

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 5806

Petition of certain ratepayers of Vermont )  
Electric Cooperative, Inc. (VEC), requesting )  
an investigation into VEC's alleged violation of )  
its bylaws )

Order entered: 6/9/99

**FINDINGS AND BOARD ORDER**

**Summary of Proceedings**

This docket concerns Vermont Electric Cooperative, Inc. ("VEC ") procedures for amending its bylaws. By petition of VEC members dated February 8, 1995, the Board was requested "to open a docket to investigate the Vermont Electric Cooperative's refusal to comply with its bylaws." The initial petition was construed as "a request for a declaratory ruling, an injunction, or both,"<sup>1</sup> with specific focus on the petitioners' allegation that, in violation of VEC bylaws, the VEC trustees were not placing before the full VEC membership proposals for bylaws amendments made by individual VEC members.<sup>2</sup> However, this docket also has been treated as an ongoing general investigation of VEC practice concerning bylaws amendments, and as it has progressed, it has been expanded to address and resolve appropriate related questions.<sup>3</sup>

Several issues pertaining to the language and application of VEC bylaws already have been decided in this docket.<sup>4</sup> There now remains for resolution one last question--whether the

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1. Letter of Clerk of the Board, March 15, 1995.

2. Order of April 13, 1995, at 1-2.

3. *Id.*, at 12 and 14; Order of March 20, 1996, at 1 and 6.

4. Orders in this docket have resolved issues concerning parties' standing to bring complaints, the sufficiency of evidence to show that bylaws proposals were timely presented to the Board of Trustees by a bona fide VEC member for inclusion in the 1995 annual meeting notice, and the impact of certain VEC bylaws amendments on term limits of trustees. See Order of April 13, 1995, at 13 and 14, Order of April 24, 1995, at 5, and Order of March 20, 1996.

procedures for amending VEC's bylaws contained in VEC's letter to the Board of 2/12/96 are lawful.<sup>5</sup> This Order addresses that issue.

### **Jurisdiction**

The Public Service Board (the "Board") has general superintendence of laws relating to public service corporations, including electric cooperatives.<sup>6</sup> It has jurisdiction to hear and make orders in all matters provided for in the charter or articles of any electric cooperative.<sup>7</sup> And, with respect to any matter within its jurisdiction, the Board may issue orders on its own motion.<sup>8</sup>

In this docket, the Board specifically has ordered an investigation into VEC's procedures for reviewing bylaw amendments proposed by its members.<sup>9</sup> This order was issued notwithstanding VEC's assertions that declaratory relief was no longer available. And, it was followed by a Board Order explaining that "this docket is a Board investigation" and an ongoing docket.<sup>10</sup> Accordingly, Board jurisdiction is properly invoked to address the question of whether the procedures for amending VEC's bylaws contained in VEC's letter to the Board of 2/12/96 are lawful.

### **Findings**

1. By letter dated February 8, 1996 (i.e. the "letter to the Board of 2/12/96"), VEC advised the Board that it would be presenting to its members at VEC's annual meeting to be held May 4, 1996, a proposed by-law amendment concerning the procedures for amending by-laws.
2. The text of that proposed amendment reads as follows:

#### Article XIV: How Bylaws are Amended or Changed

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5. Order of June 18, 1996. Also note that the "letter of 2/12/96" is dated February 8, 1996, but was filed with the Board on February 12, 1996. Transcript of Status Conference of February 14, 1996, at 27-28.

6. 30 V.S.A. §§ 201, and 203(1); *In re Petition of Bloch*, 133 Vt. 326, 327 (1975); *Trybulski v. B.F. Hydro-Electric Corporation*, 112 Vt. 1, 5-6 (1941).

7. 30 V.S.A. § 209.

8. 30 V.S.A. § 2(c).

9. Order of August 31, 1995, at 1.

10. Order of March 20, 1996, at 6.

Section 1. Except as may otherwise be expressly stated in these bylaws and except as may be inconsistent with law, these bylaws may be changed by addition, amendment or repeal by a majority of the members voting by secret paper ballot case in person or by mail in connection with any regular Annual or special meeting, provided the notice of such meeting shall have contained a copy of the proposed alteration, amendment or repeal.

