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Utilities--Extension of Electric Service: The Municipalities' Power Play

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Utilities—Extension of Electric Service: The Municipalities' Power Play

In two recent decisions, the North Carolina Supreme Court has undermined the ability of investor-owned utilities and electric membership corporations (EMCs)[1] to compete with municipalities for utility customers outside the municipalities' corporate limits. This Note considers the court's decisions in *Lumbee River Electric Membership Corp. v. City of Fayetteville*[2] and *North Carolina ex rel. Utilities Commission v. Virginia Electric and Power Co.*[3] and analyzes the court's interpretation of the statutes that govern the rights of competing suppliers of electricity. The Note concludes that in these decisions the court subverts the purpose and language of the applicable statutes, particularly because it fails to harmonize them. The court's holdings may signal the end of fair competition for EMCs and investor-owned utility companies.

Prior to 1965, publicly owned utility companies, EMCs, and municipalities supplying electricity were free to compete for utility customers outside the boundaries of municipal corporate limits.[4] In 1965, reacting to the wasteful duplication of facilities and frequent litigation that resulted from free competition,[5] the North Carolina General Assembly passed the Electric Act.[6] The Electric Act is codified at North Carolina General Statutes section 62-110.2 and sections 160A-331 to 160A-338.[7] This Act, together with North Carolina General Statutes section 160A-312 (a provision that confers general authority on a municipal corporation to act outside its boundaries), governs competition among suppliers of electricity.

The Electric Act has two parts. Section 62-110.2 applies to competition for customers outside the corporate limits of municipalities, and sections 160A-331 to 160A-338 apply to competition within the corporate limits. Both parts enumerate circumstances in which one supplier exclusively is entitled to serve customers; such exclusivity of service is based on the location of a supplier's facilities relative to the facilities of other suppliers and on whether a supplier previously has been serving a particular customer.[8] Exclusivity also may be

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1. EMCs are governed by N.C. GEN. STAT. §§ 117-6 to -26 (1981).

2. 309 N.C. 726, 309 S.E.2d 209 (1983).

3. 310 N.C. 302, 311 S.E.2d 586 (1984).

4. *See, e.g.*, Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 139-40, 203 S.E.2d 838, 841 (1974).

5. *Id.* at 141, 203 S.E.2d at 842; *see also* N.C. GEN. STAT. § 62-110.2(c)(1) (1982) ("In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign . . . all areas . . . that are outside the corporate limits of municipalities.").

6. Act of April 20, 1965, ch. 287, 1965 N.C. Sess. Laws 328 (codified at N.C. GEN. STAT. §§ 62-110.2, 160A-331 to -338 (1982)). The municipalities chose not to participate in the formulation of the act, but the EMCs and investor-owned utilities did collaborate in recommending the Act to the general assembly. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 141, 203 S.E.2d 838, 842 (1974); North Carolina *ex rel.* Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 258, 166 S.E.2d 663, 669 (1969).

7. N.C. GEN. STAT. §§ 62-110.2, 160A-331 to -338 (1982).

8. *See id.* §§ 62-110.2(b)(4)-(7), 160A-332(a)(3)-(7).

granted to a supplier under section 62-110.2(c), a provision giving the North Carolina Utilities Commission authority to assign to an "electric supplier" exclusive rights to serve a particular territory.[9]

As used in section 62-110.2, "electric supplier" includes EMCs and public utilities, but not municipalities;[10] therefore, only an EMC or investor-owned utility may be assigned exclusive territory under section 62-110.2(c). The exclusivity granted to an electric supplier cannot be invoked to exclude service by a municipality.[11] In fact, any exclusivity outside corporate boundaries pursuant to section 62-110.2 operates only to the exclusion of other electric suppliers, not to the exclusion of municipalities. On the other hand, the portion of the Electric Act pertaining to service inside municipal boundaries, codified at sections 160A-331 to 160A-338, is not addressed solely to "electric suppliers"; once any supplier of electricity has the exclusive right to serve a customer within corporate limits, that right may be exercised to the exclusion of any other supplier of electricity.[12] Theoretically, therefore, the Electric Act provides that municipalities may acquire exclusive rights of service within their borders but not outside them, although a municipality is free to compete outside its borders with an otherwise exclusive electric supplier.

