomac Edison Company of Virginia,* Chancery No. 1811, the order entered by the Supreme Court of Appeals on March 10, 1970 dismissing by agreement the appeal theretofore awarded the Town of Front Royal from the decree of June 19, 1969, the agreement dated February 23, 1970 between the Town of Front Royal and the Potomac Edison Company of Virginia on the basis of which said appeal was dismissed, the opinion of the Circuit Court of Roanoke County dated August 13, 1963 in the case of *Appalachian Power Company* v. *Town of Salem,* the decree of that Court entered on September 6, 1963 and the order of the Supreme Court of Appeals entered on March 6, 1964 denying the Power Company's petition for an appeal.

* * *

Opinion of Court dated July 25, 1973

Gentlemen:

After much deliberation, I have reached the conclusion that Commissioner Archibald M. Aiken, Jr. and Judge Raynor V. Snead,

in the case of Town of Front Royal vs The Potomac Edison Company of Virginia, were correct in their decision in that case. I adopt the report of Archibald M. Aiken, Jr., Commissioner in Chancery, in that case as my decision in the case at Bar.

Mr. Ellis and Mr. Slaughter will draw an appropriate decree and submit it to Mr. Jolly and Mrs. Jefferies for their endorsement.

This has been a most interesting case, well presented, and beautifully argued by both sides. My sympathies are with the Town of Culpeper but the law appears to be on the side of the public utility.

Kindest personal regards to each counsel.

* * *

REPORT OF COMMISSIONER IN CHANCERY ARCHIBALD M. AIKEN, JR.

Dated October 4, 1968

* * *

By Order entered in this Declaratory Judgment proceeding on the 8th day of March, 1966, this proceeding was referred to the undersigned, Commissioner in Chancery of the Circuit Court of Loudoun County, Virginia, to hear evidence and make a determination and report to the Court on the following issues:

I. Whether or not the defendant Power Company is occupying or using the streets, alleys or public grounds of the Town of Front Royal, and if so, whether it has the legal right so to do;

II. Whether or not the defendant Power Company has the legal right to sell and distribute electric current and power to customers, domestic, commercial and industrial, within the corporate limits of the Town of Front Royal.

Pursuant to said Order a hearing was held on August 1, 1966 and August 2, 1966 in Leesburg, Virginia, after reasonable notice to counsel for the parties hereto, at which hearing testimony was adduced and exhibits were submitted by both parties hereto. A further

hearing was conducted at Front Royal, Virginia, on September 20, 1966, on which date your Commissioner took a view of power poles and streets in Front Royal.

On May 1, 1967, after your undersigned Commissioner stated to the Court that the services of a certified, independent land surveyor were necessary to assist him in determining which streets, alleys and public grounds of the Town of Front Royal the Defendant was occupying or using and the specific poles of the Defendant which are occupying said streets, alleys and public grounds, the Court entered an Order authorizing the employment of R. M. Bartenstein, a certified, independent land surveyor of Warrenton, Virginia, to assist the undersigned in making said determinations.

Pursuant to said authorization, Mr. Robert M. Bartenstein and his brother and partner, Mr. John H. Bartenstein, were requested to determine the location, with respect to property lines in the Town of Front Royal, Virginia, of certain power poles designated by number on the map of Front Royal filed herein as Power Company Exhibit 1 and selected by the undersigned. The poles so selected were those as to the location of which, with respect to property lines, your Commissioner was in doubt.

In October and November, 1967 the said surveyors rendered written reports of their findings, illustrated and amplified by plats which they prepared. The said reports and plats are filed herewith as Commissioner Exhibits 1 to 8 inclusive.

On January 4, 1968 a further hearing was held in Leesburg, at which Messrs. Robert M. Bartenstein and John H. Bartenstein testified concerning their surveying work in Front Royal and their findings.

During the course of this proceeding the parties have filed with your Commissioner additional exhibits and seven (7) stipulations in writing, two of which are dated September 9, 1966 and the others are dated November 7, 1966, December 30, 1966, January 20, 1967, January 31, 1968 and March 27, 1968.

In letters to your Commissioner dated April 19, 1967 and January 24, 1968 counsel for Defendant answered inquiries from your Commissioner as to when certain poles in Front Royal were installed and as to locations of certain places in the Town designated by name in one of the stipulations.

Counsel for the Town of Front Royal submitted to your Commissioner a brief, as did counsel for the Defendant, and counsel for the Town of Front Royal submitted a reply brief.

The testimony in the aforesaid hearings was reduced to writing in the form of depositions, which are returned herewith. All exhibits filed with your Commissioner as stated above, including the eight (8) Commissioner Exhibits received from the surveyors, were received into evidence and are returned herewith. Also returned herewith are the aforesaid stipulations, briefs and letters.

At the hearings on August 1, 1966 and January 4, 1968 numerous objections were made to admission of evidence. Your Commissioner excluded no evidence but believes, however, that in this report specification should be made of the objections he deems well taken. The following evidence was given no weight:

(A) On page 49 of the transcript of the hearing of August 1, 1966, testimony of witness Duncan as to statements on Highway Department plat concerning width of Kendrick Lane and the year it was established as a street are inadmissible as hearsay;

(B) On page 84 of the transcript of the August 1, 1966 hearing the affirmative answer of witness Duncan to the effect that he located on Town Exhibit 1 what he testified to are power lines within dedicated street right-of-ways, is inadmissible to prove the streets are dedicated, as there is no foundation to show dedication;

(C) On page 85 of the same transcript, the testimony of witness Duncan that he checked the official records of the Clerk's Office of the Warren County Circuit Court and that the

streets shown on the map are dedicated of record in said Clerk's Office is inadmissible as hearsay;

(D) On page 86 of said transcript, the testimony of witness Duncan that the streets are shown on plats recorded in the Warren County Clerk's Office and that the plats state that they are dedicated streets is inadmissible as hearsay;

(E) The testimony of witness Duncan on page 87 of said transcript, affirmatively answering that the area and streets shown on the map are computed for the purpose of receiving aid from the Highway Department, is inadmissible because irrelevant;

(F) On page 50 of the transcript of the hearing of January 4, 1968, the testimony of witness Robert M. Bartenstein, that he found the streets of Front Royal, when checked on the ground, to conform as well or better with the latest plats of record, than the streets of most communities the street alignments of which he had checked, is inadmissible as irrelevant.

All other evidence was deemed admissible.

* * *

Your Commissioner respectfully reports to the Court his determination of the issues set forth in the Order entered on March 8, 1966.

I. *Whether or not the Potomac Edison Company of Virginia is occupying or using the streets, alleys or public grounds of the Town of Front Royal.*

In addition to the poles and wires occupying Sixth Street and South Street pursuant to franchises duly granted by the Town and which are not the subject of dispute herein, poles and wires of the Defendant occupy streets and public grounds of the Town of Front

Royal in accordance with the following listing by lines. The poles are identified by the numbers assigned to them in the map labelled Power Company Exhibit 1 and the stipulation dated September 9, 1966 relating to poles and the traveled portion of various streets.

(A) *Manassas Avenue line:*

The following poles in this line are in Sixth Street, on the southern portion thereof, east of Happy Creek:

L-18664	L-15648	N-10162
L-18663	L-4087	N-10163
N-10158	N-10411	N-10164
L-15649	N-10161	N-10165

The wires connecting said poles overhang Sixth Street.

The following poles in this line are within the right-of-way of Manassas Avenue:

PF-577	PF-572	PF-567	PF-562	PF-557
PF-576	PF-571	PF-566	PF-561	PF-556
PF-575	PF-570	PF-565	PF-560	PF-555
PF-574	PF-569	PF-564	PF-559	S-130
PF-573	PF-568	PF-563	PF-558	S-129

Accordingly, the wires connecting said poles overhang Manassas Avenue.

Pole PF-551 is in Stonewall Drive, and the wires adjacent to said pole overhang Stonewall Drive.

