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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 741185

LITTLE BAY CORPORATION
a Virginia corporation on behalf
of itself and on behalf of all
others similarly situated,

Appellant,

vs.

VIRGINIA ELECTRIC AND POWER COMPANY,
a Virginia corporation,

Appellee.

APPENDIX

H. JOEL WEINTRAUB, ESQUIRE
MELVIN FRIEDMAN, ESQUIRE
STEINGOLD, STEINGOLD & FRIEDMAN
1116 United Virginia Bank Building
Norfolk, Virginia 23514

Counsel for Appellant

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VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

LITTLE BAY CORPORATION, a Virginia Corporation on behalf of itself and on behalf of all others similarly situated, *Plaintiff,*	:	
vs.	:	IN CHANCERY DOCKET NO. C-74-303 C-2178-74
VIRGINIA ELECTRIC AND POWER COMPANY a Virginia Corporation, (Serve: Harrison, Hubard or any officer, 2700 Cromwell Drive, Norfolk Virginia) *Defendants.*	:	

BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF THE AFORESAID COURT:

Now comes the above named plaintiff, Little Bay Corporation by its attorney, Steingold, Steingold and Friedman, complaining of the defendant, and alleges on behalf of itself and on behalf of all others similarly situated as follows:

1. This action is brought on behalf of the plaintiff, as well as on behalf of each and all other persons similarly situated, who had contracted with Virginia Electric and Power Company (hereinafter referred to as VEPCO) and whose contracts were breached by VEPCO; such persons are about fifty (50) in number and located in all parts of the United States and therefore are so

numerous as to make it impractical to bring them all before the court; the right which is the subject of this action is common to all those who had contracted with VEPCO to install electric heat in their commercial building construction projects which were then under construction, or which were to be constructed at a date in the future, in return for being allowed a building and advertising allowance that was to be paid by VEPCO to each individual builder.

2. Plaintiff did contract with VEPCO in 1970 to install electric heat in twenty-eight (28) apartment units located at 9558 21st Bay Street, Norfolk Virginia. Pursuant to this contract plaintiff was entitled to receive a total of $4,900.00 in installation allowances and related advertising allowances, upon completion of these structures.

3. Plaintiff did install electric heat, and did complete the construction on the aforesaid property in accordance with all provisions of its contract with VEPCO.

4. VEPCO has refused and continues to refuse to pay the plaintiff, Little Bay Corporation, as well as the others similarly situated, the amounts to which they are entitled under their contracts with VEPCO which provided for installation allowances and related advertising allowances.

Wherefore the plaintiff prays that it may have and recover judgement against the defendant as follows:

1. For the sum of $4,900.00, together with interest, costs, and attorney's fees to be paid to Little Bay Corporation.

2. For an accounting to determine the amounts that are owing to all others similarly situated.

3. For all sums as an accounting will indicate are owing to all others similarly situated, together with their interest, cost and attorney's fees.

4. For such further relief as may be deemed proper.

LITTLE BAY CORPORATION,
on behalf of itself and on behalf
of all others similarly situated,

By _____

Of Counsel

Steingold, Steingold & Friedman
1116 United Virginia Bank Building
Norfolk, Virginia 23514

PLEA TO JURISDICTION

The plea of Virginia Electric and Power Company to the Bill of Complaint filed against it in the Circuit Court of the City of Norfolk by Little Bay Corporation.

For plea to the said Bill defendant says that the State Corporation Commission of Virginia has ordered that no installation or advertising allowance shall be paid with respect to any premises to which electric service had not been connected before August 1, 1972; that electric service had not been connected before August 1, 1972 to any of the apartment units mentioned in the Bill of Complaint; and that no Court other than the Supreme Court of Virginia has jurisdiction to review, reverse, correct or annul said order of the State Corporation Commission.

VIRGINIA ELECTRIC AND POWER COMPANY

By _____

Of Counsel

PLEA OF ILLEGALITY

The plea of Virginia Electric and Power Company to the Bill of Complaint filed against it in the Circuit Court of the City of Norfolk by Little Bay Corporation.

For plea to said Bill of Complaint defendant says that any contract defendant might have made to pay installation or advertising allowances as alleged in the Bill of Complaint was as a matter of law subject to the power of the State Corporation Commission to declare the same to be unlawful and to prohibit such payments; that by order entered July 13, 1972, said Commission did prohibit payment of any such allowances with respect to premises to which permanent electric service had not been connected before August 1, 1972; that electric service had not be connected to the permises described in the Bill of Complaint before August 1, 1972. Wherefore defendant says that it would be unlawful to make the payments which the Bill of Complaint seeks to compel.

VIRGINIA ELECTRIC AND POWER COMPANY

By _____

Of Counsel

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK
On the 20th day of August 1974

LITTLE BAY CORPORATION, a Virginia Corporation on behalf of itself and on behalf of all others similarly situated, *Plaintiff,*	:	
vs.	:	IN CHANCERY NO. C-74-303 C-2178-74
VIRGINIA ELECTRIC AND POWER COMPANY, a Virginia Corporation, *Defendant.*	:	

ORDER ALLOWING PLEA TO JURISDICTION AND PLEA OF ILLEGALITY AND DISMISSING SUIT

This cause came on to be heard on the 3rd day of May, 1974 upon the Bill of Complaint of the plaintiff, Little Bay Corporation, the Plea to Jurisdiction and Plea of Illegality filed by the defendant, Virginia Electric and Power Company, and the evidence heard *ore tenus* and exhibits introduced by the defendant in support of said pleas, and was argued by counsel; and the Court now having maturely considered thereof, and being of opinion that the relief prayed for by the plaintiff cannot be granted without reviewing, reversing or annulling an order of the State Corporation Commission in case number 19158 dated July 13, 1972, which this Court is without jurisdiction to do, the Court doth allow the defendant's plea to jurisdiction.

