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Record Nos. 7390, 7391

In the
Supreme Court of Appeals of Virginia
at Richmond

POTOMAC ELECTRIC POWER COMPANY

v. Record No. 7390

DOUGLAS B. FUGATE, STATE HIGHWAY COMMISSIONER OF VIRGINIA

WASHINGTON GAS LIGHT COMPANY

v. Record No. 7391

DOUGLAS F. FUGATE, STATE HIGHWAY COMMISSIONER OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7390

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

POTOMAC ELECTRIC POWER COMPANY, Plaintiff in error,

against

DOUGLAS B. FUGATE, STATE HIGHWAY COMMISSIONER OF VIRGINIA, Defendant in error.

From the Circuit Court of the City of Richmond
E. Ballard Baker, Judge

Upon the petition of Potomac Electric Power Company, a District of Columbia and a Virginia corporation, a writ of error is awarded it from a final order entered by the Circuit Court of the City of Richmond on the 8th day of May, 1969, in a certain action at law then therein depending, wherein the said petitioner was plaintiff and Douglas B. Fugate, State Highway Commissioner of Virginia, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7391

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

WASHINGTON GAS LIGHT COMPANY,
Plaintiff in error,

against

DOUGLAS B. FUGATE, STATE HIGHWAY COMMISSIONER OF VIRGINIA, Defendant in error.

From the Circuit Court of the City of Richmond
E. Ballard Baker, Judge

Upon the petition of Washington Gas Light Company, a District of Columbia and a Virginia corporation, a writ of error is awarded it from a final order entered by the Circuit Court of the City of Richmond on the 8th day of May, 1969, in a certain action at law then therein depending, wherein the said petitioner was plaintiff and Douglas B. Fugate, State Highway Commissioner of Virginia, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

Record No. 7390

Potomac Electric Power Co. v. Douglas B. Fugate,
State Highway Commissioner

* * * * *

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* * * * *

FINAL ORDER

This declaratory judgment proceeding came on to be heard upon the complaint for declaratory judgment filed by the plaintiff, the answer filed on behalf of the defendant, the stipulation entered into between the parties, exhibits and tesmony filed herein, and the briefs filed by counsel and oral argument before the Court, and after thorough consideration of the entire record and the briefs and argument of counsel, it appearing to the Court for the reasons set forth in its memorandum opinion dated April 4, 1969, that the complaint should be dismissed, the Court does Adjudge, Order and Decree that the complaint for declaratory judgment be and it is hereby dismissed.

To all of which rulings and actions of the Court, the plaintiff, by counsel, respectfully objected and excepted.

Enter: 5-8-69
E. Ballard Baker
Judge

* * * * *

page 94 } We ask for this:
Paul D. Stotts
Of Counsel for Defendant

Seen, Objected and Excepted to:
John S. Stump
Of Counsel for Plaintiff

page 95 } STATEMENTS OF INCIDENTS OF TRIAL

The parties hereto stipulate that no oral testimony was presented at trial of this cause.

The parties stipulate that Exhibits PI through P4C for

plaintiff and Exhibits PA through PH3 for defendant were submitted, received as and constitute a part of the record in this case.

It is further stipulated that this cause was tried together with the case of *Washington Gas Light Company* v. *Fugate,* Law A-1960, and that certain material hereinbelow specifically identified was submitted, received as and constitutes a part of the record in both this cause and Law A-1960, to wit:

A. Joint Exhibits J-I through J-XIII inclusive submitted by both parties in both cases.

B. Plaintiffs "common" Exhibits 1-15 inclusive submitted by this plaintiff in this case and by Washington Gas Light Company in Law A-1960.

C. Stipulation of the parties filed November 4, 1968, together with all annexes thereto, including deposition of Paul J. Garfield.

It is further stipulated that the hearing in this cause consisted solely of oral argument and that no evidence was received thereat except for Exhibit J-XIII jointly submitted in this cause and in Law A-1960 by both parties hereto.

The parties hereto stipulate that the foregoing
page 96 } constitutes a complete and accurate statement of
all incidents of the hearing herein as required by Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia and hereby tender the same for the signature of the trial judge.