In addition to the Electric Act, when disputes arise over competition between municipalities and either EMCs or power companies, courts usually invoke section 160A-312.[13] Section 160A-312 is relevant in such disputes because it permits municipal corporations to extend electric service beyond their corporate boundaries. The statute provides that "a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations."[14] "Within reasonable limitations" is the key phrase in determining whether extension of electric service by a municipality is permissible. In three recent North Carolina decisions, North Carolina courts have not restricted the "within reasonable limitations" language to an enabling purpose,[15] but have held that this language in section 160A-312

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9. *Id.* § 62-110.2(c) (1982). Section 62-110.2(c)(1) prescribes factors the Utilities Commission should consider in assigning a territory to an electric supplier.

> [T]he Commission is authorized and directed to assign . . . areas . . . that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments. . . . The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

Id.

10. *Id.* § 62-110.2(a)(3). This Note uses the term "electric supplier" only in this limited sense.

11. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 143-44, 203 S.E.2d 838, 843 (1974).

12. In North Carolina electricity is supplied by publicly owned utility companies, EMCs, and municipalities. *See id.* at 139-44, 203 S.E.2d at 841-43.

13. N.C. GEN. STAT. § 160A-312 (1982); *see, e.g., Virginia Elec.*, 310 N.C. at 303, 311 S.E.2d at 587; *Lumbee River*, 309 N.C. at 729, 309 S.E.2d at 212; Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 144, 203 S.E.2d 838, 843-44 (1974).

14. N.C. GEN. STAT. § 160A-312 (1982).

15. The predecessor to section 160A-312 was construed as an enabling statute in Town of Grimesland v. City of Washington, 234 N.C. 117, 122-23, 66 S.E.2d 794, 797-98 (1951).

serves as the sole authority for resolution of competitive disputes involving municipal suppliers of electricity acting outside their corporate boundaries.[16]

Courts making decisions about competition outside municipal borders, however, should not apply section 160A-312 in a vacuum. Instead, the "within reasonable limitations" language must be applied with the provisions of the Electric Act and the case law construing that act in mind. Because section 160A-312 has not been applied in conjunction with the Electric Act, competition among the suppliers of electric power has been undermined, and municipalities have a striking competitive advantage. Moreover, the *Lumbee River* and *Virginia Electric* decisions have undermined the right of electric suppliers to serve customers allocated to them by the Electric Act. A further, anomalous result of applying section 160A-312 independently of the Electric Act is to give more rights to electric suppliers when they serve inside corporate borders than when they serve outside them.

In *Lumbee River* plaintiff EMC sought to enjoin defendant municipality from providing electric service to a new customer, the Montibello subdivision, located outside the municipality's corporate limits and entirely within territory assigned to the EMC under section 62-110.2(c).[17] The subdivision had requested that Fayetteville supply service.[18] The North Carolina Supreme Court framed the issue in the case as whether Fayetteville's extension of service to the new customer was within the "reasonable limitations" required by section 160A-312; the court found no provision of the Electric Act apposite to resolution of the case.[19] Persuaded by the city's current level of service and by its readiness, willingness, and ability to serve relative to Lumbee River's current service locations, the court found Fayetteville's extension of service within reasonable limits.[20] In arriving at its conclusion, the court did not consider as a "determinative factor" the assignment of the territory to Lumbee River by the Utilities Commission.[21]

Because section 62-110.2 applies only to electric suppliers, the exclusive privilege to serve conferred upon Lumbee River by the assignment under section 62-110.2(c) did not automatically exclude Fayetteville from servicing the assigned area. That the area was assigned, however, should have been a factor considered by the court when it determined whether extension of Fayetteville's service outside its boundaries was reasonable under section 160A-312. The relevance of a prior assignment had been suggested earlier in *Domestic Electric Service v. City of Rocky Mount*,[22] the first case to resolve a dispute over competition between a municipality and an electric supplier after passage of the Electric Act.

16. *Virginia Elec.*, 310 N.C. at 305-06, 311 S.E.2d at 588-89; *Lumbee River*, 309 N.C. at 732-33, 309 S.E.2d at 214; Duke Power Co. v. City of High Point, 69 N.C. App. 378, 383, 317 S.E.2d 701, 703, *appeal denied*, 312 N.C. 82, 321 S.E.2d 895 (1984).