Section 2. A member may present to the board of trustees a request to change one or more of these bylaws by the first day of December preceding the regular (Annual) meeting at which the member wished to have the membership vote on the change. The board of trustees shall consider the requested change within sixty (60) days after the request is received at the headquarters' offices of the cooperative and vote whether to place the requested change before the members for a vote. A vote by the trustees to place the requested change before the members shall include a statement of the date, time and place for the vote by the members, or that the requested change shall be placed on the ballot at the next regular or special meeting or at a later specified regular or special meeting of the members. The board of trustees shall advise the member or members who made the request of its action within ten (10) days.

Section 3. At any time, a petition may be presented to the board of Trustees requesting to change one or more of these bylaws. The trustees shall place the requested change before the members for a vote at the next regular (Annual) or special meeting of the members held not less than one hundred twenty (120) days following the date on which the petition is received at the headquarters of the Cooperative if all of the following conditions are met:

(a) the petition states the exact wording of the change requested, and the change or vote by the members on the change is consistent with law; and

(b) the petition is signed by at least one hundred fifty (150) members of whom at least fifty (50) are members in a single district of the Cooperative and at least fifty (50) of whom are members in one other single district of the Cooperative.

Section 4. The procedures set forth in these bylaws for special meetings also may be used to bring about a vote on changing these bylaws.<sup>11</sup>

3. At the May 4, 1996, meeting of VEC, the proposed amendment was adopted by the VEC membership.<sup>12</sup>

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11. VEC's letter to the Board of 2/12/96.

12. Status Conference of June 12, 1996, tr. at 4-6; VEC Bylaws Article XIV.

### **Discussion**

**Background:** 30 V.S.A. § 3006 provides that "the members [of an electric cooperative] shall adopt, amend or repeal the bylaws ... in no case by the vote of less than a majority of those members voting ... at a meeting of the members." The statute itself does not specify further the method(s) by which such may be accomplished, nor does it define the precise scope of the "adopt, amend or repeal" process. However, the Board has provided guidance regarding construction of this statutory language by determining that the "practice of substantive review of the content of [member] proposed bylaw amendments [by the Board of Trustees] violates Vermont law and VEC's bylaws."<sup>13</sup> And, the Board has made clear that the shareholders' right to change corporate bylaws cannot be usurped by management, i.e., there must be some process whereby members can vote on proposed policy changes, notwithstanding the position of the trustees concerning those proposals.<sup>14</sup>

Accordingly, the Hearing Officer in this docket asked the parties to submit memoranda addressing:

"Are the two methods described above [i.e., the methods set forth in the new bylaw] consistent with the statutory requirement which provides that the adoption, amendment, or repeal of bylaws lies with the members of a cooperative. Is the requirement to collect 150 signatures unduly burdensome? Is the collection of signatures more burdensome than asking for Trustee approval? Should all proposed amendments be required to be supported by 150 signatures? What role should the Trustees exercise, if any, regarding proposed amendments "inconsistent with law"? Are all of these issues resolved because the members approved the two methods?"<sup>15</sup>

Both VEC and the Department responded to this request. Their respective memoranda conclude that the new bylaw is consistent with the provisions of 30 V.S.A. § 3006 and that the requirement to collect 150 signatures is not unduly burdensome. The memoranda further assert that the question about the Trustees' role in ascertaining whether a proposed bylaw is "inconsistent with law" should be deferred to such time as the issue actually arises.<sup>16</sup>

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13. Order of April 13, 1995, at 11.

14. *Id.*, at 11-12.

15. Order [Status Conference Memorandum] of June 18, 1996, at 2.

16. Vermont Electric Cooperative's Response to Questions Raised by the Hearing Office Regarding Its Procedures for Amending Its Bylaws, August 1, 1996, at 4-9 ("VEC Comments"); August 5, 1996, Letter of Sheldon M. Katz, DPS Special Counsel, at 1-3 ("DPS Comments").

