



# **COMMONWEALTH of VIRGINIA**

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January 22, 2008

The Honorable Phillip P. Puckett  
Member, Senate of Virginia  
General Assembly Building  
Richmond, Virginia 23219

Dear Senator Puckett:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## **Issue Presented**

You ask whether current law permits a telephone company to dispose of some, but less than all, of its assets without the prior approval of the State Corporation Commission under the Utility Transfers Act.<sup>1</sup>

## **Response**

It is my opinion that the Utility Transfers Act requires prior approval of the State Corporation Commission only when (1) control or (2) all of the assets of a telephone company are being transferred.

## **Applicable Law and Discussion**

Certain transfers of public utility assets require prior approval by the State Corporation Commission. This is governed by the Utilities Transfers Act. Section 56-88.1 of the Act provides that:

No person, whether acting alone or in concert with others, shall, directly or indirectly, acquire or dispose of control of (i) a public utility within the meaning of [Chapter 5 of Title 56] or (ii) a telephone company, or all of the assets thereof, without the prior approval of the Commission.

Additionally, § 56-89 of the Act provides, in part, that:

It shall be unlawful for any public utility, directly or indirectly, to acquire or dispose of any utility assets situated within the Commonwealth or any utility securities of any other

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<sup>1</sup>See VA. CODE ANN. tit. 56, ch. 5, §§ 56-88 to 56-92 (2007).

company unless such acquisition or disposition shall have been authorized by the Commission.

For purposes of the Utility Transfers Act, the term “public utility” does not include telephone companies.<sup>2</sup> Consequently, the term “utility assets” would not include the assets of a telephone company.<sup>3</sup> Therefore, only the requirements of the Act specifically applying to “a telephone company” are applicable to the determination of whether prior State Corporation Commission approval is required for a transfer of control or assets. Section 56-88.1 specifically requires prior approval for transfer of control of a telephone company or for transfer of all its assets. Thus, transfers of less than all of a telephone company’s assets that would not constitute control of the telephone company do not require prior approval from the Commission.

The State Corporation Commission also recognizes this distinction. For example, a 2002 case before the Commission considered transfers of assets as part of a pro forma corporate restructuring involving Adelphia Business Solution of Virginia, LLC (“Adelphia”), and others.<sup>4</sup> Adelphia initially requested authority under the Utility Transfers Act to transfer all of its assets, but after amending the application to reflect a transfer of less than all of its assets, the Commission dismissed the application on the grounds that approval was no longer required under § 56-88.1.<sup>5</sup>

Your request does not set forth specific facts or circumstances. Depending on the particular facts of a transfer and related transactions, State Corporation Commission approval might be required under other *Code* provisions.<sup>6</sup> However, the opinions expressed herein are limited to the issue you present regarding application of the Utility Transfers Act.

### Conclusion

Accordingly, it is my opinion that the Utility Transfers Act requires prior approval of the State Corporation Commission only when (1) control or (2) all of the assets of a telephone company are being transferred.

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<sup>2</sup>“‘Public utility’ means any company which owns or operates facilities within the Commonwealth for the generation, transmission or distribution of electric energy for sale; for the production, transmission or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas for sale for heat, light or power, but excluding any company described in subdivision (b)(8) of § 56-265.1 [related to landfill gas]; or for the furnishing of sewerage facilities or water.” Section 56-88.

<sup>3</sup>“‘Utility assets’ means the facilities in place of any public utility or municipality for the production, transmission or distribution of electric energy or natural or manufactured gas, or for the furnishing of sewerage facilities or water.” *Id.*

<sup>4</sup>See *infra* note 5.

<sup>5</sup>See Adelphia Bus. Solutions of Va., LLC, State Corp. Comm’n Case No. PUA-2001-00080 (June 28, 2002) (dismissal order), available at [http://docket.scc.state.va.us:8080/CyberDocs/Libraries/Default\\_Library/Common/frameviewdsp.asp?doc=20982&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=native](http://docket.scc.state.va.us:8080/CyberDocs/Libraries/Default_Library/Common/frameviewdsp.asp?doc=20982&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=native).

<sup>6</sup>See, e.g., tit. 56, ch. 4, §§ 56-76 to 56-87 (2007) (governing transactions between entities with affiliated interests); ch. 10.1, §§ 56-265.1 to 56-265.9 (2007) (setting forth Utility Facilities Act governing, *inter alia*, certificates to operate as telephone utilities).

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Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive, flowing style with a large initial 'R' and 'M'.

Robert F. McDonnell