17. *Id.* at 727-29, 309 S.E.2d at 211-12.

18. *Id.* at 729, 309 S.E.2d at 212.

19. *Id.* at 732-33, 309 S.E.2d at 214.

20. *Id.* at 738-40, 309 S.E.2d at 217-18.

21. *Id.* at 738-39, 309 S.E.2d at 217.

22. 285 N.C. 135, 144-45, 203 S.E.2d 838, 844 (1974).

The *Lumbee River* court believed that this case governed its own decision.[23] The *Domestic Electric Service* court appeared to recognize that a prior assignment of territory under section 62-110.2(c) meant that there would be a supplier ready and willing to serve any customer in the assigned area. It considered this assignment an important factor in deciding whether extension of service by a new municipal supplier was "within reasonable limitations."[24]

Elaborating on its view of the "within reasonable limitations" phrase, the *Domestic Electric Service* court noted that "[a]n extension of a city's electric system, reasonable at the time of and under the circumstances prevailing in *[Town of] Grimesland v. [City of] Washington*[25] [decided prior to the Electric Act] . . . would not necessarily be reasonable in the present day under the circumstances disclosed in the record before us."[26] One circumstance existing in 1974 when *Domestic Electric Service* was decided, but not in 1951 when *Grimesland* was before the court, was the existence of the Electric Act with its provisions allowing assignment of territory. Thus, assignment of territory under section 62-110.2(c) should be taken into account in a modern reading of the "within reasonable limitations" language.

That an assignment of territory outside municipal boundaries should be a factor in evaluating "reasonable limitations" under section 160A-312 follows not only from a careful reading of *Domestic Electric Service* but also from an understanding of the motivations that persuaded the general assembly to adopt the Electric Act. A major impetus for the act was the concern that unfettered competition was causing wasteful duplication of service facilities.[27] Although it was specifically the duplication created by facilities of EMCs and power companies that led to the adoption of the Electric Act,[28] duplication caused by installation of a municipality's facilities should not escape objection. To permit a municipality to duplicate already existing facilities of a competitor would be to ignore the general assembly's motivations in enacting the Electric Act. The municipalities' choice not to participate in the drafting of the Electric Act[29] should not allow them to avoid being affected by measures taken in response to legislative concern. While a municipality is not automatically excluded from serving an assigned or otherwise exclusive area outside its boundaries simply because there will be duplication of the facilities of an electric supplier who has exclusive rights in that area,[30] the duplication factor should be weighed in the "reasonable limitations" balance.

Arguably, the *Lumbee River* court did consider duplication, even though the statute did not require that it do so and even though the court did not ex-

23. *Lumbee River*, 309 N.C. at 733, 309 S.E.2d at 214.

24. *See Domestic Elec. Serv.*, 285 N.C. at 144-45, 203 S.E.2d at 844.

25. 234 N.C. 117, 66 S.E.2d 794 (1951).

26. *Domestic Elec. Serv.*, 285 N.C. at 144-45, 203 S.E.2d at 844.

27. *Id.* at 141, 203 S.E.2d at 842.

28. *See, e.g., id.*; North Carolina *ex rel.* Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 257-58, 166 S.E.2d 663, 668-69 (1969).

29. *See supra* note 6.

30. *E.g., Lumbee River*, 309 N.C. at 736-37, 309 S.E.2d at 216; *Domestic Elec. Serv.*, 285 N.C. at 143-44, 203 S.E.2d at 843-44.

pressly articulate that it was doing so. Fayetteville already had facilities near the disputed territory. Thus, allowing the city to serve in the territory would not effect a gross duplication of facilities, even though the territory had been assigned to the EMC under section 62-110.2(c). Because the court did not indicate specifically that lack of duplication was a factor in its decision, however, it left unresolved the issue whether duplication arguments will be heard when the statute does not expressly bar a supplier from an already serviced territory.