In addition wires in this line overhang the following intersecting streets and ways: Happy Creek Road, Braxton Road, the southern portion of Hamilton Circle, Turner's Lane, Jackson Lane, Portsmouth Road and Route 522 near Route 55.

(B) *34.5 KV line from Front Royal to Sperryville.*

Pole SP-2 is in Manassas Avenue, and Stub 132 is in Sixth Street, with the wire connecting these poles overhanging Sixth Street. Pole SP-14 is in Braxton Road and Pole SP-15 is in Randolph Avenue, and the wire or wires connecting SP-14 and SP-15 overhand Randolph Avenue.

The following poles are within the right-of-way line of Bee Street, and the wires connecting them overhang Bee Street:

Stub 11 SP-20-A SP-21 SP-22

In addition, wires in this line to Sperryville overhang the following intersecting public streets and roads: Sixth Street, Washington Avenue, Randolph Avenue, Frederick Avenue, Happy Creek Road, Polk Avenue, Braxton Road, Rodney Avenue, Hamilton Road, Stockton Road, an un-named lane parallel to Stockton Road, Stonewall Drive, Portsmouth Road, Richmond Road and Route 55.

(C) *Linden Feeder.*

Although no poles on this line are on the street or highway, wires of this line overhang Jamestown Road and Richmond Road.

(D) *Line on East Side of Manassas Avenue.*

The following poles are in Manassas Avenue, and the wires connecting them overhang said Avenue:

RF-66	RF-63	RF-60
RF-65	RF-62	RF-59
RF-64	RF-61	RF-58

In addition, a wire or wires on this line overhang 7th Street.

(E) *West side of Manassas Avenue.*

Although no poles on this line are in the street, a wire or wires on this line overhang 7th Street.

(F) *Front Royal-Strasburg Line.*

The following poles in this line, outside the franchise area, are in the right-of-way of Sixth Street:

L-30710	SF-2-21	L-16476
SF-2-24	SF-2-20	SF-2-17
SF-2-23	SF-2-19	SF-2-16
SF-2-22	SF-2-18	

Accordingly the wires connecting said poles overhang Sixth Street.

The following poles are in the right-of-way of Kendrick Lane:

SF-2-5	SF-2-2	SF-1-217S	SF-1-213
SF-2-4	SF-1-219S	SF-1-216	SF-1-212
SF-2-3	SF-1-218	SF-1-215	SF-1-211
L-18665	SF-1-217	SF-1-214	SF-1-201

In addition the wires adjacent to said poles overhang Kendrick Lane.

(G) *Commerce Avenue Line.*

The following poles are in Commerce Avenue:

N-10081	N-2612	L-30620	L-18856
N-10080	L-35096	N-10076	N-10074

The wires adjacent to said poles overhang Commerce Avenue, and a wire or wires on this line overhangs 8th Street.

The following poles on this line are in Belmont Avenue, and the wires connecting said poles overhang Belmont Avenue:

N-10069	N-10067	N-10065	N-42	N-10060
N-10068	N-10066	N-10064	N-10062	N-10059

In addition wires on this line overhang 13th Street, 14th Street, 15th Street, 16th Street, 17th Street, 18th Street and 19th Street.

(H) *6900 Volt Line North toward Winchester.*

The following poles are in 18th Street, and the wires connecting them overhang 18th Street:

L-26270 N-10103 N-10102 N-10061 N-10104

Pole N-10061 is also in Belmont Avenue.

In addition the wires on this line overhang the following intersecting streets: Belmont Avenue, the extension of 19th Street, and North Royal Avenue.

Pole N-10105 is in the extension of 19th Street at the intersection of said extension with 18th Street.

The following poles are in North Royal Avenue, and the wires connecting them overhang North Royal Avenue:

N-10107 L-18666 N-10110
N-10108 N-10109 N-10111

(I) *Radio Station Area.*

The following poles are in Hillvue Avenue, and the wires connecting them overhang Hillvue Avenue:

N-13846 N-13847 N-13849

(J) *Line from Front Royal to Luray.*

The following poles on this line, outside the South Street franchise area, are on Route 55 and the wires adjacent to said poles overhang Route 55:

PF-535 PF-530 PF-529 PF-528 Stub 407

In addition the wires on this line overhang South Royal Avenue.

(K) Pole Number N-10193, at the intersection of Route 522 and Route 55, is within the right-of-way of Route 522.

Defendant also has power lines on poles which are owned by Virginia Telephone and Telegraph Company located in Shenandoah Avenue, 18th Street and the Chester Gap Road. Presumably Defendant still has the permission of the telephone company for such use. The telephone company has a franchise from the Town of Front Royal.

II. *Whether the Potomac Edison Company of Virginia has the legal right to occupy the streets and public grounds of the Town of Front Royal, as aforesaid.*

As of January 1, 1949 the Town of Front Royal annexed a substantial area of land which formerly had been a part of Warren County. All of the poles listed above are in the area so annexed, except poles N-10081, N-10080 and N-2612 on Commerce Avenue.

Defendant and its predecessors served Front Royal and the part of Warren County annexed as above stated for many years prior to January 1, 1949, and most of its power lines now in the annexed area were built prior to January 1, 1949. Under the Virginia Utility Facilities Act, enacted in 1950, Defendant obtained from the State Corporation Commission in 1951 a certificate of public convenience and necessity under the "grandfather" provision of Sec. 56-265.3 of the Code of Virginia authorizing it to provide electric service to customers in the annexed area and to operate therin electric transmission lines and facilities.

The Town of Front Royal contends that the Defendant is illegally occupying the aforesaid streets as listed under I above because Defendant has no franchise to use or occupy them, in violation of Sections 124 and 125 of the Virginia Constitution. Also invoked are Section 15.1-307 of the 1950 Code of Virginia and the Charter of Front Royal granted in 1937. The Town further contends that the certificate of public convenience and necessity obtained as aforesaid,

permitting Defendant to serve Front Royal and Warren County and to locate its facilities within the streets and public ways of the Town, was rendered void by the annexation as to the annexed territory.

As to the annexed area, Defendant did not become subject to the requirements of Sections 124 and 125 of the Virginia Constitution, Sec. 15.1-307 of the Code and the 1937 Charter of Front Royal until January 1, 1949. Prior to that date Defendant and its predecessors had erected their lines in the annexed area pursuant to rights-of-way obtained from private landowners. On May 27, 1930 the Board of Supervisors of Warren County, in accordance with former Sec. 4035 of the Code of Virginia (now Sec. 56-458), passed a resolution granting permission to Defendant "to construct, maintain and operate its wires and pole lines along and over the public roads and highways of Warren County . . . ". This action was taken prior to legislation granting jurisdiction over secondary roads to the Commonwealth.

Thus, on December 31, 1948 the lines owned by Defendant in the annexed area were in the following categories:

(A) Lines situated on and over private property for which Defendant had consent from private landowners;

(B) Lines originally built over rights-of-way granted by private landowners, which private ways on December 31, 1948 were included in public streets and ways constructed after installation of the lines;

(C) Lines on and over public roads and streets comprising part of the State Highway System or the secondary system of State highways, installed on said roads and streets after said roads and streets were built.

As to the lines in Category (A), the Town has no standing to complain and seeks no relief.

As to the lines in Category (B), the rights of Warren County and the Commonwealth of Virginia, as the case may be, were subject to the rights previously acquired by Defendant and its predecessors. *Armiger* v. *Lewin*, 216 Md. 470, 141 Atl. 2d 151, 69 ALR 2d 1230, annotation at 69 ALR 2d 1236.

As to the lines in Category (C), it must be inferred, because of lack of evidence to the contrary, that there was acquiescence by the State Highway Commissioner in the occupation of such roads and streets, that such occupation was legal and that there was no violation of Sec. 56-458 of the Code.