And the Court finding from the evidence that although the plaintiff had begun construction of twenty-

eight dwelling units on or before December 31, 1970 under existing promotional allowance programs permitting the payment of advertising and installation allowances for subsequent electric installations, all pursuant to an order of the State Corporation Commission in case number 18796 dated April 15, 1970, and finding further that although permanent electric service was subsequently connected to said premises it was not so connected before August 1, 1972, pursuant to the order of the State Corporation Commission in case number 19158 dated July 13, 1972, and being of the opinion that payment of installation allowances with respect to said premises would violate the latter order, and therefore be unlawful, the Court doth allow the defendant's plea of illegality.

WHEREFORE, it is ADJUDGED, ORDERED and DECREED that this suit be, and it is hereby dismissed.

To all of which action of the Court, in allowing said pleas and in dismissing this suit the plaintiff, by counsel, duly objected and excepted.

Enter this Order:

Judge

We ask for this:

Jos. L. Kelly, Jr. of Counsel
for the defendant, Virginia
Electric and Power Company

Seen and Objected to:

Of Counsel for the plaintiff,
Little Bay Corporation

ASSIGNMENTS OF ERROR

1. The court erred as a matter of law in sustaining the defendants plea to jurisdiction.

2. The court erred as a matter of law in sustaining the defendants plea of illegality.

EXHIBIT NO. 4

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA

At the Relation of the CASE NO. 17889
October 17, 1966

STATE CORPORATION COMMISSION

v.

APPALACHIAN POWER COMPANY, ET AL.

INVESTIGATION OF PROMOTIONAL ALLOWANCES AND PRACTICES OF PUBLIC UTILITIES

Opinion, BY THE COMMISSION:

This proceeding was instituted by order of the Commission on April 12, 1966. The order instituted an investigation to determine:

> (a) What promotional allowances are offered, made or given to anyone or what promotional practices are used or followed with respect to anyone by the public utilities which are parties to this proceeding in connection with the furnishing or the offer to furnish in this State of either electric energy or gas for heat, light or power;

(b) Whether any such promotional allowances or practices are in violation of the laws of this State; and,

(c) What action should be taken by the Commission in the public interest with respect to any such promotional allowances or practices.

This Comnission has had jurisdiction over such matters since its creation as the governmental agency regulating public utilities. Also, utility companies have engaged in promotional practices, including the giving of promotional allowances and similar inducements to the use of their service, for many years. The Commission has received no complaints from consumers in connection with such promotional practices, and in fact no formal complaint has ever been filed with respect to such practices except to the extent that the testimony, arguments and briefs of the parties in this proceeding constitute such complaints.

In the 1966 Session of the Virginia General Assembly representatives of the fuel oil dealers were responsible for the introduction of a bill which would have made unlawful promotional allowances and practices of the types engaged in by many utility companies. This legislation was not passed by the General Assembly, but in its place there was enacted a provision directing the Commission to investigate the promotional allowances and practices of public utilities and take such action as such investigation may indicate to be in the public interest.

On February 7, 1966, prior to the introduction of this bill, the Commission directed each electric and gas utility operating within the State of Virginia to furnish to the Commission a copy of the sales promotional programs which they had in use. This was done by the utilities, and these promotional programs are the subject of this proceeding.

Pursuant to the order of April 12, 1966, a hearing on this matter was held on June 20, 21 and 22, 1966. The electric utilities, the gas utilities and the fuel oil dealers appeared and were represented by counsel. The electric and gas utilities presented a great deal of frequently repetitious evidence in support of their positions. The fuel oil dealers, however, did not offer any evidence, stating that it would only be repetitious of that presented by the gas utilities. Opening briefs were filed by the electric and gas utilities on September 1, 1966, and reply briefs were filed on September 21, 1966.

At the hearing and in their briefs the electric utilities concentrated on justifying their promotional allowances and practices and did not concern themselves with the allowances and practices of their competitors. Conversely, the gas utilities concentrated on challenging the allowances and practices of the electric utilities and made no attempt to justify their own, other than as being necessary to compete with the practices of the electric utilities.

The basic position of the electric utilities may be summarized generally as follows: promotional allowances and underground wiring programs are desirable and in the public interest because they stimulate the growth of use of electricity and this growth is necessary to keep electric rates low; the uses of electricity which are promoted in this fashion are uses which have high revenues in relation to cost and therefore are desirable uses from the utility's point of view; the allowances and underground wiring practices are not discriminatory because the benefits of them are available to all customers who meet the objective requirements which have been established; the size of the allowances and costs of other promotional practices are not large enough to impose a burden on customers in other classes and are recovered in a reasonably short period of time; and it is in the public interest for utility management to

be flexible and imaginative in promoting increased sales of electricity. In opposition to this, the contentions of the gas utilities may be likewise generally summarized; promotional allowances and underground wiring programs are unjustly discriminatory in that they confer benefits upon some customers and deny those benefits to others within the same general classification of service; the practices of the electric companies are in violation of their filed tariffs; the revenues generated as a result of the challenged promotions, when all the costs of generating those revenues are taken into account, are insufficient to permit the electric companies to recover those costs in a reasonable time and therefore there is discrimination against other customers; and the public interest requires that all cash allowances and similar inducements be prohibited and that underground electric service be furnished only upon payment of the additional cost of such service by the person who benefits from it.

At the outset the electric utilities also defended certain promotional programs which guaranteed to electric heating customers that their heating bills would not exceed certain amounts or that they would be satisfied in every respect with such electric heat, and the gas utilities likewise opposed these programs. During the hearing the Commission, in an interim ruling which is hereby reaffirmed [1], declared that such programs were unlawful and had to be discontinued, and the electric utilities have not pursued this matter any further.

