

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6200

Joint Petition of the Villages of Barton,)
Morrisville, and Swanton, and the Rural)
Utilities Service of the United States)
Department of Agriculture for: (1))
authorization for the transfer of all of the assets)
of the Vermont Electric Cooperative, Inc.)
("VEC"); and (2) authorization either: (a) for)
said Villages to jointly own and operate such)
former VEC assets; or (b) to form a new)
"Public Utility District" AND Petition of)
Vermont Public Power Supply Authority on)
behalf of itself, and the above Villages, to issue)
debt, in a principal amount not to exceed)
\$40,000,000 in order to finance the acquisition)
of the assets of VEC)

Order entered: 8/3/99

PROCEDURAL ORDER RE VILLAGES' MOTION FOR RELIEF

Introduction

In an Order entered May 28, 1999, in this proceeding, we directed the petitioning Villages of Barton, Morrisville, and Swanton (collectively, the "Villages") to "file opinions of counsel on each Village's legal authority to undertake the proposed acquisition of Vermont Electric Cooperative, Inc.'s ("VEC's") assets."¹ The opinions of counsel were to be submitted by June 21, 1999.²

The Villages failed to comply with the Board's Order to submit opinions of counsel by June 21, 1999. Instead, on that date the Villages submitted a Motion for Relief from the requirement that they file the opinions of counsel, and requested that we hear oral argument

1. Order of 5/28/99 at 12.

2. *Id.*

on the motion. No other party has responded directly to the Villages' motion; however, as noted in our May 28 Order, the Department has requested that the Villages be required to file such opinions of counsel.³

The Villages' Position

In support of its Motion for Relief, the Villages present a number of arguments for relieving them from filing the opinions of counsel. The Villages first contend that there would be no value to the submission of opinions of counsel at this time, because the Public Service Board ("Board") has stated that the issue of the Villages' authority is to be briefed and decided in this docket, so that any opinion of counsel could do no more than (a) note that the Board will be deciding the issue, and (b) essentially brief that issue, perhaps also noting the arguments on both sides of the issue and estimating the likelihood of success of each argument.⁴

The Villages further contend that opinions of counsel filed at this time would require disclosure of privileged attorney-client communications and attorney work product, if the Board required the opinions of counsel to include an examination of the strengths and weaknesses of the various arguments. Requiring such opinions would be unfair, according to the Villages, in that it would force the Villages to disclose to the other parties their counsel's views of the strengths and weaknesses of the arguments. Instead, the Villages contend, the appropriate standard to which they should be held is that of V.R.C.P. 11(b), which requires no more than that legal positions be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."⁵

Similar to its first argument, the Villages next contend that any opinion of counsel submitted now would constitute a "meaningless advisory opinion" given that the Board has stated that it will itself be deciding the issue later in this docket.⁶

Finally, the Villages contend that the Board should not require opinions of counsel solely because their proposal is novel. The Villages point to the Department of Public Service's proposal for a statewide energy efficiency utility in Docket No. 5980 as an example of a

3. Order of 5/28/99 at 11-12.

4. Villages' Preliminary Filing 6/21/99 at 3.

5. *Id.* at 3-4.

6. *Id.* at 4-5.

proceeding in which the Board moved forward and considered a proposal whose legal authority was not clear at the outset, and which was only resolved through legislative action during the pendency of the docket. The Villages also cite the Vermont Supreme Court's decision in *Association of Haystack Property Owners v. Sprague*, 145 Vt. 443, 447 (1985), for the proposition that legal claims should not be required to be conclusively established at the outset of a proceeding.⁷

Discussion

We note, first, that the Villages did not seek relief from our prior Order directing the Villages to file the opinions of counsel until the very day that the opinions were due, twenty-four days after issuance of the Order. Given the timing of the filing, the Villages' actions mean that denial of their motion inevitably leads to a finding of failure to comply with the Board's May 28 Order; that failure, in turn, could be an adequate basis for dismissal of the underlying petition. However, we do not dismiss the petition because we have not yet had an opportunity to examine the possibility that the proposed transaction will promote the public good. We note that this action by the Villages does raise concerns about the Villages' ability to manage a future utility operation such as they have proposed in their petition.

Second, we deny the Villages' request for oral argument on their motion, as we have fully considered the Villages' written arguments.

Turning to the merits of the issue, we remain unpersuaded by the Villages' arguments. First, nothing in our prior Order indicated that the opinions of counsel were to include disclosure of privileged materials. We fail to understand how the Villages could infer that opinions of counsel would encompass the disclosure of attorney-client communications.⁸ Nor can our direction that the Villages submit the opinions of counsel reasonably be read as requiring disclosure of protected attorney work product. Indeed, the Villages have acknowledged that they will be required to produce such opinions of counsel at the conclusion

7. *Id.* at 5-6.

8. Such an inference would be analogous to concluding, wrongly, that our parallel requirement that the three remaining Villages affirm their willingness to move forward with the proposed acquisition of VEC's assets would necessarily require the disclosure of matters discussed by those municipal bodies in executive session.

of this docket if this Board approves the proposed transaction,⁹ and such opinions are often required in commercial transactions. We do not seek opinions of counsel that have been prepared in anticipation of litigation, and thus do not seek any attorney work product.¹⁰

As for the Villages' contentions that opinions of counsel at this stage of the proceeding could only note that the Board will be deciding the issue and, thus, would be of little value, the Villages misconstrue the purpose of requiring the opinions now, before the Board itself addresses the issue. The opinions of counsel are appropriate at this time to ensure that the Villages themselves have carefully and fully considered their legal authority to own and operate the VEC system and believe that they possess such authority, before the Board and the parties devote substantial time and resources to investigating the issue.

In addition, we note, as we did before in our Order of May 28, that the case is ripe for opinions of counsel as to the Villages' proposal itself, and that speculation about potential conditions in an eventual Board order need not delay the current task.

Finally, while we agree with the Villages' observation that opinions of counsel should not be required merely because a petitioner has presented a novel proposal, we reiterate our statement from the May 28 Order: "In a proceeding of this importance, it is essential that the petitioning parties are secure in their belief that they possess the authority to proceed, and have appropriately conferred with legal counsel."¹¹ The Villages note that they have no wish to proceed with this Docket:

while there is an outstanding and explicit cloud over the issue of whether the seller can in fact sell. Under the DPS's proposal, the Villages could face the prospect of investing considerable resources in presenting the merits of their proposal, and perhaps convincing the Board of those merits, only to then find, if the Board were to then rule in VEC's favor on issues related to the TPB Certificates, that RUS is unable to convey those assets.¹²

For similar reasons, we conclude that it would be unwise to proceed with this Docket unless the petitioning Villages they are able to secure opinions of counsel that support their own proposal as presented.

9. Villages and VPPSA Response 3/12/99 at 10.

10. See V.R.C.P. 26(b)(3).

11. Order of 5/28/99 at 12, n. 30.

12. Villages and VPPSA Response 7/16/99 at 2.

For the foregoing reasons and for the reasons stated in our May 28 Order, we deny the Villages' Motion for Relief. Accordingly, the petitioning Villages shall file opinions of counsel on each Village's legal authority to undertake the proposed acquisition of VEC's assets, as proposed in the Villages' amended petition filed June 21, 1999. These opinions of counsel shall be submitted by August 10, 1999.

SO ORDERED.

Dated at Montpelier, Vermont, this 3rd day of August, 1999.

s/ Michael H. Dworkin)

PUBLIC SERVICE

s/ Suzanne D. Rude)

BOARD

s/ David C. Coen)

OF VERMONT

OFFICE OF THE CLERK

FILED: August 3, 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.