The question is thus presented whether Section 124 of the Virginia Constitution, requiring previous consent of the corporate authorities of a town before an electric power company may use the streets, alleys or public grounds of the town, which Section was made operative in the annexed area of Front Royal on January 1, 1949, has a retrospective effect.

Courts are reluctant to give a statute a retroactive effect. (Vol. 50 American Jurisprudence, "Statutes", Sec. 477).

The general rule is that statutes are to be construed to operate prospectively only, unless a contrary intention is manifest and plain. *Commonwealth v. Wellford,* 114 Va. 372, 76 S. E. 917 (1913). The Front Royal annexation ordinance and decree manifest no such contrary intention.

Section 124 is a product of the Constitutional Convention of 1901-1902. Examination of the debates concerning this section prior to passage reveals repeated use of words such as "entry", "enter", and "come in", in referring to the activity of the utilities with regard to towns which the authors of this Section were contemplating. ("Debates Constitutional Convention 1901-1902", Vol. II, pp. 1960-1985). Your Commissioner is of the opinion that such phrases evidence an intention to empower the towns to prohibit a utility from *entering* the town subsequent to the effective date of this provision of the Constitution, but not to require the ouster of utility facilities already in place prior to the effective date of Section 124. (emphasis supplied).

In *Commonwealth v. Portsmouth Gas Company,* 132 Va. 480, 112 S. E. 792 (1922), the Supreme Court of Appeals said that Sections 124 and 125 of the Constitution are not intended to operate retrospectively, the opinion stating as follows: "Furthermore, it cannot be thought that a retrospective effect was intended by the framers of the

Virginia Constitution because that would impair the obligation of the contract and would deprive the company of its property without due process of law, and thus violate Article 1, section 10, clause 1, of the United States Constitution and section 1 of the fourteenth amendment thereto".

In *City of Prichard v. Alabama Power Co.*, 234 Ala. 339, 175 So. 294, the plaintiff city invoked Sec. 220 of the Alabama Constitution in its suit for an injunction compelling Alabama Power Co. to remove its poles and wires from the public streets. Section 220 required a power company, before erecting or maintaining such poles and wires on streets, to obtain the consent of the municipal authorities. The City of Prichard was incorporated in 1925 and prior thereto the streets involved had been laid out, opened up and dedicated as public streets and roads in Mobile County, and after such dedications and prior to the incorporation the power company erected poles and wires upon and over said streets. The Court held that the provisions of Sec. 220 were not applicable to the streets and roads in question at the time the lines were constructed and the power company's rights to maintain its lines were not superseded by the subsequent incorporation. Retrospective effect to the incorporation, and an ouster of the power company's lines, were not granted.

The analogy of the non-conforming, or pre-existing, use in the law of zoning, urged by counsel for Defendant in their brief, your Commissioner believes to be valid. If zoning laws were given a retrospective effect as to such uses forfeitures would result and the law seeks to avoid such consequences. The same would be true if the Virginia Constitution, together with the Front Royal annexation of January 1, 1949, required an ouster of Defendant's poles and wires placed in the annexed area prior to said annexation.

As to the annexed area Sec. 124 became effective and operative not in 1902 but on January 1, 1949 when the Front Royal annexation ordinance and decree became effective. Furthermore, Sec. 125 of the Constitution, Sec. 15.1 - 307 of the Code and the 1937 Charter of Front Royal, particularly the Charter provisions giving the Town's Council power to deny permission to persons for occupancy of the streets and alleys with their works, did not become applicable to the

annexed area until January 1, 1949. The above laws, together with the annexation ordinance, form a system or combination of laws which did not become operative against Defendant in the annexed area until said date and should not be given a retroactive effect.

In support of its contention that the Defendant derives no authority from the State Corporation Commission for the presence of its poles and wires in the annexed area, Plaintiff relies heavily on two Virginia decisions. *Carolina Coach Company v. City of Norfolk,* 202 Va. 322, 117 S. E. 2d 131 (1960) and *Appalachian Power Company v. Town of Salem,* in which the Supreme Court of Appeals on March 6, 1964 refused an appeal from the Circuit Court of Roanoke County.

The decision in the *Carolina Coach Company* case was based on this unequivocal language of Sec. 56-273, subsection (k) of the Code: "but nothing contained in this chapter shall be construed to mean that the Commission can issue any such certificate authorizing in-tracity transportation".

The "certificate" referred to is a certificate of public convenience and necessity, and the "chapter" referred to is Chapter 12 of Title 56 of the Code.

The Utility Facilities Act is contained in a different chapter of Title 56, namely Chapter 10.1. There is no provision in the Utility Facilities Act, nor in any other portion of Title 56, nor in the Virginia Constitution, prohibiting the issuance of a certificate of public convenience and necessity by the State Corporation Commission to an electric power company for service, or construction and maintenance of facilities, within a city or town. Thus, the *Carolina Coach Company* case is clearly distinguishable from our case.

In the *Appalachian Power Company* case, the Supreme Court of Appeals rendered no opinion other than to state that the decree of the Circuit Court of Roanoke County "is plainly right". A careful reading of the said decree and the accompanying opinion of Judge Hoback discloses that the holding of the Circuit Court was controlled by interpretation of the franchise of 1956 and the contract of 1960 between the power company and the town. A significant paragraph of

the opinion states that it "appears from the acts of the parties themselves, that the customers being furnished electric energy in the annexed areas of 50 horsepower or less, should be turned over to the Town by the Company by virtue of the interpretation that the parties hereto have previously put upon the franchise and the contract, . . . ". In the Decree the Court said it was of the opinion that the franchise granted to Appalachian Power Company by the Town of Salem in 1956 and the contract of August 1, 1960, automatically extended to and became operative over all areas annexed to the Town in 1959 and thus vested in the Town and the Company the right to serve in the annexed areas only those classes of customers in the annexed area as they have the right to serve in the "Old Town Areas". Indeed it appears that there was agreement between the parties that the said franchise and contract extended by operation of law over the annexed areas. Although there is a statement in the opinion that "any prior rights granted by other governmental agencies are extinguished after annexation", such a determination was not necessary to the holding of the Court and is deemed dictum, as the holding was governed by interpretation of the franchise and contract, which both parties accepted as operative. A utility can contract with a town even if a certificate of public convenience and necessity is still in effect, particularly where it wants the consent of the town for use of its streets. The dictum might have been induced by what your Commissioner feels was an erroneous view of the import of the ruling in the *Carolina Coach Company* case. The proposition for which the Town of Front Royal contends is a drastic one, entailing an abridgement of the police power of the Commonwealth by the partial nullification of the act of an agency of the Commonwealth, the State Corporation Commission. Your Commissioner believes that in the absence of a clearer expression from the Supreme Court of Appeals than is afforded by its denial of the appeal in the *Appalachian Power Company* case, the above quoted provision of Sec. 56 - 273(k) of the Code, on which the decision in the *Carolina Coach Company* case turned, should not be extended by judicial decision into the legislative enactments relating to electric power companies.

In invoking Sec. 56 - 273(k) and demanding the ouster of Defendant's facilities in the annexed area, Front Royal is in effect claiming that the State Corporation Commission has no authority to

issue a certificate of public convenience and necessity in an incorporated city or town and that its power to issue such certificates under the Utility Facilities Act is confined to the unincorporated areas of Virginia. I find no constitutional or statutory provision supporting such a sweeping assertion. The Commission manifestly did not deem itself so confined, as evidenced by the grant of certificates to Defendant for *Winchester, Luray,* and *Berryville,* in addition to Front Royal. (Power Company Exhibit 50).