Dates: June 27, 1969

Kelly E. Miller
Counsel to Defendant

John S. Stump
Counsel to Plaintiff

E. Ballard Baker
Judge, Circuit Court of the City of Richmond

Received & Filed
Jun 27 1969
Luther Libby, Jr., Clerk

By Jean K. Martin, D.C.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO:

Hon. Luther Libby, Jr., Clerk
Circuit Court of the City of Richmond
Richmond, Virginia

Potomac Electric Power Company, by counsel, hereby gives notice of its intention to appeal from the Final Order of this Court entered herein May 8, 1969, and hereby assigns as its grounds therefor the following errors by the trial court:

I. The Court erred in holding that the law of Virginia does not require defendant to reimburse plaintiff for the non-betterment cost of relocation of its facilities in Arlington County necessitated by Interstate Highway construction.

II. The Court erred in holding that the law of Virginia does not allow defendant to reimburse plaintiff for the non-betterment cost of relocation of its facilities in Arlington County necessitated by Interstate Highway construction.

III. The Court erred in holding that neither §11 nor §58 of the Constitution of Virginia requires payment by defendant to plaintiff of the non-betterment cost of relocation of its facilities in Arlington County necessitated by
page 98 } Interstate Highway construction as just compensation for taking or damaging private property for public uses.

Potomac Electric Power Company
By Counsel

Mays, Valentine, Davenport
& Moore
1200 Ross Building
Richmond, Virginia

By Angus H. Macauley

Boothe, Dudley, Koontz,
Blankingship & Stump
4011 Chain Bridge Road
Fairfax, Virginia 22030

By John S. Stump

Record No. 7391

Washington Gas Light Co. v. Douglas B. Fugate, State Highway Commissioner

* * * * *

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* * * * *

LAW NO. A-1960

WASHINGTON GAS LIGHT COMPANY,
a Virginia corporation, Plaintiff,

v.

DOUGLAS B. FUGATE, State Highway Commissioner
of Virginia, Defendant.

FINAL ORDER

This declaratory judgment proceeding came on to be heard upon the complaint for declaratory judgment filed by the plaintiff, the answer filed on behalf of the defendant, the stipulation entered into between the parties, exhibits and testimony filed herein, and the briefs filed by counsel and oral argument before the Court, and after thorough consideration of the entire record and the briefs and argument of counsel, it appearing to the Court for the reasons set forth in its memorandum opinion dated April 4, 1969, that the complaint should be dismissed, the Court does Adjudge, Order and Decree that the complaint for declaratory judgment be and it is hereby dismissed.

To all of which rulings and actions of the Court, the plaintiff, by counsel, respectfully objected and excepted.

Enter: 5-8-69

E. Ballard Baker
Judge

* * * * *

page 23 } We ask for this:
Paul D. Stotts
Of Counsel for Defendant

Seen, Objected and Excepted to:
John S. Stump
Of Counsel for Plaintiff

page 24 } STATEMENT OF INCIDENTS OF TRIAL

The parties hereto stipulate that no oral testimony was presented at trial of this cause.

The parties stipulate that Exhibits W1 through W3K for plaintiff and Exhibits WA through WH3 for defendant were submitted, received as and constitute a part of the record in this case.

It is further stipulated that this cause was tried together with the case of *Potomac Electric Power Company* v. *Fugate,* Law A-1959, and that certain material hereinbelow specifically identified was submitted, received as and constitutes a part of the record in both this cause and Law A-1959, to wit:

A. Joint Exhibits J-1 through J-XIII inclusive submitted by both parties in both cases.

B. Plaintiffs "common" Exhibits 1-15 inclusive submitted by this plaintiff in this case and by plaintiff Potomac Electric Power Company in Law A-1959.

C. Stipulation of the parties filed November 4, 1968, together with all annexes thereto, including deposition of Paul J. Garfield.

It is further stipulated that the hearing in this cause consisted solely of oral argument and that no evidence was received thereat except for Exhibit J-XIII jointly submitted in this cause and in Law A-1959 by both parties
page 25 } hereto.

The parties hereto stipulate that the foregoing constitutes a complete and accurate statement of all incidents of the hearing herein as required by Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia and hereby tender the same for the signature of the trial judge.

Dated: June 27, 1969

Kelly E. Miller
Counsel to Defendant

John S. Stump
Counsel to Plaintiff

E. Ballard Baker
Judge, Circuit Court of the City of Richmond

Received & Filed
Jun 27 1969
Luther Libby, Jr., Clerk

By Jean K. Martin, D.C.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO:

Hon. Luther Libby, Jr., Clerk
Circuit Court of the City of Richmond
Richmond, Virginia

Washington Gas Light Company, by counsel, hereby gives notice of its intention to appeal from the Final Order of this Court entered herein May 8, 1969, and hereby assigns as its grounds therefor the following errors by the trial court:

I. The Court erred in holding that the law of Virginia does not require defendant to reimburse plaintiff for the non-betterment cost of relocation of its facilities in Arlington County necessitated by Interstate Highway construction.