If the duplication argument is valid even when duplicative service is not specifically precluded by the statute, then any exclusive rights granted under section 62-110.2 must be considered when section 160A-312 is applied. The duplication question actually is quite complicated.[31] Courts have held that since the general assembly set out in the Electric Act to remedy problems of duplication, such duplication may continue unless the statute prohibits it in the context of the facts of a particular case.[32] If this interpretation of the statutes prevails, then there is no room for a duplication argument when the statute does not explicitly give exclusive rights.

Applying section 160A-312 without considering the Electric Act is most injurious when a court finds, as it did in *Virginia Electric*, that once a municipality satisfies the requirements of section 160A-312 it obtains an exclusive right to serve a customer.[33] In *Virginia Electric* the customer, Polylok Corporation, originally received electric service from the city of Tarboro. Polylok was located outside Tarboro's municipal boundaries in an area unassigned to any electric supplier under section 62-110.2(c). Polylok sought to change its supplier of electric service from Tarboro to Virginia Electric and Power Co. (VEPCO). In arguing over the propriety of the requested change in suppliers, the parties to the action never urged application of section 160A-312 because neither party contended that Tarboro did not have the authority to serve a customer outside its boundaries. Instead, the parties based their arguments on section 62-110.2(b)(5), which provides:

> Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the customer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier . . . , and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.[34]

Tarboro argued that this statute gave it a continuing, exclusive privilege to serve, regardless of Polylok's preference, because Tarboro had been the initial supplier of service to Polylok.[35] The court ignored both Tarboro's and

31. *See infra* notes 33-35 and accompanying text (discussion of *Virginia Elec.*).

32. *E.g.*, North Carolina *ex rel.* Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 257, 166 S.E.2d 663, 668 (1969).

33. *Virginia Elec.*, 310 N.C. at 303, 311 S.E.2d at 587.

34. N.C. GEN. STAT. § 62-110.2(b)(5) (1982).

35. *Virginia Elec.*, 62 N.C. App. at 265, 302 S.E.2d at 644, *rev'd*, 310 N.C. 302, 311 S.E.2d 586

VEPCO's arguments based on section 62-110.2(b)(5), correctly deciding that because section 62-110.2(b)(5) applies to "electric suppliers," its provisions are not applicable to disputes involving municipalities.[36] Instead, the court found section 160A-312 the only applicable statute. The court determined that section 160A-312 provided exclusivity of service rights for municipalities that satisfy section 160A-312's "within reasonable limitations" requirement.[37] The court held that Tarboro satisfied 160A-312 and thereby acquired an exclusive right to serve Polylok.[38]

It is difficult to understand where in section 160A-312 the court found this exclusive privilege. Unfortunately, the court's opinion is of no help; the conclusion of exclusivity is drawn without supporting arguments from case law, legislative history, or statutory language. The finding of exclusivity appears as a sweeping statement at the end of the opinion.[39] Not only is there nothing in the language of the statute to support the *Virginia Electric* court's conclusion, but there also is nothing in the purposes of section 160A-312 to support the finding. Because municipalities act only under authority of statutes or corporate charters,[40] section 160A-312 is necessary to permit a municipality to venture beyond its borders. Giving municipalities permission to do something, however, is hardly the same as giving them an exclusive right to take part in that activity.

Because section 160A-312 does not expressly confer an exclusive right on municipalities to provide electric service outside their boundaries, any ambiguity in this regard should have been resolved against the municipality in *Virginia Electric*. "[S]tatutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power. [The North Carolina Supreme] Court has long held that '[a]ny fair, reasonable doubt concerning the existence of the power is resolved against the corporation.' "[41] To concede that there is ambiguity in section 160A-312 would be generous; nothing in the language of the statute hints at an exclusive right to serve. Because the primary duties of a municipality are to be performed within its borders,[42] any extension of authority to act outside those borders

(1984) (supreme court opinion never specifically referred to the parties' arguments concerning application of N.C. GEN. STAT. § 62-110.2(c) (1982)).

36. *Virginia Elec.*, 310 N.C. at 305, 311 S.E.2d at 588.

37. *See id.* at 303-04, 311 S.E.2d at 588.

38. *Id.* at 307, 311 S.E.2d at 589.

39. The court stated:

> We conclude, on these facts, that Tarboro's decision to provide electric service to Polylok in 1970 and 1973 at Polylok's request was "within reasonable limitations" as a matter of law. Its continuation of that service has been and is now "within reasonable limitations." Tarboro, therefore, has the exclusive right to continue this service. The desire of its customer, Polylok, to discontinue the service has not diminished this right.