Finally, neither memorandum explicitly answers the question about whether all issues are resolved because the members approved the two methods.<sup>17</sup>

**Is the new bylaw consistent with the statutory requirement that the adoption, amendment or repeal of bylaws rests with the members of the cooperative?** In this docket the petitioners have contended that, under 30 V.S.A. § 3006, any single member who wants to propose a bylaw amendment is entitled to have it presented to the full membership.<sup>18</sup> Neither VEC nor the Department reads the statute this broadly. Rather, both agree that § 3006 does not prescribe any particular process for ensuring that members effectuate the adoption of bylaws. They therefore maintain that the new bylaw is not inconsistent with the provisions of § 3006, and so does not contravene Vermont law.

**Is the requirement to collect 150 signatures unduly burdensome?** VEC and the Department agree that this requirement is not unduly burdensome.<sup>19</sup> In support of this position, both VEC and the Department compare the requirements of new bylaw provision with Washington Electric Cooperative's bylaw amendment provisions, and with the provisions of two statutes: 30 V.S.A. § 3008, which establishes a procedure for electric cooperatives to call special meetings, and 17 V.S.A. § 2645(a)(1), the statute concerning proposals to adopt, repeal or amend municipal charters. In each of these circumstances, members may call for action by petition, and in each case, the number of signatures required exceeds or is comparable to the 150-signature requirement of the new VEC bylaw.

Electric cooperatives are required to call special meetings upon petition of not less than ten percent of their members;<sup>20</sup> noting that VEC has 14,000 members, VEC calculates that 1,400 signatures would be needed to call a special meeting of the cooperative, as compared with the 150-signature requirement of the new bylaw. Similarly, municipal charters may be amended by petition of five percent of the voters of the municipality.<sup>21</sup> This translates to a requirement of 700 signatures for a municipality with the same number of residents as VEC has members. Again, the 150-signature requirement is a much lower threshold. Finally, VEC observes that 50

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17. VEC's memorandum points out that if the membership is dissatisfied with the new bylaw amendment, they have the power and authority to change it.

18. March 20, 1995, Prehearing Conference, tr. at 25.

19. VEC Comments; DPS Comments.

20. 30 V.S.A. § 3008.

21. 17 V.S.A. § 2645(a)(1).

signatures are required on a member petition to amend the bylaws of the Washington Electric Cooperative and that "[g]iven the fact that Washington Electric is smaller than VEC, there is little difference between VEC's and Washington Electric's procedures for amending bylaws."<sup>22</sup> The Department agrees with VEC's analysis, and further asserts that the 150-signature threshold is a legitimate control over submission of frivolous ballot initiatives.<sup>23</sup>

**What role should the Trustees exercise, if any, regarding proposed amendments "inconsistent with law"?** Both VEC and the Department contend that without a specific proposed bylaw amendment to consider, the role of the Trustees regarding amendments "inconsistent with law" is hypothetical and that, therefore, the question should be deferred to such time as the issue actually arises.<sup>24</sup> However, according to the new bylaw amendment, the trustees are not required to place a member-requested bylaw amendment before the members for a vote unless the proposal is "consistent with law." And, the VEC bylaws are silent concerning a process for determining whether a proposed amendment is "consistent with law." Therefore, there is question about whether the new bylaw amendment purports to entitle the trustees to engage in an impermissible substantive review of the content of the proposal. Neither the VEC nor the Department memoranda address this question.

### **Conclusion**

In order to be valid, bylaws must be reasonable and not arbitrary or oppressive, not only in themselves, but also in their practical application.<sup>25</sup> The bylaw amendment at issue provides that member-initiated proposals that are not also sponsored by the Trustees must be supported by a petition signed by at least one hundred fifty (150) members. As discussed above, the VEC bylaw petition signature requirements are either less burdensome or comparable to the petition signature requirements prescribed for member-initiated calls for special meetings of electric

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22. VEC comments, at 7-8.

23. Letter of Sheldon Katz, Special Counsel for the Department, August 5, 1996, at 2.

24. VEC Comments, at 9; DPS Comments, at 3.

25. 18A AmJur 2d § 319, citing *Conlee Construction Co. v. Cay Construction Co.*, 221 So. 2d 792 (1969), and *Lerman Diagnostic Data, Inc.*, 421 A.2d 906 (1980) (inequitable conduct by management in amending corporate bylaws for the dual purposes of thwarting shareholder opposition and perpetuating management in office does not become permissible simply because it is legally possible; such amendment will be held unreasonable and void).

cooperatives,<sup>26</sup> for member-initiated changes to municipal charters,<sup>27</sup> and for member-initiated amendments to Washington Electric Cooperative's bylaws. In addition, the 150-signature threshold provides a justifiable measure of protection against casual submission of proposals. Accordingly, that portion of the bylaw amendment requiring a petition signed by 150 members is neither arbitrary nor unduly burdensome.

