

99-073

**COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.**

**PUBLIC SERVICE COMPANIES: UTILITY FACILITIES ACT.**

**Authority for town to construct, maintain and operate its own electric facilities where no such facilities exist in town. No authority for public electric utility to act as town's agent to construct, maintain and repair electric facilities and handle billings and customer relationships. Town may install and operate its own electric utility in areas of town not served by exclusive franchisee; to do so within certificated territory of exclusive franchisee is subject to constitutional challenge.**

The Honorable R. Steven Landes  
Member, House of Delegates  
November 24, 1999

You ask three questions regarding the ability of a town to provide electric service to its citizens. You relate that most of the town is served by an exclusive franchisee, whose franchise to use public property is scheduled to expire in 2018.<sup>1</sup> You also relate that the town plans to annex two areas within the certificated territory of the franchisee.<sup>2</sup> You further relate that certain areas of the town are undeveloped and have no electric service. You note that a few areas of the town are served by an electric cooperative that has no franchise. You state that the town is dissatisfied with certain aspects of electric services being offered to its citizens and that the town would like to offer its own electric service.<sup>3</sup> You also state that the town does not desire to oust the current providers; rather, the town would like to offer its own service as another option. You further state that the town will rely on contracts with electric utilities to provide the service, such as contracts for the purchase of power in bulk for resale.

You first inquire whether the town is authorized to construct, operate, and maintain electric facilities in the areas of the town in which no electric facilities currently exist.

Section 15.2-2109(A) of the *Code of Virginia* states:

Any locality may ... establish, maintain, operate, extend and enlarge ... electric plants ... and may acquire ... whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending or enlarging ... electric plants ... and the rights-of-way, rails, pipes, poles, conduits or wires connected therewith, or any of the fixtures or appurtenances thereof.

Section 15.2-2109(A) "authorizes all localities to establish and operate ... 'electric plants,'"<sup>4</sup> along with the services necessary for such operation. Thus, § 15.2-2109(A) authorizes a town to construct, maintain, and operate its own electric facilities where no current facilities exist in the town.<sup>5</sup>

You next inquire whether a town may utilize a public utility to act as its agent to construct the electric facilities, to maintain and repair them, and to handle the billing and customer relations regarding its customers.

The long-followed Dillon Rule requires a narrow construction of the powers conferred on and exercised by local governments in Virginia, because such powers are delegated powers.<sup>6</sup> Thus, "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."<sup>7</sup> Accordingly, when a statute confers the authority for a locality to enter into a contract with an entity to act as its agent, it may do so. For example, § 15.2-2117 specifically provides that "[a]ny locality may contract with any sewerage or water purification company to introduce, build, maintain and operate" sewerage and water purification systems.<sup>8</sup> I can find no similar statute authorizing a public electric utility to act as a locality's agent in the manner you propose. My answer to this inquiry, therefore, is that a town may not utilize a public electric utility to act as its agent in the manner about which you inquire.

Your final inquiry concerns the ability of a town to provide its own electric service in areas of the town which are served by either an exclusive franchisee or a nonexclusive franchisee electric cooperative.<sup>9</sup>

Article VII, §§ 8 and 9 of the Constitution of Virginia (1971) empower a municipality to grant or deny a franchise to a public utility.<sup>10</sup> Regarding the nonexclusive franchisee electric cooperative, such franchise is not impaired by lawful competition and thus no requirement of compensation would arise without an actual physical taking of its facilities.<sup>11</sup> Thus, the Supreme Court of Virginia has held that a municipality has "the right ... to engage in the business in competition with [a nonexclusive franchisee], since it had been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalit[y], it will be by lawful competition from which no legal wrong results."<sup>12</sup> Conversely, such language indicates that an exclusive franchise may be impaired by competition from a municipality and thus may be entitled to compensation.<sup>13</sup>

In addition, the Supreme Court of Virginia has enunciated that a franchisee may possess certain vested property rights in their service areas.<sup>14</sup> Furthermore, the Court, in articulating the options a town has when it does not desire to renew an exclusive franchise, stated that, "in anticipation of the termination of a franchise, a city or town has the power to install its own distribution system and either to make bulk service contracts with a public utility or, if need be, to construct and operate its own plant."<sup>15</sup> Accordingly, in the instant case, where the municipality seeks to operate its own electric service regardless of the term remaining on the franchise, such actions may be subject to constitutional challenge.