II. The Court erred in holding that the law of Virginia does not allow defendant to reimburse plaintiff for the non-betterment cost of relocation of its facilities in Arlington County necessitated by Interstate Highway construction.

III. The Court erred in holding that neither §11 nor §58 of the Constitution of Virginia requires payment by defendant to plaintiff of the non-betterment cost of relocation of its facilities in Arlington County necessitated by Interstate Highway construction as just compensation for taking or damaging private property for public uses.

page 27 }

Washington Gas Light Company
By Counsel

Mays, Valentine, Davenport
& Moore
1200 Ross Building
Richmond, Virginia

By Angus H. Macauley

Boothe, Dudley, Koontz,
Blankingship & Stump
4011 Chain Bridge Road
Fairfax, Virginia 22030

By John S. Stump

* * * * *

Received & Filed
Jul 1 1969
Luther Libby, Jr., Clerk

By Jean K. Martin, D.C.

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Records Nos. 7390-7391

* * * * *

STIPULATION

The Plaintiffs, Potomac Electric Power Company and Washington Gas Light Company, and the Defendant, Douglas B. Fugate, State Highway Commissioner of Virginia, have hereby stipulated the following matters for the purpose of this case:

I.

Plaintiffs, Potomac Electric Power Company and Washington Gas Light Company, are investor-owned utilities serving portions of Arlington County. Certain of their facilities have been and will in the future be affected by the
page 12 } construction of interstate highways in Arlington County.

The Defendant has directed these Plaintiffs to relocate certain of their facilities as the result of the construction of Interstate Highways 95, 66 and 266. The Plaintiffs assert that they are entitled to be reimbursed by the Defendant for the nonbetterment costs of all such relocations; but the Defendant denies that he is required to reimburse the Plaintiffs for any relocations which are referred to in this suit and states that the Plaintiffs have the obligation to make such relocations at their own expense.

The parties are agreed that an actual controversy exists.

II.

The parties agree that, subject to objections as to materiality or other proper grounds for the exclusion of testimony, the following witnesses would testify:

A. Albert F. Laube, Assistant Right of Way Engineer, witness for the defendant—As set forth in Annex 1 hereto.

B. C. E. Owen, Jr., Special Right of Way Engineer, witness for the defendant—As set forth in Annex 2 hereto.

C. Clifton G. Stoneburner, Director, Department of Transportation, Arlington County, Virginia, witness for the defendant—As set forth in Annex 3 hereto.

D. R. H. Kidwell, Superintendent of the Transmission and Distribution Department of Washington Gas Light Company witness for the plaintiffs—As set forth in Annex 4 hereto.

E. Paul J. Garfield, Vice President of Foster *Associaties,* witness for the plaintiffs—As set forth in his deposition taken July 14, 1967 as supplemented by the two documents thereto appended and by his letter of October 23, 1968 also attached to the deposition transcript.

All parties hereto agree that the foregoing testimony and exhibits to be filed on or before November 4, 1968 constitutes all testimony and exhibits to be offered by any party hereto.

page 13 } III.

The Plaintiff, Washington Gas Light Company, hereinafter referred to as WGLCo, is a public service corporation chartered and doing business under the laws of the Commonwealth of Virginia and is authorized to manufacture, transmit and distribute gas for all lawful purposes to customers throughout its service area in Arlington County, Virginia.

page 14 } WGLCo is the surviving corporation of a merger with Rosslyn Gas Company, a Virginia Corporation, which merger occurred December 31, 1953. Rosslyn Gas Company, in turn, was the surviving corporation of a merger with the Alexandria Gas Company under an agreement of merger dated November 13, 1941. WGLCo acquired all franchises, rights, privileges, properties and facilities of the Potomac Gas Company by deed dated December 31, 1953.

Under the mergers and acquisitions hereinabove referred to, WGLCo assumed all rights, duties and obligations of such companies.