The principal questions to be determined in this proceeding are whether utility promotional allowances and practices constitute "unjust discrimination" in violation of §56-247 of the Code of Virginia, and what action

1. There is no objection to a reasonable guarantee of satisfaction so long as it excludes satisfaction with respect to cost of the electric or gas service.

is necessary to eliminate or prevent such unjust discrimination.

The evidence in this proceeding, particularly the report of Ernest M. Jordan, Jr., Assistant Engineer of the Commission (Exhibit No. 1), shows a variety of promotional allowances and practices by the utilities. The principal challenge (other than with respect to those guarantees of cost and satisfaction which have already been held to be invalid) has been to the payment of cash incentives for the installation of certain electric appliances and to the furnishing of underground distribution at partial or no cost to customers who make certain uses of electricity.

In general the payment of cash allowances or incentives was not shown to be illegal or contrary to the public interest in this case. The programs under which such payments are made do provide for varying treatment of customers within residential, commercial and industrial classifications. However, these classifications are not exclusive, and reasonable subclassifications may be made. In general, the classifications made by the electric utilities in their promotional programs are those based on the amount and character of the consumption of electricity: Gold Medallion homes, homes with electric heat, homes with electric water heaters, homes with certain other electric appliances. The evidence showed that the uses of electricity promoted tended to improve the utilization of the installed plant of the utilities and thereby improve the annual load factor of those utilities. Moreover, it was shown that the additional revenues generated by the uses of electricity promoted was sufficient to enable the utilities to recover those costs within a reasonable period of time—generally speaking, less than a year on the basis of gross revenues and less than two years if gross revenues are reduced by application of the system operating ratio. We

believe this effectively prevents any discrimination against other customers and actually operates to the benefit of all the customers. The weight of decided authority from other States is to the same effect. See, for example, *Gifford* v. *Central Maine Power Co.,* 217 A. 2d 200 (1966); *Rossi* v. *Garton,* 60 PUR 3d 210 (1965); Re *Delaware Power & Light Co.,* 56 PUR 3d 1 (1964); Re *Savannah Electric and Power Company,* 45 PUR 3d 88 (1962).

It would be against the public interest to hamper the growth of a utility's business for the purpose of enabling an unregulated industry to make more money. The fuel oil dealers object to letting the utilities offer inducements to increase the consumption of their products. But if the utilities could not attract new business their customers would have to pay higher rates, so that the economic consequences of the fuel oil dealers' proposal would be the same as if they were demanding that utility rates be increased to the point where nobody could afford to heat his house with gas or electricity. That would not be in the public interest.

In recent years the gas companies have been taking business from the oil companies, and, still more recently, the electric companies have been getting a small percentage of the heating business. The gas companies find themselves in much the same predicament that the railroads found themselves in when their former customers began to prefer to travel by bus or plane. The principle involved is that the public interest requires that the public be allowed to choose between competing public service companies the service that it prefers.

Motor buses have put the trolley lines out of business. In *Petersburg, Hopewell and City Point Railway Company* v. *Commonwealth,* 152 Va. 193, a trolley-car line was rendering perfectly adequate service between Petersburg and Hopewell, but the Commission nevertheless issued a certificate to a motor bus carrier to parallel the car line.

The court said (p. 202):

> "The State is under no obligation to protect the car line, or to see that its operations are financially successful."

And at page 205:

> "When people generally wish to travel in this way, they should be permitted to do so, and it is no sufficient answer to say that other carriers, in other ways, stand ready to give the necessary service."

It is the duty of the managers of a utility to do all they can to reduce costs. Every year the electric companies, for example, are buying bigger and more economical generators, they are building plants in the coal fields (which hurts the railroads), they are developing nuclear power plants (which hurts the coal industry), they are installing transmission lines of higher voltages, and they seek to persuade governments to lower their taxes. When their costs are reduced the savings inure to the benefit of the consumers in lower rates. The promotional allowances of gas and electric companies are likewise designed to reduce unit costs by increasing consumption.

Although the general concept of promotional allowances for certain uses of gas or electricity is not unlawful, several applications of it revealed by the record are. Virginia Electric and Power Company (Vepco) gives an allowance of $20 for an electric range when it is installed at the same time as an electric water heater (the water heater installation brings $40) but an electric range otherwise installed entitles the owner to no allowance. There is no rational basis for this distinction, and therefore it is discriminatory. Vepco's gas department gives allowances for conversion to gas from all fuels other than electricity. It is understandable that

Vepco does not wish to pay to induce an electric customer to become a gas customer, but if it is to offer allowances for conversions to gas it must do so uniformly and not discriminate against customers who convert from electricity.

In contrast, Washington Gas Light Company pays up to four times as much for conversions from electricity as it does for conversions from coal or oil. This discriminates against the consumers who receive the smaller allowances.

Of course, any promotional allowance that is not uniformly applied among the customers meeting its requirements is unjustly discriminatory. Both Appalachian Power Company and Natural Gas Service Company have adjusted bills or furnished free service in certain instances where heat was required to dry out a newly constructed house. The record showed other instances where incentives had been negotiated on a case-by-case basis. This is clearly unlawful. All of these specific discriminatory allowances are hereby disapproved.

The second major area of contention in this proceeding has been the development by the electric companies of underground distribution plans. These plans vary in detail considerably, but the basic concept is that a customer or builder desiring underground service must pay the average difference between underground and overhead construction cost to obtain it unless the residence or development is Gold Medallion or All-Electric, in which event all or part of the difference in actual cost will be obsorbed by the electric company.