It is the Board's responsibility to ensure that public service corporations, including electric cooperatives, comply with organizational directives from the legislature.<sup>28</sup> 30 V.S.A. § 3006 clearly requires that bylaws be adopted, amended or repealed by electric cooperative members at a meeting of the members. The statute itself establishes no other specific procedural requirements; however, the Board has held that the shareholders must be afforded a way to adopt bylaws amendments without intrusion by management.<sup>29</sup> Except for the portion of the bylaw amendment adopted at the May 4, 1996, VEC annual meeting that contains the prerequisite that the proposal be "consistent with law," the new bylaw establishes a process by which individual members, without the approval of management, may initiate and place proposed bylaws amendments before the full membership of the cooperative for a vote. To that extent it satisfies the objective of 30 V.S.A. § 3006, and consequently, it is not inconsistent with requirements of that statute.

The new VEC bylaw provides that the trustees are not required to place a member-requested bylaw amendment before the members for a vote unless the proposal is "consistent with law." At first blush, this provision may appear to be no more than a restatement of the requirement set forth in 11A V.S.A. § 2.06 that "[t]he bylaws of a corporation may contain any provisions for managing the business and regulating the affairs of the corporation that are *not inconsistent with law* or the articles of incorporation" (emphasis added). However, unlike the statute, the new VEC bylaw implicitly makes trustee determination about whether a member-proposed amendment is "consistent with law" prerequisite to presentation of the proposal to the full membership. Trustee scrutiny for content of member-proposed amendments is neither

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26. 30 V.S.A. § 3008.

27. 17 V.S.A. § 2645(a)(1).

28. *In re Petition of Bloch*, 133 Vt. at 327.

29. Order of April 13, 1995, at 11 - 12.

necessary (in light of the provisions of 11A V.S.A. § 2.06) nor permissible (in light of the provisions of 30 V.S.A. § 3006).

First, a bylaw that is "inconsistent with law," is, by operation of law, of no force and effect.<sup>30</sup> The Trustees are under no specific obligation to review member-proposed bylaws for legality pursuant either to statute or to the articles of association for the cooperative. If a bylaw is passed that is "inconsistent with law," it is rendered invalid by the provisions of 11A V.S.A. § 2.06 notwithstanding any action or inaction by the Trustees. Therefore, Trustee review of member-proposed bylaws to ensure their legality is unnecessary.

Second, in order to effectuate compliance with 30 V.S.A. § 3006, shareholders must be afforded a way to adopt bylaws amendments without intrusion by management.<sup>31</sup> The new VEC bylaw provides that the Trustees need place before the full VEC membership only those ballot initiatives that are "consistent with law." It thereby obligates the Trustees to evaluate the substance of a member-initiated proposal and authorizes them to prevent its presentation to the full membership. This is in direct conflict with the statutory right of members to amend bylaws, because under 30 V.S.A. § 3006, the members' right to change corporate bylaws cannot be usurped by management.<sup>32</sup> Consequently, that portion of the new VEC bylaw which entitles the trustees to determine whether a member-proposed bylaw is "consistent with law" is not valid and enforceable, as a matter of law.<sup>33</sup>

Thus, based on applicable provisions of Vermont law as well as Board rulings made in connection with this docket, I conclude that the new bylaw requirement to collect 150 signatures is not unduly burdensome. I further conclude that the methods for presentation of proposed bylaws to VEC members established by the new bylaw are consistent with the provisions of 30 V.S.A. § 3006, except for the portion of the new VEC bylaw that contains the prerequisite that a proposal presented by petition of at least 150 members be "consistent with

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30. *Clark v. Wild*, 85 Vt. 212 (1914); 11A V.S.A. § 2.06; see also, VEC Bylaws Article XIV, Section I, which allows for changes in the cooperative's bylaws "except as may be inconsistent with law".