WGLCo, over the course of years, has constructed transmission and distribution gas mains in Arlington County in order to fulfill its functions and duties as a gas utility company. Its mains have been installed under permits granted to it over the course of years from before 1916 to date, by Arlington County, Virginia through the County Board of Arlington County, Virginia, a body corporate, through the County Board of Arlington County, Virginia, as owner of certain rights obtained from the Richmond, Fredericksburg

and Potomac Railroad Company, a Virginia corporation, by the Highway Engineer of Arlington County, Virginia, and by other authorized officials of Arlington County, Virginia; and by the Washington and Old Dominion Railroad Company, a Virginia corporation, and the Virginia Department of Highways; Richmond, Fredericksburg and Potomac Railroad Company; and Rosslyn Connecting Railroad Company.

Many of the permits issued to WGLCo through the years by Arlington County cannot, despite diligent search, be located in that company's records. Arlington County advises it destroys its copy of such permits upon the lapse of three years. These permit references found in WGLCo's records are listed in Exhibit W-2. The full permit docu-
page 15 } ments found to have been retained and the reference of Exhibit W-2 were left with Defendant's counsel for several weeks for examination. The parties agreed:

A. That the sample permit furnished as Exhibit W-3 E(i) is a fair sample of the permit form used over the pertinent years by Arlington County.

B. The permits granted WGLCo by Arlington County, of which Exhibit W-3 E(i) is a sample, contained no express provisions for relocation nor any express grant or exclusion of rights, duties or obligation to WGLCo, Arlington County or any third party, except as set out in Exhibit W-3 E(i).

Clifton G. Stoneburner and R. H. Kidwell would testify concerning this matter as set forth in Annexes 3 and 4 respectively.

The remaining authorizations under which WGLCo occupies each of its locations in the areas affected by Interstate Highways 95, 66 and 266 have been supplied as Exhibits W-3A through W-3G.

The Plaintiff, Potomac Electric Power Company, hereinafter referred to as PEPCO, is a public utility corporation chartered and doing business under the laws of the Commonwealth of Virginia, and is authorized to generate, transmit, distribute and sell electricity for all lawful purposes to customers throughout its service area in Arlington County.

PEPCO is a successor corporation to Braddock Light and Power Company under agreement of merger entered into and certified by the State Corporation Commission in 1949. Pursuant to such merger, PEPCO assumed all rights, duties and obligations of the said Braddock Light and Power Company.

page 16 } Over the course of years PEPCO has constructed and maintained overhead and underground lines for the transmission and distribution of electricity in Arlington County, especially a 69 Kv. underground electrical facility running from a point east of the easterly boundary of Jefferson Davis Highway, just opposite the easterly end of 20th Street, up and along the right of way of the Richmond, Fredericksburg and Potomac Railroad Company, adjacent to the Jefferson Davis Highway, crossing thereunder and under Interstate Route 95 to the PEPCO substation 55 and running thence by the Pentagon through the former right of way of Rosslyn Connecting Railroad Company, thence entering United States Government property, thence recrossing the former Rosslyn Connecting Railroad right of way to the Jefferson Davis Highway and the Route 50 approaches to the Theodore Roosevelt Bridge, and thence along Arlington Ridge Road to Wilson Boulevard and thence along North Lynn Street and across proposed Interstate Route 66 and proposed Interstate Route 266 through Rosslyn to the Key Bridge.

PEPCO also has constructed and maintained 13 Kv. and 4 Kv. overhead circuits along Arlington Ridge Road and along Fairfax Drive. Such construction and maintenance has been done by PEPCO in order to meet its service obligations and duties as a public utility company.

The PEPCO lines and circuits have been installed over the course of years under permits granted to it from the Bureau of Public Roads; the United States Department of Interior, the National Park Service, National Capital Parks; the County Board of Arlington County, Virginia through its County Engineer and other duly authorized officials; and, under agreements with Rosslyn Connecting Railroad Company; and under agreement with the Richmond, Fredericksburg and Potomac Railroad Company.

The authorizations pursuant to which PEPCO occupies each of its locations in the areas affected by the construction of Interstate Highways 95, 66 and 266 have been furnished Exhibits P-3A through P-3G.

page 17 } IV.

It is further stipulated that the interrogatories and answers and objections thereto filed in Civil Actions 4996 and 4997 in the United States District Court for the Eastern Division of Virginia, Richmond Division, and attached hereto as Annex 5 may be received and treated in this case as

though the same had been duly filed by the respective parties in these law actions.

Witness, the following signatures this 31st day of October, 1968.