The public is becoming more and more interested in underground distribution of electricity, and it is in the public interest to encourage such underground distribution. However, so long as the cost of underground is substantially more than the cost of overhead, the customer who receives the underground service must, in

one way or another pay for it, regardless of whether underground distribution is voluntarily chosen or required by local ordinance. Otherwise, there would be an unjust burden on customers who are served by the less expensive but less desirable overhead method. There are a number of methods by which the customer can be required to pay for underground service. It can be done through cash payment of the *actual* difference in cost between underground and overhead, payment of the *average* difference in cost between underground and overhead, the establishment of a separate rate for underground electric service, the addition of an underground surcharge to existing rates or a credit based on anticipated revenues. So long as the method of repayment selected by the utility company is reasonable and not unjustly discriminatory, the method should be determined by the company and not by the Commission.

The underground distribution plans considered in this proceeding are, in general, combinations of the "average difference in cost plan" and the "credit for anticipated revenue plan." However, the credit is not given on a pure revenue basis, but rather is tied generally to the total electric concept, and this is what the gas companies find objectionable. In the future, beginning with the year 1967, we will require such plans to be based primarily on a pure revenue basis.

This proceeding has revealed that whereas most of the promotional allowances and practices of the electric and gas utilities are lawful and nondiscriminatory, not all of them are, and it appears that without adequate supervision in the heat of competition there is substantial opportunity for discriminatory concessions to be made. For these reasons we consider it to be in the public interest for the Commission to be fully and constantly aware of the promotional allowances and practices which the utilities have in effect in order that it may insure that none of them are unlawfully discriminatory

and that none of them are administered in an unlawfully discriminatory way. To this end, henceforth each utility shall file a description of its promotional allowances and practices with the Commission.

1. Each utility shall, before January 1, 1967, file with the Commission new schedules giving in detail the terms and conditions governing charges for underground wiring or governing construction on the customer's side of the meter, and giving in detail all allowances of any kind. The schedules shall define each class of customer and each charge and each allowance so specifically as to leave no room for bargaining between the utility and the customer. The new schedules shall be effective on and after February 1, 1967, and shall supersede the schedules heretofore filed. Thereafter, no change in any such schedule shall become effective until thirty days after it has been accepted for filing by the Commission.

2. A utility may not, directly, or indirectly through a third person, promise that a customer will be satisfied with the cost of service. If it gives estimates of costs it must make it perfectly clear that an estimate is an estimate and not a guaranty or warranty.

3. A utility that sells appliances can guarantee that they will work properly and that it will take them back if they do not. It cannot guarantee that the customer will be "satisfied" in the sense that the customer can get his money back merely by saying that he is dissatisfied. Such a promise would enable the customer to get his money back if the costs exceeded the estimate and would give the estimate the force of a promise. For the same reason a utility may not agree to reimburse in whole or in part an independent contractor who gives a guaranty that the utility could not give.

4. Allowances against charges for underground

wiring must be based on estimated consumption and not on specified kinds of appliances used by the consumer.

5. An allowance given to any person for installing or procuring the installation of an appliance must be the same whether or not the appliance is substituted for an appliance already in use. If the appliance is substituted for an appliance already in use, the allowance must be the same regardless of the fuel used in the appliance already in use.

6. An allowance given for the installation of two or more appliances must be the sum of the allowances given for the installation of each of the appliances separately.

_____
Ralph T. Catterall, Chairman

_____
Jesse W. Dillon, Commissioner

_____
H. Lester Hooker, Commissioner

EXHIBIT NO. 5

STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 15, 1970

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION
COMMISSION CASE NO. 18796

v.

APPALACHIAN POWER COMPANY, ET AL.

PROMOTIONAL ALLOWANCES

By Acts of 1966, page 734, the General Assembly directed the Commission to investigate the promotional allowances and practices of public utilities and take such action as such investigation may indicate to be in the public interest. Hearings were held in 1966 and the Commission directed each utility to file a description of its promotional allowances and practices. Since that time, the Commission has been informed as to the promotional practices of the utilities under its jurisdiction. It appearing that the continuance of the promotional allowances and practices approved in 1966 may no longer be in the public interest, the Commission directed the electric and gas utilities under its jurisdiction, by order of February 17, 1970, to show cause why the Commission should not enter an order disapproving further use of promotional allowances and underground electric service plans which provide for credit for anticipated revenue.

This case came on for hearing on March 12, 1970, and was taken under advisement. After considering the testimony, the exhibits, and the arguments of counsel; a

majority of the Commission, Commissioner Hooker dissenting, is of the opinion and finds:

1. Competition by utilities is not adverse to the public interest, and it is not the function of a regulatory agency to suppress competition or to direct the marketing programs of utilities.

2. While promotional allowances are not illegal, nevertheless, in view of existing circumstances, it is contrary to the best interest of the consuming public for electric and gas utilities to continue to offer promotional allowances at this time.

IT IS, THEREFORE, ORDERED:

1. No electric or gas utility shall give or offer to give any payment, subsidy or allowance, directly or indirectly, or through a third party, to influence the installation, sale, purchase or use of any appliance or equipment.

2. No electric utility shall give or offer to give any monetary or other allowance or credits based on anticipated revenues for the installation of underground service. Schedules of charges for underground service based on revenue-cost ratios or cost differentials shall be filed with the Commission.

3. In order to provide for an orderly phase-out of existing programs and to permit utilities to honor existing commitments, the following exceptions are made.:

(a) Existing promotional allowance programs presently filed with the Commission may be completed in accordance with their terms. No new commitments shall be made for allowances for appliances or equipment to be installed after December 31, 1970, other than in new dwelling units that are under construction on December 31, 1970. This paragraph does not apply to underground service programs.

(b) Written contracts heretofore entered into may be carried out in accordance with their terms, but shall not be amended or extended. This applies to allowances for appliances or equipment and underground service plans.