31. Order of April 13, 1995, at 11-12.

32. Order of April 13, 1995, at 11-12; see, *Rogers v. Hill*, 289 U.S. 589 (1933) and *SEC v. Transamerica*, 163 F.2d 511 (3<sup>rd</sup> Cir. 1947), 332 U.S. 847 (1948) (cert. denied). See also, the leading treatise on the subject, by R.C. Clark, *Corporate Law* (1986) at 374-383.

33. Of course, there is no prohibition against the Trustees opposing a member-proposed bylaw when it comes for vote before the full membership. The thrust of the difficulty with the bylaw as currently written is that it allows an impermissible infringement by management upon the member-initiated proposal process.

law." I do not agree with VEC and the Department that the question about the Trustees' role in ascertaining whether a proposed bylaw is "consistent with law" simply should be deferred to such time as the issue actually arises. Rather, I conclude that the portion of the new VEC bylaw which entitles the trustees to determine whether a member-proposed bylaw is "consistent with law" is invalid and unenforceable.

**Recommendation**

Based on the above, I recommend that the Board find that the new VEC bylaw amendment is in compliance with 30 V.S.A. § 3006, except for the portion of the bylaw that contains the prerequisite that a member-initiated proposal supported by a petition of 150 members be "consistent with law." I further recommend that the Board encourage VEC to remove from its new bylaw the unenforceable provision concerning implied trustee scrutiny of member proposals. This may be accomplished by amending Article XIV Section 3 (a) to delete the words: "and the change or vote by the members on the change is consistent with law." Finally, I recommend that this docket be closed.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8. This Proposal for Decision has been served on all parties in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

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Judith M. Kasper, Esq.  
Hearing Officer

### **Board Discussion**

The language of the new VEC bylaws is ambiguous about the basis on which the trustees may determine whether a member-initiated proposal is "consistent with law." We share the Hearing Officer's concern that this language could create the opportunity for impermissible trustee scrutiny of member-initiated bylaws proposals. We agree that the language might be read to suggest that the trustees could evaluate the substance of a member-initiated proposal and, on the basis of that evaluation, prevent the presentation of that member-initiated proposal to the full VEC membership. We also agree with the Hearing Officer that such a process would be contrary to the provisions of 30 V.S.A. § 3006.

However, the language of the new VEC bylaw may also be read more narrowly: to authorize the trustees to prevent a member-initiated proposal from being presented to the full VEC membership if there has been either a court or a Board order finding that the proposed bylaw is not "consistent with law." If read in this manner, the bylaw would be in compliance with 30 V.S.A. § 3006. Thus, we will interpret the bylaw as it now stands to authorize the trustees to prevent a member-initiated proposal from being presented to the full VEC membership only if there has been a court or a Board order stating that the proposed bylaw is not "consistent with law." The bylaw does not authorize the trustees to make this determination on their own.

We agree with the Hearing Officer's recommendation that VEC be encouraged to remove the provision from its bylaws. The bylaw is not needed in order for the trustees to seek alternative ways to keep proposals they deem not "consistent with law" off the ballot. The trustees have authority to seek a declaratory ruling or an injunction, and they may, of course, publicly oppose adoption of any proposal they deem unsound.

In all other respects, we adopt the findings and conclusions of the Hearing Officer.

**ORDER**

IT IS HEREBY ORDERED ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions and recommendations of the Hearing Officer, as modified in the Board Discussion, are adopted.
2. The VEC bylaw amendment enacted as Article XIV of the VEC bylaws is in compliance with 30 V.S.A. § 3006, except for the portion of the bylaw that may be interpreted to authorize trustee scrutiny of member proposals to determine whether the proposals are "consistent with law."
3. VEC is encouraged to remove from Article XIV of its bylaws the provision concerning trustee scrutiny of member proposals to determine whether the proposals are "consistent with law."
4. This docket is hereby closed.

DATED at Montpelier, Vermont, this 9th day of June, 1999.

<u>s/ Richard H. Cowart</u>	)	PUBLIC SERVICE  BOARD  OF VERMONT
	)	
<u>s/ Suzanne D. Rude</u>	)	
	)	
	)	
<u>s/ David C. Coen</u>	)	

OFFICE OF THE CLERK

Filed: June 9, 1999

Attest: s/ Susan M. Hudson

Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*