John S. Stump
Counsel to Plaintiffs

Paul D. Stotts
Counsel to Defendant

* * * * *

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* * * * *

October 31, 1968

File No. 6524

Paul D. Stotts, Esq.
Assistant Attorney General
1401 East Broad Street
Richmond, Virginia 23219

Circuit Court of the City of Richmond
Law Actions A 1959 and A 1960

Dear Mr. Stotts:

It is agreed between us, for our respective clients, that exhibits to be filed in these actions in most cases duplicate exhibits filed in Civil Actions 4996 and 4997 in the United States District Court involving the same parties and therefore that each of us waives for his client any right to receive an additional copy of any exhibit filed herein provided he has already received a copy thereof from the other in either Civil Action 4996 or Civil Action 4997. We further agree that no copy of our Exhibits P1, P1A, P1B, and P1C is to be furnished to you but that, nevertheless, such exhibits will be admissible in these cases. Certain of your exhibits to be noted by your signature below are to be similarly treated.

It is further agreed that a copy of this letter, signed by each of us, will be filed with the Court.

Very truly yours,

Angus H. Macaulay

18:85
Agreed:
Paul D. Stotts

State Exhibits to be filed without service of a copy are P-A through P-B4 and W-A through W-B4.

Paul D. Stotts

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* * * * *

April 4, 1969

John S. Stump, Esquire
Boothe, Dudley, Koontz, Blankingship and Stump
P. O. Box 189
Fairfax, Virginia 22030

Angus H. *Mccaulay,* Esquire
Denny, Valentine and Davenport
1200 Ross Building
Richmond, Virginia 23219

Paul D. Stotts, Esquire
1214 Westover Hills Boulevard
Richmond, Virginia 23225

Re: Richmond City Circuit Court—*Potomac Electric* v. *Washington Gas Light* v. *Fugate,*
Case No. A-1959
Washington Gas Light v. *Fugate,*
etc., Case No. A-1960

Gentlemen:

These are declaratory judgment proceedings in which the Utilities ask the Court to order that the Highway Commissioner, (1) be enjoined from requiring them to relocate certain facilities in Arlington County at their expense, and (2) be directed to pay the non-betterment cost of relocating certain facilities in Arlington County which have to be relocated because of the construction of the Interstate Highway System.

The Utilities, over a period of many years, have constructed certain necessary facilities in Arlington County, under agreements with those who owned the land at the time—including Arlington County, the Bureau of Public Roads, the National Park Service, the R. F. & P. RR Company, the W. & O. D. RR Company, and Rosslyn Connecting Railroad Company. The Virginia Department of Highways,

in the construction of the Interstate Highway System, has acquired certain land from the above-named, including the land on which the Utilities had constructed such facilities. The Highway Commissioner has directed that these facilities on the acquired land be relocated at the cost of the Utilities.

The Federal Aid Highway Act of 1956 includes a provision under which the states will be reimbursed to the extent of 90% from the Federal Highway Trust Fund for the payment of non-betterment cost of untility relo-
page 86 } cation—

"...Provided that Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State." (23 U. S. C., 6104(5).

1. *Rights under which the Utilities constructed their facilities.*

Exhibits P-3A through P-3G(viii) and W-3A through W-3K are the rights under which the Utilities made their installations. Under these it appears that the Utilities did obtain permission to construct their facilities with the agreements varying in details. Some contain no time limit or revocability clause; others do. However, in no case, except P-3C, W-3C(iv) and W-3G, is there any reference to an easement; and these exceptions when examined only grant permission for installation quite similar to the other permits.

While Exhibits J-VI through J-XII, Highway Department permits to Potomac Electric, do apply to many of rights of PEPCO, these permits were issued on July 29, 1965, after the Highway Department secured the land on which PEPCO had previously placed its facilities; and Exhibit P-3G(i) disclaims any waiver by PEPCO of any claim it may have relating to relocation costs. J-VI through J-XII, like J-1 through J-V, merely provide a means whereby the work can proceed, with the costs of relocation to be settled later.

There is no dispute between the parties in cases where the Utilities had easements or where the Utilities placed their facilities after 1958, pursuant to a permit from the Highway Department.

2. *Statutes applicable to Utilities installations.*

The Utilities contend that the permits under which they made their installations are protected by certain statutes

which give them a statutorily protected right. They refer to §§56-458 and 56-459 applicable to them under §56-256.