The following are not prohibited by this order:

1. Advertising by a utility in its own name.

2. Joint advertising with others, if the utility is prominently identified as a sponsor of the advertisement.

3. Financing the purchase of appliances by utilities so long as the interest rate or carrying charge to the purchaser is not less than the interest rate paid by the utility for short term debt.

4. Merchandising of appliances or equipment by utilities.

5. Inspection and adjustment of appliances by utilities. Repairs and other maintenance to appliances and equipment if charges are at cost, or above.

6. Donation or lending of appliances by utilities to schools for instructional purposes.

7. Technical assistance offered to customers by employees of utilities.

8. Incentives to full time employees of utilities.

An attested copy of this order shall be sent to each of the public utilities named in the order of February 17, 1970.

HOOKER, *Chairman,* dissenting:

It is my opinion that those whose responsibility it is to manage and operate utilities should not be interferred with so long as such operation is within their legal rights. The Commission should not interfere with or im-

pede management in its responsibilities. Our jurisdiction extends to rates and service. It is our obligation to see that service rendered by utilities is good and that the cost is not excessive. It is pointed out by a majority of the Commission that "...promotional allowances are not illegal"; this being true, the utilities should not be prohibited from competing with their competitors. I favor competition and oppose limiting it because competition, in my opinion, is beneficial to the public. It makes each utility strive to operate as efficiently and economically as possible, which benefits the consumer.

EXHIBIT NO. 6

Vepco

VIRGINIA ELECTRIC AND POWER COMPANY, NORFOLK, VIRGINIA 23501

February 1, 1971

Mr. George Powell
Little Bay Corp.
1500 Beekman St.
Norfolk, Va.

Dear Builder:

We can no longer award allowances for either electric equipment or appliance installations unless construction of the building began prior to January 1, 1971.

Effective January 1, 1971, the State Corporation Commission has ordered that no electric or gas utility shall give or offer to give any payment, subsidy or allowance, directly or indirectly, or through a third party, to influence the installation, sale, purchase, or use of any appliance or equipment.

This is to advise that on December 31, 1970, we inspected your construction site known as 9558 21st Bay St. (Ocean View) and found the status of construction as outlined on the enclosed sheet.

28 We will allow the appropriate installation allowance for these units that qualify under our 1970 allowance program; when they are completed and connected to our lines. We can furnish you with the necessary allowance request forms.

We must receive the request for payment within sixty days of completion. The sixty day limit cannot be extended under any circumstances.

We appreciate the confidence that you have shown in electric living as indicated by the equipment you are installing, and, we look forward to working with you in the construction of your future projects using the most modern of concepts - Total Electric Living!

Sincerely,

Builder Representative

STATUS OF RESIDENTIAL CONSTRUCTION

AS OF DECEMBER 31, 1970

Enclosure to letter of date February 1, 1971

A. Builders Name Little Bay Corp.

B. Project Name 9558 21st Bay St.(Ocean View), Norfolk, Va.

C. Location 9558 21st Bay St.,(Ocean View), Norfolk, Va.

D. Type of Living Unit(s) Apartments

Units under construction, street address or block and lot numbers.

9558 21st Bay St.,Norfolk, Va., 28 Units

EXHIBIT NO. 7

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JULY 13, 1972

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. 19158

v.

VIRGINIA ELECTRIC AND POWER COMPANY

BY ACTS OF 1966, page 734 (§56-247 of the Code of Virginia), the General Assembly of Virginia provided that "the Commission shall investigate the promotional allowances and practices of public utilities and shall take such action as such investigation may indicate to be in the public interest". By order of April 15, 1970, in Case No. 18796, instituted to investigate such promotional allowances, the Commission directed public utilities, including Virginia Electric and Power Company (the Company), to discontinue installation and advertising allowances, but permitted them to honor existing contracts.

In Case No. 19027 - Application of Virginia Electric and Power Company for an Increase in Rates - heard on April 20, 1972 the promotional allowances of the Company were again the subject of investigation. The evidence in this proceeding showed that as a result of commitments made before April 15, 1970 the Company paid

promotional allowances amounting to $1,544,000 during the calendar year 1971. It further appears from the evidence in this proceeding that these commitments were made expressly subject to action by the Commission.

The Commission by order of June 28, 1972, entered in Case No. 19027, and as explained in the majority opinion entered therein, dissallowed as an operating expense the $1,544,000 in customer installation allowances and related advertising allowances during the test year, 1971.

The Commission finds that the continuing payment of customer installation allowances and related advertising allowances is not in the public interest. Accordingly

IT IS ORDERED:

That no further payments be made by Virginia Electric and Power Company of customer installation allowances ,or related advertising allowances with respect to any premises to which permanent electric service shall not have been connected before August 1, 1972.

AN ATTESTED COPY hereof shall be sent to George D. Gibson, General Counsel to the Company, P.O. Box 1535, Richmond, Virginia 23212, and delivered to the Commission's Divisions of Accounting and Public Utilities.

EXHIBIT NO. 8

	DATE OF APPLICATION	DATE METER SET
Laundry Room	1-29-73	2-5-73
Apt. 1	7-21-72	2-26-73
2	7-21-72	2-15-73
3	7-21-72	2-5-73
4	7-21-72	2-5-73
5	7-21-72	2-22-73
6	7-21-72	2-23-73
7	7-21-72	2-21-73
8	7-21-72	2-5-73
9	7-21-72	2-14-73
10	7-21-72	2-20-73
11	7-21-72	2-12-73
12	7-21-72	2-26-73
13	7-21-72	2-14-73
14	7-21-72	4-6-73
15	7-21-72	2-22-73
16	7-21-72	2-26-73
17	2-27-73	3-1-73
18	1-29-73	2-5-73
19	2-9-73	2-21-73
20	3-1-73	3-5-73
21	2-14-73	2-15-73
22	2-15-73	2-15-73
23	2-11-73	2-20-73
24	2-9-73	2-9-73
25	2-20-73	2-23-73
26	2-26-73	2-26-73
27	2-20-73	2-20-73
28	2-16-73	2-16-73

EXHIBIT NO. 9

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 12, 1972

COMMONWEALTH OF VIRGINIA
ex rel. STATE CORPORATION
COMMISSION CASE NO. 19158

v.