The Court has also articulated that

[a]s a general rule, ... a municipality acts and contracts in connection with the construction or operation of its municipal utility in its proprietary or individual capacity rather than in its legislative or governmental capacity, and is governed, for the most part, by the same rules that control a private individual or business corporation.<sup>16]</sup>

Thus, its acts in this regard are not subject to preferential treatment.<sup>17</sup>

With respect to your third inquiry, therefore, it is my opinion that a town may install and operate its own electric utility in areas of the town which are not served by an exclusive franchisee, but to do so within certificated territory of an exclusive franchisee is subject to constitutional challenge.

<sup>1</sup> See Va. Const. art. VII, § 9 (1971) (regarding granting of franchises by cities and towns and terms of franchises).

<sup>2</sup>See Va. Code Ann. § 56-265.4:2 (regarding municipality's acquisition of public utility's facilities serving annexed area).

<sup>3</sup>You do not question and thus I do not address the options of the town terminating a franchise or of having a second certificated utility authorized by the State Corporation Commission. See §§ 15.2-2106, 56-265.4, respectively.

<sup>4</sup>1995 Op. Va. Att'y Gen. 93, 93 (quoting § 15.1-292(A), predecessor statute to § 15.2-2109(A)).

<sup>5</sup>See *also* § 15.2-2109(B) (locality is not required to hold referendum to provide electric service to its own facilities; may provide services to customers of public utility with consent of public utility).

<sup>6</sup>1973-1974 Op. Va. Att'y Gen. 101, 102.

<sup>7</sup>*Commonwealth v. Arlington County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977) (quoting *Bd. of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

<sup>8</sup>See *also* § 58.1-3812(F) (providing that local consumer utility tax be collected by utility); § 15.2-5114(14) (providing that local water and sewer authority may contract with person or entity to act as billing and collecting agent for sewer service).

<sup>9</sup>You do not question and thus I do not address issues regarding the town acquiring existing public utility facilities. See § 15.2-2109(B).

<sup>10</sup>See *Potomac Edison Co. v. Town of Luray*, 234 Va. 348, 353, 362 S.E.2d 678, 681 (1987).

<sup>11</sup>See *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).

<sup>12</sup>*Mumpower v. Housing Authority*, 176 Va. 426, 450, 11 S.E.2d 732, 741 (1940) (addressing ability of municipal corporation to sell its excess electricity to outside consumers (quoting *Alabama Power Co. v. Ickes*, 302 U.S. at 480)).

<sup>13</sup>You do not provide information regarding the franchise agreement; thus, I do not address any provisions of the agreement that may affect your inquiries.

<sup>14</sup>See *Culpeper v. Vepco*, 215 Va. 189, 196, 207 S.E.2d 864, 869 (1974) (holding that to deny utilities use of their facilities within newly annexed area of town, and right to service customers within that area who desire to be serviced, would destroy vested and valuable right utilities possess and cause companies to sustain noncompensable loss); see *also* 1979-1980 Op. Va. Att'y Gen. 144, 145.

<sup>15</sup>*Potomac Edison Co. v. Town of Luray*, 234 Va. at 354, 362 S.E.2d at 681.

<sup>16</sup>*Light v. City of Danville*, 168 Va. 181, 209, 190 S.E. 276, 287 (1937).

<sup>17</sup>*Compare Town of Blackstone v. Southside Elec. Coop.*, 256 Va. 527, 506 S.E.2d 773 (1998) (holding that requirements applicable to any public corporation or authority seeking to take property by condemnation are similarly applicable to town seeking to acquire by condemnation, pursuant to § 56-265.4:2, public utility's facilities in annexed area).