Id.

40. *E.g.*, *Lumbee River*, 309 N.C. at 732, 309 S.E.2d at 213; Williamson v. City of High Point, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938).

41. Porsh Builders v. City of Winston-Salem, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981) (quoting Shaw v. City of Asheville, 269 N.C. 90, 97, 152 S.E.2d 139, 144 (1967)).

42. *Domestic Elec. Serv.*, 285 N.C. at 144, 203 S.E.2d at 844.

should be construed even more narrowly than authority to act within those borders.

The nonexclusivity of a municipality's specific right to serve utility customers outside corporate boundaries was established in *Town of Grimesland v. City of Washington*.[43] In *Grimesland* the court determined that

> legislative authority would not be regarded as conferring the right to exclude competition in the territory served. Having the right to engage in this business gives no exclusive franchise, and if from lawful competition [the municipality's] business be curtailed, it would seem that no actionable wrong would result, nor would it be entitled to injunctive relief therefrom.[44]

Although *Grimesland* preceded the current version of section 160A-312, its interpretation of a right granted by the statute still is applicable.[45]

Moreover, similar rights to serve granted by the terms of the Electric Act have been construed by case law as not conferring exclusive rights on electric suppliers.[46] When the Electric Act specifically grants an exclusive right to serve, it is very clear on this point.[47] Similar statutory language should not give exclusive rights to one competitor while withholding exclusive rights from another. Holding otherwise in this scenario creates a severe discriminatory effect against electric suppliers.

Not only is there discrimination in the court's granting exclusive rights to municipalities under section 160A-312, but there also is an undermining of the rights to serve given electric suppliers by various provisions of the Electric Act.[48] Rights granted by the Electric Act would be eroded by the municipalities' gradual accretion of exclusive privileges. What good is an assignment under section 62-110.2(c) if, theoretically, a municipality eventually could annul the rights in that assignment by acquiring exclusive rights to the entire assigned territory? What good is it to have an exclusive right as to any other electric supplier under section 62-110.2(b) if municipalities leave no territory within which those rights can operate? If the court continues to apply the "within reasonable limitations" language as it did in *Lumbee River*, without regard to

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43. 234 N.C. 117, 66 S.E.2d 794 (1951).

44. *Id.* at 122, 66 S.E.2d at 797 (construing Act of March 19, 1929, ch. 285, 1929 N.C. Public Laws 342, the precursor of N.C. GEN. STAT. § 160A-312 (1982)). Although the earlier law did not contain the "within reasonable limitations" language, the court, in dictum, imposed that condition on extension of service beyond corporate boundaries. *Id.* at 122, 66 S.E.2d at 798.

45. *E.g.*, State v. McGraw, 249 N.C. 205, 208, 105 S.E.2d 659, 662 (1958).

46. *E.g.*, *Domestic Elec. Serv.*, 285 N.C. at 143, 203 S.E.2d at 843.

47. *See* N.C. GEN. STAT. § 62-110.2(b)(4)-(7) (1982) (language of exclusivity is that suppliers other than the one initially selected by a customer for a particular premises "shall not thereafter furnish service to such premises"); *id.* § 160A-332(a)(4)-(7) (statutory language is that another supplier "shall not" serve or that "no other supplier shall thereafter furnish service," explicitly denoting the exclusivity given suppliers servicing a particular premises inside municipal corporate limits).

48. For example, N.C. GEN. STAT. § 62-110.2(b)(2)-(3) (1982), which gives any electric supplier the right to serve certain premises located wholly within 300 feet of that supplier's lines, is subject only to the exclusive right of another electric supplier to serve those premises. The rights given by § 62-110.2(b)(2)-(3) can be empty grants if a municipality, merely by satisfying the requirements of § 160A-312, attained an exclusive right to continue to serve premises located within 300 feet of an electric supplier's lines.

whether territory is assigned or otherwise deemed even qualifiedly "exclusive" under section 62-110.2, and then applies the *Virginia Electric* result of exclusivity, electric suppliers effectively will have no rights outside municipal boundaries.