VIRGINIA ELECTRIC AND POWER CO.

By its order of April 15, 1970, the Commission found that the practice of making payments to home builders to induce them to build all electric homes was not in the public interest and ordered Vepco to discontinue the practice, but permitted payments to be made on contracts previously entered into. Thereafter, in Case No. 19027, the Commission disallowed the payments made during 1971 as expenses for rate-making purposes.

By its order of July 13, 1972, the Commission ordered the company to discontinue further payments on contracts entered into before April 15, 1970.

Interveners assert that the order of July 13, 1972, is unconstitutional and request the Commission to vacate it on equitable grounds. After considering the evidence and the arguments of counsel, the Commission concludes that the order of July 13, 1972, is constitutional, and that to vacate it for the benefit of the interveners would abridge the police power of the Commonwealth in violation of Section 6 of Article IX of the Constitution. Accordingly, it is

ORDERED

That the order of July 13, 1972, be continued in full

force and effect.

Attested copies of this order shall be sent to the Attorney General and to each of the interveners.

A true Copy
Teste: _____

Clerk of State Corporation Commission

EXHIBIT NO. 10

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION — CASE NO. 19158

v.

VIRGINIA ELECTRIC AND POWER COMPANY — November 13, 1972

Opinion, CATTERALL, *Chairman*

§56-247 of the Code was amended by Acts of 1966, ch. 552, by adding:

> The Commission shall investigate the promotional allowances and practices of public utilities and shall take such action as such investigation may indicate to be in the public interest.

By its order of October 12, 1972, the Commission refused to vacate its order of July 13, 1972, which left the order of July 13, 1972, in full force and effect. The order

of November 2, 1972, refused a rehearing. The order of July 13, 1972, is the order that deprives the interveners of their property. Since they are deprived of property and contract rights, the question is whether the deprivation is with, or without, due process of law, and the answer to that question turns on whether the action is within the police power of the state. The police power is the inherent and inalienable power of a state to adopt and enforce a policy for the promotion of the health, safety or general welfare of its inhabitants.

The 1966 amendment of §56-247 was passed by the legislature to make it the duty of the Commission to investigate possibly injurious effects on the general welfare of so-called "promotional allowances" designed to influence homebuilders to wire their houses with electricity in such way that other forms of energy could not be installed without prohibitive expense. It was, quite naturally, the gas and fuel oil companies that brought this possible evil to the attention of the legislature.

The homebuilders, even without the spur of the allowances, had a sufficient financial inducement to install home-heating by electricity, which is the cheapest kind to install and the most expensive kind to operate. The $200 allowance was a slight additional inducement. The homebuilders insist that they passed the amount on to the home buyers in the form of reduced prices, but one witness testified that homebuilders sell houses for as high a price as they can get, and we know judicially that that is a fact, as the court pointed out in *Utilities Corporation* v. *Commonwealth,* 211 Va. 620 at 625: "Neither the Commission nor this court needs testimony to tell it what is a matter of common knowledge." It is a matter of common knowledge, that sellers of property get the highest prices they can get for it. Promotional allowances to some customers discriminate against the customers who do not get them. The homebuilders are

the initial customers of Vepco the moment that the power is turned on in the houses that they then own. The associated advertising allowances of $30 have to be spent on advertising and do not go into the pockets of the homebuilders. The Commission has refused to let Vepco claim the promotional payments to favored customers as legitimate and necessary expenses in rate cases, and virtually all the contracts disapproved by the Commission's order were not legally binding contracts, because they contained a proviso that they were made expressly subject to disapproval by future action of the Commission. Accordingly the orders in question were neither unconstitutional nor inequitable.

§56-247 is well within the police power of the state, and it has been settled in many cases that private contracts cannot keep the state from exercising its police power to cancel them. Section 6 of Article IX of the 1972 Constitution spells out the truism that "The police power of the Commonwealth. . .shall never be abridged."

The leading Virginia case on this topic is *Town of Victoria* v. *Victoria Ice, Light & Power Company,* 134 Va. 134 (1922) which has been followed in many later cases.

We are satisfied that the order of July 13, 1972, is a valid exercise of the police power of the Commonwealth, exercised by the Commission as the agent of the Commonwealth, as required by §56-247 of the Code.

BRADSHAW and SHANNON, *Commissioners,* concur.

TRANSCRIPT OF PROCEEDINGS,
Plaintiffs Opening Statement
By Mr. Weintraub
Witness, Guy E. Bishop, Jr.

(Page 9, Line 24 through Line 21, Page 12)

THE COURT: All right, sir.

You wish to make an opening statement, gentlemen?

MR. WEINTRAUB: Yes, judge. I think Mr. Kelly's statement of the facts that would be brought out here is substantially accurate. The only think that puzzles me is that he indicates between the time of the April 15, 1970, order and 1972 that the SCC was taken by surprise by the amount of construction that had been begun by December 31, 1970.

THE COURT: '70, um-hum.

MR. WEINTRAUB: I don't know that that is in the record at all in any of these orders of the state corporation commission. But other than that, I think the statement of facts is quite accurate.

THE COURT: In any event, they had a hearing, regardless of the reasons for it, in '72.