Furthermore, an indication that such a drastic result is not warranted is provided by the last paragraph of Sec. 56 - 265.4:1 in the Utility Facilities Act: "Nothing herein shall be construed to increase, decrease or affect any rights a municipal corporation, public utility or other governmental body may have with regard to supplying electric public utility service in areas heretofore or hereafter annexed by such municipal corporation". Sec. 56 - 265.4:1 became effective in 1964 after the decisions in the *Carolina Coach Company* case and the *Appalachian Power Company* case. It is believed that the General Assembly in this paragraph recognized that an electric public utility could have rights to supply electric public utility service in areas annexed by a municipal corporation. In the context of the Act, such rights would include rights under a certificate of public convenience and necessity granted by the State Corporation Commission.

It is the opinion of your Commissioner that, in order to protect the vested rights of the Defendant from a deprivation of property without due process of law, in violation of the Virginia and United States Constitutions, only those poles of Defendant which were placed in their present positions in the streets or public ways of Front Royal after December 31, 1948 without the consent of the Town of Front Royal should be removed from public property, and that those placed in their present positions in the streets and public ways before January 1, 1949 are legally occupying such streets and public ways.

Accordingly, I am of the opinion that the following poles listed by number under Question I above, which are occupying streets or public ways of Front Royal without the consent of said Town as required by Section 124 of the Virginia Constitution, should be removed from such public property:

PF-551	SP-2	SP-21	L-26270
PF-557	Stub 11	SP-22	Stub 407
PF-565	SP-20-A	L-30620	N-10193

Certain poles are listed under Question I as being in the street on the east side of Manassas Avenue and in Commerce Avenue, and as to these poles an explanation of the reasons why they are not included among those which should be removed is in order.

Poles RF-66, RF-65, RF-64,RF-63, RF-62, RF-61, RF-60, RF-59 and RF-58 on the east side of Manassas Avenue were erected after the annexation pursuant to permission unanimously voted by the Town Council of Fron Royal in May, 1949. (Town Exhibit 7). This action of the Council was implemented by the granting of an easement or right-of-way by the Town to Defendant, executed by the Mayor of Front Royal and acknowledged on July 6, 1949. This instrument recites the receipt of valuable consideration for the grant. A copy of said easement is Power Company Exhibit 21. There was no advertisement or receipt of bids prior to this grant pursuant to Sec. 125 of the Constitution.

The Defendant contends that the Town should be stopped to claim that Defendant does not have the legal right to occupy its streets for at least a reasonable period of time not to exceed thirty years. The Town contends that ultra vires acts of municipal officials cannot be ratified or confirmed, and that the powers of a municipal corporation cannot be extended by estoppel.

Admittedly there were irregularities and omissions in connection with this grant to Defendant of a right-of-way on the east side of Manassas Avenue between Sixth Street and the Southern Railroad Y. There was no advertisement or reception of bids as prescribed in Section 125 of the Virginia Constitution and Sections 3016, 3018, 3019 and 3020 of Code of 1919 (now sections 15.1 - 307, 15.1 - 308, 15.1 - 309 and 15.1 - 310 respectively), nor was a bond required as prescribed by former Section 3020 (now. Section 15.1 - 312) of the Code. A careful reading of these sections, however, particularly said Section 3020, reveals that it was not essential to the grant that it be made to the highest bidder, or indeed, to any bidder at all, as the

eventualities of an award to a lower bidder and of the non-existence of a bid, are covered and treated as permissible. The provision as to a bond was held to be merely directory in *Town of Victoria v. Victoria Ice, Light and Power Co.*, 134 Va. 124, 114 S. E. 89 (1922). Another asserted defect in that case was the omission of certain language in one of the publications of the advertisement. This failure of strict compliance was held not to invalidate the ordinance, notice being held to be not essential in the performance of this legislative function.

Under Sec. 3024 of Code of 1919 (now Section 15.1 - 316) the use of the public places pursuant to a legally obtained consent is as permissible as occupation after securing a franchise.

In this connection it should be noted that Section 18 of Chapter V of Front Royal's Charter approved January 18, 1937 contains the following:

> "but no person shall occupy with his works, or any appurtenances thereof, the streets, side-walks or alleys of the town, without the consent of the council, duly entered upon its records".

This constitutes special legislation of the General Assembly for Front Royal, and compliance therewith has been effected as to this line on the east side of Manassas Avenue, as the consent is shown on the Town Council's minutes.

The opinion in the case of *Daniel v. Sherrill* (Florida), 48 So. 2d 736, 23 A. L. R. 2d 1410 (1950), contains reasoning which I believe is pertinent to our case. In that case an agency of the State of Florida brought suit to quiet title. The land in question had been owned by the United States government prior to 1869 but in that year the county records were destroyed. Gonzalez and Maxwell, predecessors in title to defendants, purchased tax certificates for the years 1870, 1871 and 1872 and acquired tax deeds to the land from the State of Florida as grantor. The purchasers and their successors in title paid state and county taxes assessed on the land until 1933 when Florida ceded the property to the United States. After a re-purchase from the United States this suit to quiet title was brought.

In the lower court the Chancellor held that he had no jurisdiction to enforce against the sovereign the equities arising from the counter-claims, including the claim that plaintiff is estopped to deny the title of the grantees, Gonzalez and Maxwell, and their successors in title. The Supreme Court of Florida reversed this ruling, saying that the great weight of authority is that "when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances". The tax deeds were invalid as the United States owned the land, but the Supreme Court of Florida held that the State is estopped to question the validity of such deeds and the truth of their recitals.

In *Board of Managers etc. v. Wilmington,* 74 S. E. 2d 749 (N. C. 1953) and *American La France v. Arlington County,* 164 Va. 1, 178 S. E. 783 (1935), cited in Plaintiff's reply brief, the City of Wilmington and Arlington County, respectively, were defendants, not plaintiffs. The Town of Front Royal here set in motion the machinery of a court of equity and should be subject to the rules of estoppel. Your Commissioner is of the opinion that it would be inequitable for Front Royal, through unanimous vote of its governing body and execution of a right-of-way instrument containing a general warranty, to grant permission to Defendant in 1949 to occupy the east side of Manassas Avenue with its poles and wires and contend 17 or 18 years later, after construction in reliance thereon, that the poles should be removed because Front Royal's governing body in 1949 failed to observe certain formalities in exercising a power which it possessed to permit use of the streets.

The duration of this easement, on the face of the instrument, ostensibly is perpetual, but by operation of Section 125 of the Constitution, it is limited to 30 years from July 6, 1949.

In a somewhat different category are poles N-10081, N-10080 and N-2612, which were in Commerce Avenue within the corporate limits before the 1949 annexation, being part of a line built in 1922. No evidence of any formal consent by the Town to this occupancy of Commerce Avenue has been presented. It was within the power of the

Town, however, to consent thereto. In 1962 these poles were moved slightly to the west of their original location, which was in the street, at the request of both the Town and the Virginia Department of Highways, Commerce Avenue being then a part of the primary system of state highways as a portion of the Route 522 By-Pass. The presence of these poles in Commerce Avenue for many years presumably has not been a matter of concern to the Town of Front Royal, as it has for a long period of time obviously acquiesced in their presence there, and in 1962, at the time of the construction of said By-Pass, instead of demanding their removal from the highway, knowingly acquiesced, to say the least, in their removal to their present location farther away to the west from the eastern boundary of Commerce Avenue. Your Commissioner believes that the reasoning of the Florida Supreme Court in *Daniel v. Sherrill,* supra, is controlling here and that the Town of Front Royal is estopped from demanding the removal of these three poles notwithstanding non-compliance with legal formalities.

Pole L-35096, although placed in Commerce Avenue at its present location within the annexed area after January 1, 1949, was so placed there at the request of the Town and the Department of Highways and should not be removed. The Town should not be permitted to set in motion action by the Defendant, with the attendant effort and expense by the latter, and later reverse itself at its whim.

III. *Whether or not the defendant power company has the legal right to sell and distribute electric current and power to customers, domestic, commercial and industrial, within the corporate limits of the Town of Front Royal.*

Before the Constitution of 1902 became effective the State, through the legislature, had plenary power over the rates of all public service corporations, and the purpose of the Constitutional Convention of 1902 was to exercise the dormant power of the State for the control of such corporations. *City of Richmond v. Chespeake & Potomac Telephone Company,* 127 Va. 612, 105 S. E. 127 (1920).