Anomalously, as the electric suppliers' rights to serve outside municipal boundaries diminish, the rights they have inside corporate boundaries in relative terms become greater. This is true because there are at least some absolutely exclusive rights recognized for electric suppliers inside corporate boundaries under sections 160A-331 to 160A-338, while all absolutely exclusive rights outside municipalities are reserved to the municipalities after *Virginia Electric.* This result might have been prevented if the court had considered the Electric Act in applying section 160A-312. It the court had considered the Electric Act, the court at least would have seen a statute that is more explicit than is section 160A-312 when it confers on a competitor exclusive rights to serve. The court, however, continues to resolve disputes between municipalities and electric suppliers without such consideration.[49]

The *Virginia Electric* result may not find the support it needs in a duplication-of-facilities argument. Although a primary purpose of the Electric Act was to prohibit free competition when it led to wasteful duplication of facilities, if the general assembly did not specifically prohibit duplication, free competition might continue as before the Electric Act, despite a seemingly wasteful overlap of facilities.[50] Thus the *Virginia Electric* finding of exclusivity has only shaky

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49. Duke Power Co. v. City of High Point, 69 N.C. App. 378, 385, 317 S.E.2d 701, 705, *appeal denied*, 312 N.C. 82, 321 S.E.2d 895 (1984).

In *Duke Power* plaintiff electric company sought to enjoin the city of High Point from extending electric service outside its municipal boundaries into an area proposed for annexation. The proposed annexation area had been assigned to Duke Power under § 62-110.2(c). *Id.* at 380, 317 S.E.2d at 702. The court of appeals acknowledged that the city desired to serve the area in question prior to annexation because after annexation, according to the Electric Act, N.C. GEN. STAT. § 160A-332(a) (1982), Duke Power would have an exclusive right to continue any service provided in the area up to the annexation date. *See Duke Power*, 69 N.C. App. at 387-88, 317 S.E.2d at 706. The court nonetheless insisted on ignoring the imminent operation of this provision of the Electric Act; the court relied solely on the authority given by the "within reasonable limitations" language of § 160A-312 and permitted the municipality to extend its service to the area.

The court's refusal to consider the operation of the Electric Act meant that it condoned the city's attempts to circumvent rights about to accrue to Duke Power under the Electric Act. Duke Power would have been better off had its service initially been inside rather than outside municipal borders because exclusivity of service given any supplier inside municipal boundaries is operative against all other suppliers and does not yield to the municipal supplier. Furthermore, the assignment of the about-to-be annexed territory to Duke Power created an empty privilege. Had the court weighed into the "reasonable limitations" balance of § 160A-312 the provisions of the Electric Act, its decision might have been different. The ease with which High Point was permitted to serve customers in the assigned, proposed annexation area, is an interesting contrast to the insurmountable barrier placed before VEPCO when it tried to serve Polylok.

50. When the general assembly has not restricted free competition, "neither [the supreme court] nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines." North Carolina *ex rel.* Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 257, 166 S.E.2d 633, 668 (1969).

In many sections of the Electric Act, the general assembly has specifically established a 300-foot measure as a guideline for desired distance between facilities of different suppliers, thus buttressing the argument that when the 300-foot measure is not prescribed, overlap of facilities is condoned. Because the Electric Act provides this 300-foot measure between electric suppliers outside municipal

support in an argument that Tarboro was already equipped to service Polylok and that to allow VEPCO to serve would create wasteful duplication. Furthermore, to rest the basis for the *Virginia Electric* decision on a duplication argument is inconsistent with *Lumbee River* because the *Lumbee River* court did not openly consider any duplication that might result from allowing a particular supplier to serve a customer.

Besides duplication, another tenet of free competition that theoretically continues to govern unless statutes specify otherwise is that one supplier does not acquire an exclusive right merely by being an initial provider.[51] The general assembly did not specify exclusive rights for cities to serve customers outside their city limits; therefore, despite duplicative results, cities do not have a monopoly on potential users or on users they already serve in such areas.