MR. WEINTRAUB: They had a hearing.

THE COURT: That culminated in the order of 1970.

MR. WEINTRAUB: I think it was July 13, 1972, and they hook up electricity by August 1 or the utilities can't pay any longer these installation or promotional allowances. Now—

THE COURT: Well, give me the dates on your people.

MR. WEINTRAUB: Okay, Mr.—I'm sorry, Little

Bay Corporation, the named plaintiff, our evidence would show that he had begun construction by December 31, 1970. He had come in just under the wire, and a letter from employes at Vepco to him certified that fact and that they would still be permitted to pay the promotional and installation allowances that were published under its brochure.

Now, I believe the evidence would also show that Little Bay Corporation, the named plaintiff, was unable to get electricity hooked up by August 1, but that subsequent to August 1 electricity was hooked up.

Now, it is the position of the plaintiff that while the state corporation commission has authority to phase out the practice of allowing utility companies to offer installation and promotional allowances, any such orders must of course comply with both United States Constitution and the Virginia Constitution.

THE COURT: Can't take away vested rights, you say.

MR. WEINTRAUB: You can't take away vested rights. You can't impair the obligation of contracts. You cannot pass retroactive legislation.

Now, the state corporation commission is an agency that has been delegated authority—

THE COURT: Creature of the 1902 constitution.

MR. KELLY: Sir?

THE COURT: State corporation commission is a substitute for the legislature created by the 1902 legislature.

MR. WEINTRAUB: It exercises authority, so it is no question its orders are considered legislation so that they come under the ban of impairment of obligation of contracts clauses.

It is our position that as this order applies to Little Bay and others similarly situated it impairs the obligation of their contracts and is invalid as applied to them.

* * *

(Page 15, Line 14 to Page 19, Line 25)

GUY E. BISHOP, JR., called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KELLY:

Q Now, Mr. Bishop—

THE COURT: Let's have his full name for the record.

BY MR. KELLY:

Q Will you give your full name and address and occupation?

A Right. Guy E. Bishop, Jr. My address is 4654 Bromfield Avenue, Virginia Beach. I am division marketing manager for the Virginia Electric and Power Company for the eastern division.

THE COURT: Would you be more comfortable if you drew your chair up a little closer ? I believe both of you would do better. You have got to have cross-examination from way over here.

THE WITNESS: Thank you, sir.

BY MR. KELLY:

Q During 1970 and for some time before that —

MR. KELLY: Off the record. (Off-the-record discussion.)

BY MR. KELLY:

Q During 1970 and for some time before that did Vepco follow a program which included offer to residential builders inducements to equip those buildings for the use of electricity?

A Yes, sir.

Q Were those programs written out in the form of — in a form that defined the company's offer and how much would be paid for what kind of construction and filed with the state corporation commission?

A Yes, sir.

Q I show you what purports to be a filing of that nature and ask you if it is a copy of what was filed with the commission at the end of 1969?

A Yes, sir, this is it.

THE COURT: Defendant's No. 1.

MR. KELLY: Your honor please, if that could be marked Defendant's Exhibit No. 1.

THE COURT: All right, sir. (So marked by the court.)

MR. KELLY: Now, I note and ask the court to note that in that filed copy of the program or statement of the program there is a reference to the total electric standards which govern the type — define the type of installation the builder must make in order to be entitled to the two-hundred-dollar allowance provided for in it.

BY MR. KELLY:

Q I show you what purports to be a publication under the name — Vepco's name entitled "Total Electric Standards," and I ask you if that's the copy of the total electric standards published by the company and referred to in that filing?

THE COURT: What does total electric standards mean? Can you have your witness tell me that?

MR. KELLY: I will, sir.

Q Yes, this is our total electric standards. To answer your question, judge, total electric of course, as the name implies, is any living unit — and I say living unit, single-family houses, apartments, townhouses, in which everything it uses is by electricity: its heating, its cooking, water heating, et cetera, and in addition, meet certain what at the time were above-average standards as far as wiring, insulation, and other structural features go to make the house more livable.

THE COURT: No. 2.

MR. KELLY: Defendant Exhibit 2, if your honor please.

(So marked by the court.)

MR. KELLY: D-2 I think we said, didn't we?

THE COURT: And to whom was this distributed, Mr. Bishop, "Total Electric Standards," Exhibit No. 2?

THE WITNESS: Anyone and everyone, your honor. More particularly, people with whom we were discussing —

THE COURT: It wasn't just filed with the commission?

THE WITNESS: No, sir. No, sir. We gave it wide spread state-wide distribution.

This was promotional material to your prospective customers?

THE WITNESS: Precisely.

THE COURT: All right, sir.

BY MR. KELLY:

Q It is fair — is it fair to say that the company published the offer to pay — published the offer to pay and disseminate it as widely as it could to people likely to engage in the building of residential units?

A We gave it the widest possible circulation.

THE COURT: Newspaper, trade magazines?

THE WITNESS: No, primarily builders, private meetings with builders, developers, group meetings with builders and developers. Not in the newspapers.

* * *

(Page 22, Line 5 to Line 19)

BY MR. KELLY:

Q Now, in April of 1970, Mr. Bishop, or immediately after that date, was the company served with the order of the commission restricting its use of this program and ordering discontinuance of the allowances with certain exceptions?

A Yes, sir.

MR. KELLY: Your honor please, I would like to offer certified copy of that order. I didn't know I had it. You should have uncertified copies. That's the April 15, 1970, order.

THE COURT: That's right, it is. That's No. 5.

(So marked by the court.)

* * *

(Page 25, Line 7 to Page 30, Line 6)

BY MR. KELLY:

Q Mr. Bishop, following the entry of that April

15th order — or first, I believe I have not — I will withdraw that which was about to turn into a question, and ask this question:

At April 15, 1970, did the plaintiff, Little Bay Corporation, have a written commitment from the company?