The authority to prescribe rates is part of the police power of the

State. *Town of Victoria v. Victoria Ice, Light & Power Co.*, 134 Va. 134, 114 S. E. 92 (1922).

The right of the Commonwealth, through such instrumentalities as it may select, to prescribe and define the public duties of all public service corporations and to regulate and control them in the performance of their public duties is placed on an equal footing with the right to regulate their charges by Section 164 of the Virginia Constitution and hence is a part of the police power of the State, which shall never be surrendered or abridged. (Section 159 of the Virginia Constitution).

The Commonwealth's police power to regulate the activity of public utilities furnishing electric power is delegated by the Constitution to the State Corporation Commission "subject to the superior authority of the General Assembly to legislate thereon by general laws". (Section 156, subsection (b) of the Virginia Constitution). The only qualification on the exercise of such police power by the State Corporation Commission, other than the superior authority of the General Assembly mentioned above, is the proviso in Section 156 (b) as to the right conferred by law on a municipality or county to prescribe rules, regulations or rates of charge in connection with services performed by a public service corporation under a franchise. This proviso, which does not derogate from the power of the General Assembly since it preserves a right "conferred by law", refers to a power to regulate and not a power of exclusion or ouster by a municipality.

The power to regulate the service to be performed by an electric power public utility, included within the police power delegated as above stated by Section 156 (b) of the Constitution, was exercised by the General Assembly by passage of the Utility Facilities Act. Section 56 - 265.3, a part of this Act, requires such public utility to obtain from the State Corporation Commission a certificate of public convenience and necessity before furnishing public utility service. The Defendant's providing of service in Front Royal and Warren County antedated the passage of this Act in 1950, and thus Defendant came under the "grandfather" clause of said section which provided that upon filing with the Commission maps of the

territories being served by it on July 1, 1950, within ninety days after said date, an electric power public utility was entitled to a certificate of public convenience and necessity for the continuance of service to such territories. As urged by Defendant in its brief, this is a legislative declaration that the public convenience and necessity require all of the services being rendered by Defendant on July 1, 1950.

On September 28, 1950 Defendant filed with the Commission maps showing the territory served by it with electric service on July 1, 1950. On October 31, 1951 the Commission issued a certificate of public convenience and necessity for Defendant to furnish electric service in the Town of Front Royal and in all of Warren County. Prior to that time Front Royal had completed its 1949 annexation, yet the State Corporation Commission did not exclude Front Royal or any part thereof from the service area covered by the certificate.

The grant of this certificate was an exercise of the police power of the Commonwealth, and Sec. 56 - 265.5 of the Code states that certificates issued under the Utility facilities Act "shall remain in effect until terminated as herein provided". Annexation by a municipality of an area covered by a certificate is not one of the enumerated grounds for termination. As annexations of county land by towns and cities have been accomplished many times over a long period of years in Virginia it is significant that the General Assembly did not include annexation within the grounds for termination of the effectiveness of a certificate of public convenience and necessity.

As stated hereinabove under Question II, there is no provision in the Virginia Constitution or in Title 56 of the Code, which relates to public utilities, prohibiting the issuance of a certificate of public convenience and necessity to an electric power company for the furnishing of service within a city or town. Likewise the comments under Question II above concerning the *Appalachian Power Company v. Town of Salem* decision, the decision in the *Carolina Coach Company* case, and Section 56 - 265.4:1 are applicable also to the issue as to whether Defendant may provide service in Front Royal.

The fact that events subsequent to July 1, 1950 have not

eliminated the convenience and necessity for Defendant's electric power in the Town of Front Royal is attested by the proposed purchase by the Town of electricity from the Defendant for resale to the ultimate customers, as described on page 12 of Front Royal's Reply Brief.

It is true that Front Royal, under Section 124 of the Constitution, can limit and impede Defendant to a certain extent in its operations under its certificate of public convenience and necessity by refusing its consent to occupancy of its streets and public ways by poles so placed or intended to be so placed in the annexed area after December 31, 1948, except for the poles as to which the doctrine of estoppel applies as stated above. The possession of such power by the Town, however, does not enable it to render null and void the certificate of public convenience and necessity and the Commonwealth's police power of which the grant of the certificate was an exercise, by the use of Section 124 of the Constitution and the withholding of its consent thereunder. This would amount to a violation of Sections 159 and 164 of the Constitution. The certificate of public convenience and necessity is still subsisting, although its practical value to Defendant in the Town of Front Royal is somewhat lessened by the Town's powers under Section 124 of the Constitution.

In conclusion it is my opinion that The Potomac Edison Company of Virginia has the legal right to sell and distribute electric current and power to customers, domestic, commercial and industrial, within the corporate limits of the Town of Front Royal.

* * *

FINAL DECREE

Entered October 5, 1973

* * *

This cause came on this day to be heard upon the Petition for Declaratory Judgment of the Town of Culpeper; upon the Answer of the Northern Piedmont Electric Cooperative, Inc.; upon the Answer of the Virginia Electric and Power Company; upon testimony of witnesses on behalf of the parties taken *ore tenus* on July 10, 1973; upon the Stipulation among the parties, dated March 13, 1973; upon the exhibits admitted into evidence on July 10, 1973; upon

memoranda of authorities filed by the parties herein; and was argued by counsel.

Upon consideration of all of which the Court is of the opinion, for the reasons expressed it its letter to counsel dated July 25, 1973, a copy of which is made a part of the record, and for the reasons expressed in the Report of the Commissioner in Chancery, Archibald M. Aiken, Jr., dated October 4, 1968 in the case of the *Town of Front Royal* v. *Potomac Edison Company of Virginia,* a copy of which is made a part of the record, and doth ADJUDGE, ORDER and DECREE, that Virginia Electric and Power Company and Northern Piedmont Electric Cooperative are legally and properly occupying and using the streets, alleys and public grounds of the Town of Culpeper within those portions of the area annexed by the Town for which they hold certificates of public convenience and necessity from the State Corporation Commission, and that Virginia Electric and Power Company and Northern Piedmont Electric Cooperative have the legal right to sell electric current and power to customers within those portions of said area, and the Town of Culpeper, having indicated its intention to appeal from this Decree, doth except to the rulings of the Court herein.

And it appearing that nothing further remains to be done in this cause, it is ORDERED that the same be removed from the docket and placed among the ended causes of this Court properly indexed, each party hereto to bear its own costs.

The transcript of the hearing held on July 10, 1973 is hereby made a part of the record pursuant to Rule 5:9(a) of the Rules of the Supreme Court of Virginia.

* * *

ASSIGNMENT OF ERROR

* * *

The petitioner, Town of Culpeper, hereby assigns as error the following ruling of the trial court herein:

1. That the Court erred in adjudicating for the reasons expressed in its letter dated July 25, 1973, which in turn adopted the

report of Archibald M. Aiken, Commissioner in Chancery, as its decision that Virginia Electric and Power Company and Northern Piedmont Electric Cooperative, Inc. are legally and properly occupying and using the streets, alleys, and public grounds of the Town of Culpeper within the portions of the area annexed by the Town by virtue of Certificates of Public Convenience and Necessity issued by the State Corporation Commission.

* * *

TRIAL EXHIBIT #1
VIRGINIA ELECTRIC AND POWER COMPANY

Commonwealth of Virginia

State Corporation Commission

I, Fannie W. Grady, First Assistant Clerk of the State Corporation Commission, do hereby certify that this Commission regulates rates and services and has issued certificates of public convenience and necessity under the Utility Facilities Act for the furnishing of electric service in the towns shown on the attached list.