These sections, along with §56-458.1, give the Utility a right to be in the road with appropriate consent, and provide for the acquisition by the Utility of additional right of way in the event it has to relocate facilities because of the need of the State Highway systems. They do not, however, provide that a change of the road thereafter is burdened with the cost of relocating the utility facilities. The statutes say nothing on the point.

3. *Anderson* v. *Stuart's Draft,* 197 Va. 36, 87 S.E. (2d) 756.

This appears to be the only Virginia case touching on the question of who bears the cost of relocation of utilities when a roadway is changed. The opinion of the Court page 87 } is expressly limited to the factual situation—far different from what we have here—but the decision requiring the utility to pay relocation costs holds that a pipe line placed under a road right of way is subordinate to it. As public needs increase the State may require greater use of its right of way than originally planned. In such event, the rights of others to the use of the land—including the owner—grow less.

The clear force of this case is that Virginia is in accord with what appears to be the common law rule that when the utility has a facility located in the right of way of a highway under agreements similar to those involved here, then the utility pays the cost of relocation. Rhyne, Municipal Law, §24-6; *Washington* v. *Public Utility District,* (Wash.) 349 P.(2d) 426; *South Carolina* v. *Parker Water* (S.C.) 146 S. E.(2d) 160. The Utilities, at page 26 of their opening brief, seem to agree that this is the common law rule.

It can be argued that the common law rule applies only where the highway right of way existed before the utility right of way. In *Stuarts Draft,* a county road came first, then came the pipe line installation and then the county road became a part of the State Secondary System, but the opinion made no particular comment on this sequence. Authorities considered in Highway Research Board, Special Report 91, Relocation of Public Utilities, indicate that the rule, in the absence of statute, turns not on which came first but on whether the utility has a property right in the land. See Special Report 91, at pages 1, 3, 4, 16, 18, 30-40, 54 and 55.

The rights the Utilities have to place their facilities are not property rights. As the Court reads the agreements,

the Utilities would have to remove and relocate on request of the grantor in each case; and under the authority of *Stuarts Draft,* supra, and what seems to be the great majority of the cases cited in Special Report 91, there is no common law right in the Utilities which supports a demand for payment of non-betterment relocation costs.

4. *Sections* 33-58, 33-67.3 and 33-117.1 *of the Code.*

The Court does not believe that these sections lead to the conclusion that the defendant must reimburse the Utilities for relocation costs.

Section 33-58 merely authorizes the Commissioner to acquire land for the relocation of utilities. In addition to its permissive nature, it applies only where a utility owns, "... land or any easement, right of way or other interest in land..." These Utilities have only a revocable license or permit under the agreements involved here.

The further authorization for the Commissioner "...to remove and relocate such facilities at his own
page 88 } cost..." if the utility does not do so, merely makes it lawful to do this when procedure under §33-58 is followed. When the circumstances do not fit the provisions of §33-58—and they do not here—then there is no authorization found in this section for the Commissioner to pay the costs.

Section 33-67.3, effective March 1964, relates to removal costs. These Utilities are seeking relocation costs which are over and beyond what can be contemplated under §33-67.3. There is a distinction between a claim for non-betterment costs and a claim for costs under §33-67.3. The case has not been presented on the narrow aspect of costs under §33-67.3. This Court does not hold that in an appropriate procedure under §33-67.3 there could be no recovery. All this Court holds is that this section does not authorize the payment of what the Utilities are seeking in this case.

Section 33-117.1 is again permissive. It may give the Highway Commission discretion to make some payments under some factual situations which could grow out of the construction, but it does not cover what is requested here.

It must be observed here that none of these sections apply specifically to the Interstate Highway System. Even if these sections could be construed to make lawful the payment of non-betterment costs, the specific provisions of §§33-36.1 through 33-36.10 relating to the Interstate System would have to be controlling.

5. *Federal Aid.*

Purely on the basis of state law, without any reference to federal aid, payment to these Utilities is contrary to the law of the state, and the Utilities are not entitled to that which they seek. Do federal aid provisions make any difference.

Prior to 1956, Virginia had statutory provisions relating to federal aid. These provisions—§§33-12(5), 33-130 and 33-131—authorized the Highway Commission to comply fully with the provisions of present or future federal aid acts. In 1958, Article 2.1 of Chapter 1 of Title 33 was passed, relating expressly to the Interstate System. §§33-36.1-33-36.9.