Customer choice was another hallmark of the pre-Electric Act competition for customers.[52] Like duplication and non-exclusivity, customer choice presumably remains a characteristic of competition for customers even after passage of the Electric Act unless the Electric Act specifies otherwise. The exclusivity found by the *Virginia Electric* court—unsupported as it is by specific provisions of the Electric Act—is inconsistent with the right of a customer to choose his supplier. In *Virginia Electric* the court dismissed the customer's right to choose as brashly as it found an exclusive right in the municipality to serve. If the *Virginia Electric* court had heeded the words of other cases which have cautioned that customer choice is not to be denied lightly, it might have weighed customer choice into the section 160A-312 balance.[53]

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boundaries and among all types of suppliers inside municipal boundaries, it is curious that due to a gap left in the statutes, there is no measurement restricting service by municipalities outside their borders. This gap in the legislative attempt to prevent duplication might be an oversight by the general assembly, or it might evince the desire of the general assembly to ignore duplication when municipalities venture beyond their borders to compete with electric suppliers. If the general assembly intended to ignore duplication when municipalities serve beyond their borders, then a duplication argument should not support either Tarboro's attempt to prevent VEPCO from serving Polylok in *Virginia Elec.* or Lumbee River's attempt to prevent Fayetteville from serving the Montibello subdivision in the *Lumbee River* case; consistency should be required. If courts refuse to consider duplication of an electric supplier's facilities when a municipality seeks to set up new facilities beyond its borders, they also should refuse to consider a duplication argument when an electric supplier seeks to duplicate the municipality's facilities in that area. Municipalities should not be entitled to favoritism in both situations.

Legislative clarification would be helpful on this point. The general assembly could—if it is concerned about duplication in all circumstances—make § 160A-312 more specific, tying the "reasonable limitations" language to some measure such as the 300-foot measure in the remainder of the statute. Perhaps a measure less than 300 feet would be more fair. A municipality's advance beyond its borders would not be "within reasonable limitations" if it proposed to set up facilities that came too near those of another supplier. Municipalities would thus be subject to the same restrictions that govern competition among electric suppliers outside as well as inside municipal borders. Another effect of making § 160A-312 more specific would be to make § 160A-312 more closely resemble the Electric Act in form, thereby hinting to the courts that the two should be applied together.

51. *Domestic Elec. Serv.*, 285 N.C. at 139, 203 S.E.2d at 841.

52. *See, e.g.*, Blue Ridge Elec. Membership Corp. v. Duke Power Co., 258 N.C. 278, 281, 128 S.E.2d 405, 407 (1962).

53. *See, e.g.*, North Carolina *ex rel.* Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 118, 171 S.E.2d 406, 413 (1970); North Carolina *ex rel.* Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 256, 166 S.E.2d 663, 668 (1969); Blue Ridge Elec. Membership Corp. v. Duke Power Co., 258 N.C. 278, 281, 128 S.E.2d 405, 407 (1962).

Because section 160A-312 and the statutory provisions comprising the Electric Act were not enacted at the same time, it is understandable that one statute might be applied without automatic reference to the other. In enacting the Electric Act the general assembly probably did not consciously envision a unified scheme that included the act and section 160A-312. Because both the Electric Act and section 160A-312 address the rights of different suppliers to extend electric service to customers, however, a court should seek to harmonize the two when resolving a dispute over that service.

The primary result of failure to interpret section 160A-312 with regard to the Electric Act is to undermine the ability of electric suppliers to compete on equal grounds with municipalities. Free competition is precluded when a court ties one competitor's hands at the same time that it gives another competitor a head start.

The decisions in *Lumbee River* and *Virginia Electric* also bestow upon electric suppliers greater rights to serve inside municipal boundaries than outside them. Electric suppliers may maintain service within a municipality without fear of poaching by the municipality. Outside municipalities, however, electric suppliers face not only competition for new customers but also the inability to compete for customers served by the municipality. This result will become more pointed as municipalities acquire customers outside their boundaries and thereafter exclusively serve those customers with the blessing of the North Carolina courts.

The fault in the narrow application of section 160A-312 lies with the general assembly. The general assembly should express more clearly its purposes in controlling competition among providers of electricity. Is duplication of facilities a primary concern that must be considered even apart from statutory direction? Are the rules of an act whose provisions are scattered throughout the statute books to be read in a unified way? The answers given these questions by the courts have skewed the rules of the game in favor of municipalities and undermined the ability of "electric suppliers" to compete for and maintain customers.

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