In Testimony Whereof I hereunto set my hand and affix the Official Seal of the State Corporation Commission, at Richmond this 1st day of May A. D. 1973

Fannie W. Grady
First Assistant Clerk of the Commission

Abingdon
Accomac
Alberta
Altavista
Amherst
Appalachia
Appomattox
Ashland
Belle Haven
Berryville
Big Stone Gap
Blackstone
Bloxom
Bluefield
Boones Mill
Bowling Green
Boyce
Boydton
Boykins
Branchville
Bridgewater
Broadway
Brodnax
Brookneal
Buchanan
Burkeville
Cape Charles
Capron
Cedar Bluff
Charlotte Court House
Chase City
Chatham
Cheriton
Chilhowie
Chincoteague
Christiansburg
Claremont
Clarksville
Cleveland
Clifton
Clinchport
Clintwood
Clover
Coeburn
Colonial Beach
Columbia
Courtland
Craigsville
Crewe
Culpeper
Damascus
Dayton
Dendron
Dillwyn
Drakes Branch
Draper
Dublin
Duffield
Dumfries
Dungannon
Eastville
Edinburg
Exmore
Farmville
Fincastle
Floyd
Front Royal
Gate City
Glade Spring
Glasgow
Glen Lyn
Gordonsville
Goshen
Gretna
Grottoes
Grundy
Halifax
Hallwood
Hamilton
Haymarket
Haysi
Herndon
Hillsboro
Hillsville
Holland
Honaker
Hurt
Independence
Irvington
Ivor
Jarratt
Jonesville
Keller
Kenbridge
Keysville
Kilmarnock
La Crosse
Lawrenceville
Lebanon
Leesburg
Louisa
Lovettsville
Luray
Madison
Manassas
Manassas Park
Marion
McKenney
Melfa
Middleburg
Middletown
Mineral
Monterey
Montross
Mount Crawford
Mount Jackson
Narrows

Nassawadox
New Castle
New Market
Newsoms
Nickelsville
Occoquan
Onancock
Onley
Orange
Painter
Pamplin City
Parksley
Pearisburg
Pembroke
Pennington Gap
Phenix
Pocahontas
Poquoson
Port Royal
Pound
Pulaski
Purcellville
Quantico
Remington
Rich Creek
Ridgeway
Rocky Mount
Round Hill
Rural Retreat
Saltville
Saxis
Scottsburg
Scottsville
Shenandoah
Smithfield
South Hill
Stanardsville
Stanley
Stephens City
St. Charles
St. Paul
Stony Creek
Strasburg
Stuart
Surry
Tangier
Tappahannock
Tazewell
The Plains
Timberville
Toms Brook
Troutdale
Troutville
Urbanna
Victoria
Vienna
Vinton
Virgilina
Wachapreague
Wakefield
Warrenton
Warsaw
Washington
Waverly
Weber City
West Point
Whaleyville
White Stone
Windsor
Wise
Woodstock
Wytheville

* * *

DIRECT EXAMINATION OF ERNEST M. JORDAN, JR.

Transcript dated July 10, 1973

* * *

[13]
BY MR. ELLIS:

Q Would you state your full name, please?

A Ernest M. Jordan, Jr.

Q Where do you live, Mr. Jordan?

A 2405 Raymond Avenue, Richmond.

Q Are you employed?

A Yes.

Q By whom?

A By the State Corporation Commission.

Q In what capacity?

A I am director of the Division of Public Utilities.

Q What are your duties as director of the Division of Public Utilities?

[14]
A The Division of Public Utilities is generally responsible for assisting the Commission in the administration of the laws, rules, and regulations pertaining to rates and service of public utilities.

Q Do your duties then include involvement in the administration of the Utility Facilities Act?

A Yes.

Q In that connection are you personally familiar with the jurisdiction and authority exercised by the State Corporation Commission under the Utility Facilities Act over public utilities such as the power company and Northern Piedmont within and without both town and city boundaries in Virginia?

A Yes.

Q In that connection does the State Corporation Commission regulate the rates charged by public utilities such as Virginia Electric and Power Company and Northern Piedmont for services they render within the boundaries of the town and cities in Virginia?

A Yes, it does.

Q Are public utilities such as the two I mentioned subject to the very same rate regulations outside municipal boundaries as inside municipal boundaries?

A Yes.

[15]

Q Does the State Corporation Commission also regulate the services furnished by public utilities such as the power company and Northern Piedmont within the boundaries of both towns and cities in Virginia?

A Yes, it does.

Q Is the regulation by the Commission over the services rendered by the power company and Northern Piedmont the same within as without the boundaries of the cities and towns of Virginia?

A Yes, the Commission's regulation is the same in cities and towns and outside cities and towns for both rates and service.

Q Now, with regard to the regulation of service, does the State Corporation Commission approve the construction of the major transmission facilities of public utilities such as the power company

and Northern Piedmont both within and without the boundaries of towns and cities of Virginia?

A Yes, it does.

Q Does the State Corporation Commission issue certificates of public convenience and necessity for public utilities such as the power company and Northern Piedmont to furnish their service within the boundaries of both towns and cities in Virginia?

[16]

A Yes.

Q And in this regard, Mr. Jordan, does the State Corporation Commission by issuing these certificates actually allocate operating territories between and among public utilities such as the power company and Northern Piedmont within the boundaries of the towns and cities in Virginia?

A Yes.

MR. ELLIS: Your Honor, Power Company Trial Exhibit No. 1 is the certificate of fact.

BY MR. ELLIS:

Q Mr. Jordan, I hand you a copy of Power Company Trial Exhibit No. 1, and ask you whether you recognize that?

A Yes. This list of cities and towns was prepared — was checked — in my office under my supervision.

Q And that indicates the towns within which the State Corporation Commission has allocated territories by issuing certificates of public convenience and necessity to public utilities, does it not?

A Yes. The Commission has issued a certificate of convenience and necessity for utilities to operate in each of the towns on this list.

[17]

Q Thank you. Now, Mr. Jordan, in your capacity as director of the Division of Public Utilities, what action would you take in the event that you discovered a public utility such as the power company or Northern Piedmont furnishing electric service within a municipality without a certificate of public convenience and necessity from the Commission?

A At any time I was made aware of any utility serving either in the city or county or anywhere and not having a certificate to cover that territory, I would request counsel for the Commission to prepare the necessary papers to issue a show cause order against the utility to show cause why it should not be required to abandon such service.

Q Are you aware of any public utility within such a municipality area, within municipal boundaries, without a certificate of public convenience and necessity?

A No.

Q With regard to the Power Company Trial Exhibit No. 1, that lists towns by itself, doesn't it?

A Yes, this does not include cities.

Q Would the same statement which appears on the certificate also be true of cities as well?

A Yes. I mean, the Commission has issued [18] certificates for cities within the state.

* * *

MR. ELLIS: No further questions, You Honor.

THE COURT: Mr. Jolly.

CROSS-EXAMINATION

BY MR. JOLLY:

Q Mr. Jordan, being familiar with the Utility Facilities Act, municipals are specifically exempt therefrom, are they not, sir?

A Yes, sir, I believe that in the definition of a public utility, a municipal is not defined as a public utility, and the requirement for certification is upon public utilities.

There is one amendment to the Act in 1964 pertaining to the service of municipal government of electric systems outside the corporate limits of the jurisdiction.

Q Well, the answer to my question is, then, that municipals are exempt from the Utility Facilities Act; is that correct?

A No, sir, not completely. The 1964

* * *

[24]

GILBERT H. PIERCY, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ELLIS:

Q State your name, please.

A My name is Gilbert H. Piercy.

Q Where do you reside, Mr. Piercy?

A 2515 Woodhurst Road, Charlottesville, Virginia.

Q Are you employed?

A Yes.

Q By whom?

A The Virginia Electric and Power Company.

Q In what capacity?

A I am the Blue Ridge District Manager.

Q What are your duties as Blue Ridge District Manager?