Section 33-36.9 relates to the relocation of utility facilities, Publicly, privately, or cooperatively owned, and provided that the cost of relocation "...within cities or towns..." is to be paid by the Commission as a part of the cost of construction.

In 1964, Article 2.1 was amended by §33-36.10 which provides for payment by the Commission of utility relocations with respect to a utility owned by a county or political subdivision, or storm sewers, water lines of sanitary sewers owned by a city and extending into a county.

It is apparent that the petitioners here are not within the provisions of §§33-36.9 and 33-36.10. How-
page 89 } ever, they urge that the provisions of §§33-36.2 and 33-36.3, along with the pre-existing §§33-12.5, 33-67.3, 33-130 and 33-131, show the intent of the legislature and establish that the payment of such relocation costs are not in violation of Virginia law. They point to the statement in §§33-36.9 and 33-36.10 that such cost is a cost of highway construction to further buttress that position.

Section 33-12.5, dating back to 1922, is a general power given to the Highway Commission "To comply fully with the provisions of the present or future federal aid acts..." It provides further that the Commission "...may do all other things necessary..." to co-operate with acts of Congress. Section 33-130 authorizes the Commissioner to do all things necessary to carry out the provisions of the Act of Congress of July 11, 1916. Section 33-131, adopted in 1944, authorizes cities, towns and counties to comply fully with present or future Federal Aid Acts. Section 33-67.3 has been commented on before.

These sections do no more than they specifically say. To say that they authorize the Highway Department to get completely involved in the Interstate System is asking considerably more than these statutes can carry.

Sections 33-36.1 through 33-36.10, are the response of the

General Assembly to the Federal Aid Highway Act of 1956, and the Interstate Highway System.

As stated §§33-36.9 and 33-36.10, dealing with utility relocations, omit utilities in the position of these complainants. Having authorized payment of utility relocations in one category in 1958, and added another in 1964, the General Assembly has clearly expressed itself. Utility facilities of privately owned companies such as the complainants in the counties are not included, and there is no basis upon which this Court could enlarge the provisions to include them. *Gordon* v. *Fairfax County,* 207 Va. 827, does not help the complainants.

Section 33-36.3 speaks of the Interstate System being constructed with federal funds in addition to "...such state funds as may hereafter be appropriated and made available..." This Court has not been shown any evidence of the appropriation by the General Assembly of any funds for the purpose of payment any portion of the non-betterment cost of relocating the utility facilities involved here. Exhibits do show appropriations for utility, relocations, but §§33-36.9 and 33-36.10 require such payment in situations which differ from the ones the court is concerned with here. Relocation payments have also been made to these Utilities under other facts.

The argument of legislative intent for full cooperation with the Federal Aid Act can carry a good distance, but when the legislative act also provides that the Interstate System will be built with Federal funds and with State funds to be appropriated and made available the argument cannot carry the legislative approval for doing something for which no State funds have been shown to be appropriated.

page 90 } Add to that, the specific provisions of §§33-36.9 and 33-36.10 and the answer seems quite clear. Payment of these Utilities for relocations in Arlington County does violate the Virginia law.

Much is said about the policy of the Highway Commission. The stipulated testimony of Albert Loube explains it fully. A 1960 letter from a Highway Department official is inconsistent with Mr. Loube's testimony, but it appears to the Court that the letter was not a full and correct statement of the policy. The Highway Department policy appears to be consistent with the position taken here, though from what has been presented the Court is not saying that the various agreements referred to are completely in accord. Even if there be some deviation by the Highway Commission from its stated policy, the controlling issue here is what the

General Assembly has provided for the Interstate System, not what the Highway Department may have done in some other area.

6. *Relocation of facilities and* §§11 *and* 58 *of the Virginia Constitution.*

There being no common law or statutory provision that the non-betterment costs of utility relocations be paid by the State, does the enforced removal of the facilities constitute a taking of private property for public use without just compensation or due process contrary to §§11 and 58 of the Virginia Constitution?

Anderson v. *Stuart's Draft, sup*ra, reversed a lower court holding that the "...easement or permit for the pipe line under the road..." constituted private property which could not be taken without just compensation. Under the authority of *Stuart's Draft,* this Court holds that the requirement that the Utilities remove their facilities at their own cost does not violate §§11 or 58. The installations made here are under agreements of less strength than the easement permit of Stuart's Draft Water Company.

Whether the Utilities are entitled to any compensation under §33-67.3 is, as indicated, a question not before this Court.