A We can find no record where we had a written commitment with Little Bay prior to April 15, 1970.

Q Well, are you in charge of the office where such a commitment — there should be a record of it?

A Yes, sir.

Q Have you looked?

A We have made a thorough and comprehensive search.

Q And to the best of your knowledge there was no written commitment at that time?

A No, sir.

MR. KELLY: I want to say right now for the record if the plaintiff can come up with one — no, as a matter of fact, under the new order we can't. I will have to withdraw that. Under the second order I can't. I was about to say we'd be happy to pay it. But, no, we couldn't do that under the second order. I'll withdraw that.

BY MR. KELLY:

Q Well, after that order had been entered did the company call it to the attention of Little Bay Corporation, the April 15th order, that required him — did you — did the company call it to the attention of Little Bay Corporation or did you have any communication with them about the right to allowances under this thing after that April 15 order was entered?

A Yes, sir. On April — I mean, excuse me, on February 1, 1971, we wrote to Mr. George —

THE COURT: What was the date again?

A February 1, 1971, your honor, we wrote to Mr. George Powell, Little Bay Corporation, that based on the commission order and the fact that he had twenty-eight apartments under construction as of December 31, 1970, that we would pay the installation allowances if he qualified. If he qualified. That letter was based on a physical inspection made of the property on December 31, 1970.

Q You mean to make sure it had gotten started?

A Yes, sir.

Q Do you have a copy of that letter?

A Yes, sir, I do.

MR. KELLY: Your honor please, I offer in evidence this letter — copy of a letter addressed to Mr. George Powell dated February 1, 1971, as Defendant's Exhibit D-6.

(So marked by the court.)

BY MR. KELLY:

Q Now, following the writing of that letter in February of '71, referring to construction started in 1970 on these twenty-eight units that are in suit, did anything transpire between the company and Little Bay Corporation before July 13, 1972? That's all of 1971 and '72 down to July 13th, did anything transpire between?

A No written correspondence that I am aware of.

Q All right, sir. At any rate, there certainly had not — the work had not been connected to the company's system —

A No, sir.

Q — at that point? And were you advised —

THE COURT: At that point, you are up to July 1, 1972?

MR. KELLY: July 13, 1972. Right.

BY MR. KELLY:

Q Now, in July of 1972 were you advised of a further order of the commission further proscribing the performance or the carrying on of this program?

A Yes, sir.

MR. KELLY: I offer, your honor, a certified copy, with apologies for its physical condition, but it is a certified copy of the commission's order of July 13, 1972.

You gentlemen have copies of that? If you don't I will give you this one.

MR. WEINTRAUB: If this is an extra.

MR. KELLY: I don't have another one with me.

MR. WEINTRAUB: We have a copy.

MR. KELLY: And your honor will note that this — on page 2 the commission's order is that no further payments be made by Virginia Electric and Power Company of customer installation allowances or related advertising allowances with respect to any promises to which permanent electric service shall not have been connected before August 1, 1972.

THE COURT: Well, tell me — I understand, but for my information — I understand now about customer installation allowances and — what are related advertising allowances? What do those key words mean? I would like to know what the story is.

THE WITNESS: Of course, we understand what installation allowances are.

THE COURT: Yes, sir.

THE WITNESS: That covers the installation of

the equipment. The advertising allowance was to enable builders, realtors to advertise for either sale or rental, you know.

THE COURT: And push the fact that these residences — these buildings are equipped fully electrically?

THE WITNESS: That's right, sir, and there was a fixed allowance given for each unit.

THE COURT: And that was an advertising benefit for electrical use, period?

THE WITNESS: That's right. So we had two allowances.

(Exhibit D-7 so marked by the court.)

* * *

(Page 32, Line 6 to Page 33, Line 4)

BY MR. KELLY:

Q Was anyone of the twenty-eight units of the plaintiff, Little Bay Corporation, connected to the company's lines by August 1, 1972?

A No, sir.

THE COURT: Not a one of the twenty-eight units?

THE WITNESS: Not a one, sir.

BY MR. KELLY:

Q Do you have — have you prepared at my request a list of the connection dates showing — correctly showing when they really were connected?

A Yes, I have.

Q Do you have it?

A Yeah.

THE COURT: And for my information, what does connection — I know what connection means, but for our purposes here what physically or technically had to be done to constitute a connection, Mr. Bishop?

THE WITNESS: Electricity connected and energize so you could walk in and flick a switch and everything would work.

* * *

(Page 35, Line 9 to Page 36, Line 21)

Q All right, sir. Do you have a list of the dates on which you received the inspection certificate and made the connection?

A Yes, sir, I do. We received the electrical inspection on February 2, 1973.

THE COURT: That's the city electrical inspection?

A Yes, sir, final electrical inspection from the city, on February 2, 1973.

Immediately following that over a period primarily of during the month of February we energized a total of twenty-eight meters or services.

THE COURT: That completed your work?

A That completed our work and made electricity available.

BY MR. KELLY:

They are the twenty-eight units referred to in the bill of complaint?

A That's right.

Q And that was in February of '73?

A With —

Q And two or three in March?

A Two or three after that.

Q All right, sir. If you will let me have that list I would like to offer that as Exhibit D-8.

A I did not make a copy of that, sir.

Q Well, I'll let these gentlemen see that. Is that the only copy you have got?

A Yes, sir. I didn't make a copy of that.

MR. KELLY: Well, I believe we misunderstood that.

THE COURT: The deputy clerk will make copies for everybody.

MR. KELLY: Should be 9, not 8.

THE COURT: This should be 8.

MR. KELLY: 8, yes, it is 8.