A As district manager, I have responsibility [25] for the overall sales function of the company of electricity within the Blue Ridge District. This includes the sale of electricity to wholesale municipalities and cooperatives including all of our contractual arrangements with them related to the purchase of power and territorial assignments.

Q What position did you hold before you became district manager in the Blue Ridge District?

A I was assistant manager of power contracts in our system office in Richmond, Virginia.

Q What were your duties as assistant manager of power contracts?

A I was the coordinator of associations with our wholesale customers including REA cooperatives, municipals, and the one private power company that we sell at wholesale throughout the company's entire service area.

Q Mr. Piercy, are you familiar with the manner in which the power company serves its customers in the annexed area of Culpeper and in the County of Culpeper?

A Yes.

MR. ELLIS: If Your Honor please, I would like now to be able to use Power Company Trial Exhibit No. 4.

THE COURT: Certainly.

[26]

BY MR. ELLIS:

Q Mr. Piercy, do you recognize this (indicating Power Company Trial Exhibit No.4)?

A Yes.

Q Was it prepared under your supervision?

A Yes, it was.

Q Would you tell the Court, please, what it depicts?

A Basically, it is a map of the Town of Culpeper showing in the center area, bounded by a black and white broken line, the boundary of the Town of Culpeper prior to the annexation on January 1, 1968. And it shows immediately adjacent to that, bounded by the solid black line, that area that was annexed in 1968.

Q What are the red lines there depicting?

A The red lines indicate power lines of the Virginia Electric and Power Company in the annexed area, that is, that area that was annexed in 1968.

Q What do the numbers on top of the red lines indicate?

A The numbers on the red lines and the green lines indicate the year in which that section of that line was built in its present location, and you didn't ask, but the green lines indicate the location of facilities in [27]the old corporate limits.

Q What do the yellow areas indicate?

A The yellow areas are the areas certificated by the State Corporation Commission to Northern Piedmont Electric Cooperative in the annexed area, and the uncolored area in the annexed area is certificated by the State Corporation Commission for VEPCO.

Q Now, Mr. Piercy, does this Power Company Trial Exhibit No. 4 depict only those power company facilities in place at the time of the annexation?

A That is correct, the facilities shown here were the transmission and distribution facilities of VEPCO as of the time of the annexation. It does not, as a point of interest, show the service drops to individual customers. It shows only the transmission and distribution facilities.

Q I see. Has the power company constructed new facilities within the annexed area to serve customers within the annexed area and in the County of Culpeper since the annexation?

A Yes, it has.

Q Can you, in a general way, by referring to Power Company Trial Exhibit No. 4, indicate to the Court the extent and nature of these new facilities?

[28]

A Well, without going into specific detail, the bulk of our new facilities that were constructed in the area are in the southern part of the area, basically between this line (indicating), and Route 29, and in the area in the northwest, adjacent to Route 522 going west (indicating).

Q Now, Mr. Piercy, would you please mark this line I am indicating with a capital A, please?

A (The witness complied.)

MR. ELLIS: Can the Court see that?

THE COURT: I can see that.

BY MR. ELLIS:

Q Now, Mr. Piercy, tell us, please, what purpose line A serves?

A Line A is the 115,000 volt transmission line that provides all of the electricity into the Town of Culpeper and the bulk of the electricity for the County of Culpeper.

Q Now, so that I am clear about this, does that mean that all of the power for the power company to serve its customers in the annexed area and the bulk of its customers in the County of Culpeper comes in through that line?

A Actually it means a little bit more than that. Not only does it supply all of the electricity [29] that VEPCO serves to its ultimate customers, it also provides electricity to Northern Piedmont Electric Cooperative, who, in turn, sells to customers.

Additionally, it provides an alternate supply to a neighboring utility, Potomac Edison Company of Virginia, and it also has an interconnection with us that supplies from that source.

Q All right. Now, that power comes in there. Is this a direct distribution point there?

A This is a substation.

Q Could you mark that with a capital B, please?

A (The witness complied.) The green square is a substation that transforms electricity from 115,000 to 34,500 volts, and to 12,500 volts. Both of those voltages are direct voltages, and we utilize them to distribute electricity from that point with those two voltages.

Q And by "distribute," you mean to the customers in the annexed area and also in the County of Culpeper?

A That is right.

Q Now, Mr. Piercy, does the line that you have marked as line A cross the street in the annexed area?

[30]

A Yes, it does. It crosses the street right here (indicating).

Q Can line A deliver power to the distribution point marked B on Power Company Trial Exhibit No. 4 without crossing a street in the annexed area?

A No, it cannot.

Q It cannot?

A It cannot.

Q So, Mr. Piercy, if the Town of Culpeper could and did prohibit the power company from crossing streets in the annexed area, would the power company be able to deliver power to the distribution point and thence to its customers in the annexed area and in the County of Culpeper?

A No, we could not.

Q Mr. Piercy, would you mark this line with a C?

A (The witness complied.)

Q And mark this line with a D, please.

A (The witness complied.)

MR. ELLIS: Are those evident to the Court?

THE COURT: Yes, I can see them.

BY MR. ELLIS:

Q Now, Mr. Piercy, would you tell the [31] Court, please, what function those lines serve?

A The line designated C is a line coming from our substation and going to a delivery point to Northern Piedmont Electric Cooperative. Its only function as far as we are concerned is to supply electricity to Northern Piedmont.

Q Now, in order for the power company to deliver power to the Co-op and for the Co-op, in turn, to serve its customers in the annexed area and in the County of Culpeper, is it necessary for both Co-op lines and power company lines to cross streets in the annexed area?

A Yes, but let me modify that. As we have already said, it is necessary for us to cross a street to get to the substation. Our line from the substation to the Co-op's delivery point does not cross a street at the present time, that little short line.

Q You are talking about line C?

A Line C.

Q Line D does cross the street?

A Line D does.

Q But do the lines emanating from the delivery point, the lines of Northern Piedmont, do they coss streets in the annexed area?

A All of the Co-op's lines going from [32] point C do cross streets before they can get to their customers.

Q So, in other words, for the power company to deliver power to the Co-op, and for the Co-op to use the power to serve customers in the annexed area and in the County of Culpeper, it is necessary for both the Co-op lines and the power company lines to cross streets within the annexed area?

A Yes, that is true.

Q And then, Mr. Piercy, if the Town could and did prohibit the power company and the Co-op from crossing streets within the annexed area, could the power company deliver power and the Co-op use power to serve its customers in the annexed area and in the County of Culpeper?

A No, we could not.

Q Now, Mr. Piercy, suppose the Town, again, were empowered to force just the power company to remove all of its wires from the streets in the annexed area. What power company facilities would remain? Can you indicate to the Court in a general way?

A Well, to start out with, as we have indicated, the main power supply coming in would be interrupted right here (indicating). And that is assuming that this is not a dedicated street and I am not sure whether [33] or not it is. But in any event, it is possible that it would be interrupted here. But in any event, it would be interrupted here before it came to the distribution center.

But, assuming you overlook that for a moment, this circuit that we have designated as D, crosses the city street at this point, and that provides not only a delivery point to the Co-op in which they serve the bulk of their load in Culpeper County, but it also supplies VEPCO's load in the annexed area and most of the area south in Culpeper County. So we certainly would be prohibited from serving in that direction at this point.

The line going in the other direction crosses the street right over here, so that virtually everything north and west would be

eliminated at this point where we cross the street (indicating).

Q Mr. Piercy, wouldn't all of these little lines here be isolated as well? They all cross streets here, don't they?

A They all cross streets. I was, of course, talking just about the main supply lines. Once you cut those, you have no supply to those. But if you eliminated each one of your street crossings, you would end up with just short segments of lines between city blocks.

Q Isolated segments of lines?

[34]

A They would be of no value unless you put a generator on each block.

Q Would these remaining facilities be at all usable for furnishing electric service to power company customers in the annexed area and in the County of Culpeper?