7, *The Federal Constitutional Question*

The three judge United States District Court abstained from consideration of the case to allow the Utilities to obtain a declaration "...of applicable state law in the light of its federal constitutional claims..."

In the brief filed here, the Utilities reserve the constitutional issues for determination by the United States District Court. They do state that if this Court denies their claim upon an interpretation of the Virginia statutes, then the equal protection provision of the 14th Amendment comes into the case.

This Court is satisfied that Article 2.1 of Chap-
page 91 } ter 1, Title 33—that is—§§33-36.1 through 33-
36.10—do prevent the Highway Commissioner from paying to the Utilities the non-betterment relocation costs. The federal constitutional issue then is whether §§33-36.9 and 33-36.10 can lawfully provide for payment in those situations but not to these Utilities in this situation.

Virginia permits payment to (1) publicly, privately and cooperatively owned utilities in cities and towns and to (2) county, or political subdivision, utilities, in any county. The constitutional issue will turn on whether there is any reason-

able basis for such classifications. The Utilities say there is no reasonable basis for the classification and then go further and contend that the remedy for this deficiency is for the Court to include them in.

The classification here is between utilities in a city or town and utilities in a county. Is there any rational basis under which the legislature may aid a utility operating in a city or town and not aid the same or some other utility operating in a county?

The voluminous record has been examined but nothing has been found which sheds light on that issue. Much has been presented about the urban character of Arlington County—and that it should have the same treatment as a city, but there is nothing about whether there is any basis for a classification between PEPCO operations to Arlington County and PEPCO, or some other utility, operations in the City of Alexandria.

There is a presumption that a statute is valid until shown to be invalid. There is a further rule that a classification does not violate the equal protection provision if any state of facts reasonably can be conceived that would substantiate it. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S. Ct. 1101; *Clark* v. *Paul Gray,* 306 U. S. 583, 59 S. Ct. 744; 2 Cooley's Constitutional Limitations (8th Edition) pages 824-825; Library of Congress, Constitution of the United States, pages 1279-1284.

The fact that Arlington County has the physical appearance of a city does not make it one. Title 15.1 of the Code of Virginia relates to counties, cities and towns and in the several chapters of that Title can be found many legal differences between cities and towns and counties. Generally, powers of counties are found in Chapter 12 of Title 15.1 and powers of cities and towns are found in Chapter 18. While other powers of both are found elsewhere in Title 15.1, it is apparent that the General Assembly has classified cities and towns as different from counties. Chapter 14, providing for the form of county government Arlington has, does not give to the County all the powers of a city. *Smith* v. *Kelley,* 162 Va. 645, 174 S. E. 842. See also *Board* v. *Corbett,* 206 Va. 167, 142 S. E. (2d) 504.

With respect to highways, Title 33 of the Virginia Code has numerous provisions indicating a distinction between cities and towns and counties. While Arlington County has elected to maintain its own streets and highways like a mu-

nicipality, it may cease doing so under the provi-
page 92 } sions of this.

Section 33.36.10 classifies between some publicly-owned and privately-owned utilities. No reason has been shown by the Utilities why this is not a valid classification.

This Court is of the view that the Utilities have not shown that there is no rational basis which would support the legislative classification.

There is the further point that this Court—if it did find an improper classification—does not believe it can cure the fault by adding these facilities to it. That would require amendment by this Court, a legislative rather than a judicial act. As stated in *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500 at 518, 46 S. Ct. 619, at 623, "...amendment may not be substituted for construction..." 16 Am Jr. (2d) Constitional Law, §144.

To do what the Utilities here ask would require the appropriation of additional funds by the General Assembly. Thus, not only would the Court—assuming a constitutionally invalid classification—have to amend the act to bring these Utilities in, but the General Assembly would have to provide an appropriation to meet the State's share of the payment. I do not believe any court can do this. All that can be done, if the classification be invalid, is hold the entire provision unconstitutional—and these Utilities do not seek that in this proceeding.

This comment is added.

The Utilities ask this Court to direct the defendant Highway Commissioner to pay the cost of relocation. Assuming that the Court had found that the Utilities were entitled to have the payment made, the Court would have concern over whether it could direct a payment in a proceeding in which the State Comptroller was not a party.

Upon presentation of a sketch for an appropriate decree in accord with this, it will be entered.

With best wishes,

Yours very truly,

E. Ballard Baker
Judge

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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