A They would not be usable.

* * *

[38]

EDWIN A. KANN, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLAUGHTER:

Q Will you state your name, age, and address, please, sir?

A Edwin A. Kann, age fifty-eight, address, 1138 Oaklawn Drive, Culpeper.

Q And your occupation?

A My occupation is general manager of Northern Piedmont Electric Cooperative.

Q Mr. Kann, you heard Mr. Piercy testify here as to certain matters about supply lines and other matters relating to the Cooperative. Was that testimony correct?

A As near as I could judge.

Q As it affects the Cooperative?

A As near as I could interpret from my [39] vantage point, it was accurate. I had seen this map. I can't verify the boundaries without having my engineer ascertain this as to the accurateness of them being totally accurate. But I am assuming that it is.

Q Now, Mr. Kann, as to the Cooperative's service in the annexed area, as of December 1972, on an annual basis, what amount of revenue did the Cooperative realize from the customers in the annexed area?

A As of the close of the business of the year 1972, our revenue from the annexed area of Culpeper was approximately $140,000. That was for the year 1972.

Q That was the calendar year?

A The calendar year.

Q And during that year what were your total revenues from customers for your entire system?

A I think that I have that figure in my pocket. Our total revenue for the year 1972, was $1,813,024.

Q Now, Mr. Kann, I think in one of the statements in the exhibits filed, there is a figure assigned to the original cost of facilities of the Cooperative within the annexed area. What is that figure?

A As filed and licensed as of December 31, 1971, I think we had a figure of $231,885 involved in services. This is including the service poles, transformers and drops, [40] whether it be overhead or underground.

MR. JOLLY: May it please the Court, for the record I would like to object to all of this line of testimony on the grounds that it is irrelevant to the issues in this proceeding.

THE COURT: Overruled.

Proceed, Mr. Slaughter.

BY MR. SLAUGHTER:

Q Now, in your original cost, is that an actual original cost figure that you have there?

A That is an original cost figure less depreciation.

Q Less depreciation?

A Yes.

Q Now, what would its current value be in relation to that figure, whether market value or replacement cost? Would it be greater or smaller?

A Well, it would be much greater. That can't be ascertained without a comprehensive engineering analysis being done both from the records of the Cooperative and a physical inspection in the field. But the total system is updated annually, and each year it is determined for tax purposes what the value is that is placed on certain facilities. I don't have that figure readily available, but [41] it could be had with sufficient time to research.

Q Now, does the Cooperative have facilities in the annexed

area other than these facilities included in this cost figure less depreciation of $231,000, approximately?

A Yes, indeed. This is a very small figure compared to the total investment that the Cooperative has within the annexed area of the Town of Culpeper. First of all, we have two substations, which the one substation serves practically all of Culpeper County, out of which there are five circuits immediately adjacent to the headquarters office, which has a value of approximately $200,000. This is also within the corporate limits.

The second substation, or metering point, as we refer to it, serves outside areas of Culpeper County, making six circuits of what would normally be referred to as feeder lines from our source of power. Now, this is in addition to the increased investments in facilities that have been constructed since December of 1971.

Another figure that would not be in this would be your depreciation and engineering analysis, which is quite in excess of that amount.

Q Now, the $200,000 that you mentioned for the substation, is that also an original cost less [42] depreciation figure?

A Oh, that does not include the substation, the cost that we are talking about. That is simply the service facilities.

Q The only thing that you have mentioned, the $200,000, is that an original cost less depreciation?

A No. That does not include the substation. That original cost less depreciation is for the immediate services that are directly affected within the annexed area of the Town of Culpeper. That does not include the feeder system with the substations.

Q Now, to distribute electricity to your customers within the annexed area from these substations, do you have to cross public streets?

A Yes, with very few exceptions this is true.

Q Now, to serve customers outside the annexed area from these substations, do you have to cross public streets?

A This is true. We must cross the public streets with circuits.

Q Now, as to your territory in the annexed area, how does that compare in density of population to your territory generally?

[43]

A Well, in our total territory we serve within portions of eight counties. Now, with Culpeper being near the center, we have over approximately 1,800 miles of line with a total density of 4.6 services per mile. Now, within the annexed area of the Town of Culpeper, we have approximately 11 miles of line. Our density of service is 39 per mile of line, which is quite different.

Q Now, how does this territory within the annexed area compare to the remaining territory of the Cooperative in terms of net income, that is, the difference between the revenues and expenses to service a particular area?

A Very frankly, with the density and the nearness to our source of power and nearness to our service facilities, this is a much more lucrative area from the standpoint of revenue, and it really contributes to a great degree to the economic feasibility of the total system.

Q Now, if you lose all of your customers within the annexed area, what would be the result or the effect upon the rate structure as far as other customers of the Cooperative are concerned?

A To adequately answer that, I will have to give a brief description of how it is necessary for us to operate in our financing structure. In other to get a [44] capital investment fund it is necessary for the Cooperative to project with a ten-year financial forecast, doing a comprehensive study projecting the economics that can be

projected from history and from engineering analyses of what its position will be ten years hence at a given rate or return. That is how the regulating structure works.

Now, any time that there is any influence on this ten-year forecast, then it must be updated. Assuming that we were to eliminate the 428 services within the Town of Culpeper, it then would become necessary to prepare a ten-year financial forecast setting forth the feasibility at the present rate structure that is enjoyed by the members of the Cooperative.

Now, obviously, this has not been done, but from a practical analysis of the situation, it would simply indicate that losing any part of its territory that generated a great percent of revenue at lesser service cost would necessitate the filing for increased rates for the remaining of the territory to offset the losses. Just obviously this would happen.

MR. SLAUGHTER: Your witness.

[45]

CROSS-EXAMINATION

BY MR. JOLLY:

Q Mr. Kann, this $231,000 figure, I believe, was the figure that was used at one time back in 1971, as the service facility. Now, those are what you are saying are the facilities that if the Town were successful in this litigation it would buy from the Co-op?

A This would be a portion of it that they would buy. These facilities themselves would have no connecting link to anywhere else. My engineering analysis was that was the specific service area including transformers from the district line in.

Q And your larger transmission lines and all, engineeringwise it is feasible for those to continue to run right where they are now; isn't that correct?

A Feasible from what standpoint?

Q From an engineering standpoint.

A Being used as feeder lines?

Q Yes, sir.

A I think we are maybe talking about two different things here, Mr. Jolly. The service facilities that we have within the annexed area of the Town of Culpeper [46] do not all have individual attachments to what we consider our feeder lines that pass through for the rest of the county.

Q Right.

A There are some of these lines that serve specific areas and are interlaced from one plot of ground to the other, and one subdivision to the other. The thing that I understand you to be asking me is whether these are related to the feeder lines or whether this figure that we are talking about, the $231,000, which I can't verify as being totally accurate, whether there is a separation between these two at that point. Now, this would include distribution lines back to where it took off of a feeder line.

Q Well, that is the reason that you got an appraisal or estimate, or whatever, on those, those are the facilities that you would contemplate the Town would take over if it were successful in this suit?

A I think the Town would want the supporting lines.

Q Right.

A This is not the supporting lines from one service to the other. This is just the service that we are talking about.

Q Right. And the rest of your facilities that serve areas outside

of the present corporate limits of [47] the Town would be available, of course, to serve those areas after as well as before? That is correct, isn't it?

A It is not correct without a certificate of convenience, or whatever you would call it, because the circuits that serve from our headquarters in and to two direct points here at Culpeper must pass through the annexed area of the Town of Culpeper in order to serve the rest of the county.

Q Right. And with the cooperation of the Town that would be no problem; is that correct?

A If we had clearance for those that remained that they could still continue to serve the other part of the county, that's right.

Q Now, did I understand your figures correctly that the revenue the Co-op derived from the annexed area was $140,000, and your total revenue was one million eight?

A Right.

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