

**ORDER NO. 77760**

IN THE MATTER OF THE  
ESTABLISHMENT OF SERVICE AREAS  
OF ELECTRIC UTILITIES WITHIN THE  
STATE OF MARYLAND

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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CASE NO. 8800  
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(Petition of the Town of Easton for Authority to  
Supply Electricity Within an Annexed Area)

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I. BACKGROUND

On March 5, 2001, the Town of Easton (“Easton” or “Town”) filed a Petition for Authority to Supply Electricity Within Annexed Area (“Petition”) pursuant to PUC §7-210(d).<sup>1</sup> In 1993, Easton annexed a tract of land known as the “Lyons Farm.” The Lyons Farm is now being developed into a sub-division, approximately 10% of which, is located within Easton’s current service area. The remaining 90%, is located within Choptank Electric Cooperative, Inc.’s (“Choptank”) service area. Easton provides electricity through the Easton Utilities Commission (“EUC”). Easton seeks the Public Service Commission’s (“Commission”) authority to serve the entire Lyons Farm sub-division, thereby displacing Choptank as the electricity provider in that geographic area.

On April 11, 2001, Choptank filed its Response. Easton filed a Reply on April 20, 2001 and Choptank filed an Answer on April 30, 2001. The Public Service Commission’s Staff (“Staff”) filed comments in this matter on May 8, 2001. The Commission assigned this

matter to the Hearing Examiner Division on May 25, 2001. The Hearing Examiner held hearings on this matter, received additional pleadings, and issued a Proposed Order.

## II. PROPOSED ORDER OF HEARING EXAMINER

On January 18, 2002 the Hearing Examiner issued his Proposed Order of Hearing Examiner (“POHE”).<sup>2</sup> The POHE analyzes two issues: First, whether Choptank is legally authorized to provide electric service to the Lyons Farm development and second, whether granting Easton’s Petition is in the public interest.

### A. Legal Issues

Easton asserted that Choptank is not legally authorized to provide electric service to the Lyons Farm because Choptank must have the Town’s permission to operate within the annexed area, which it has not obtained. Easton cited §4(j) of Maryland’s Electric Cooperative Act (“Co-op Act”), Chapter 179 of the Laws of Maryland of 1976 for this proposition.<sup>3</sup> Easton also cited §7-103(b) as support. Section 7-103(b)(1) provides: “An electric company must have the consent of the governing body of the municipal corporation or county before laying or constructing any power line...” Easton argued that Choptank did not obtain the required consent of the Town to provide electric service within its corporate limits, which now includes the annexed area.

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<sup>1</sup> Public Utilities Company (“PUC”) Article of the Annotated Code of Maryland. All references herein are to the PUC Law unless stated otherwise.

<sup>2</sup> A summary of the procedural history of this matter is set forth in the POHE and will not be repeated.

<sup>3</sup> Section 4(j) authorizes a cooperative to construct, or maintain and operate electric transmission and distribution lines along publicly owned lands “after first securing the proper assent of the municipal authorities...or of the county commissioners or county council...”

The Hearing Examiner concluded that Easton’s legal argument “is clearly incorrect.”<sup>4</sup> The Hearing Examiner emphasized that the Co-op Act authorizes a cooperative to operate in a given area once it has received the assent of the municipal authorities **or** the county authorities. He also noted that Choptank provided as evidence its franchise granted by the Talbot County Commissioners in 1940. Among other things, the franchise grants Choptank:

permission to erect, operate and maintain from time to time hereafter in perpetuity, poles, towers, cables, conduits, wires, fixtures, appliances and appurtenances for the purpose of transmitting and distributing electric energy for light, heat and power on, along, over and across the county roads and highways, streets, lanes, alleys and properties, within Talbot County, including those in, or in the vicinities of, any towns or villages incorporated or unincorporated.

The Hearing Examiner concluded that in conformance with § 4(j) of the Co-op Act and §7-103(b), Choptank demonstrated that it is authorized to provide service to the annexed Lyons Farm because Choptank has the necessary franchise from Talbot County to provide electric service within the county.<sup>5</sup>

Easton argued that Choptank’s franchise only applies to county roads and county streets, etc. In reviewing Choptank’s franchise, however, the Hearing Examiner concluded that “the adjective ‘county’ modifies only ‘roads and highways’ and not ‘streets, lanes, alleys and properties within Talbot County.’”<sup>6</sup> Furthermore, the Hearing Examiner stated that this conclusion is supported by the fact that the reference in the franchise specifically includes

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<sup>4</sup> POHE at 4.

<sup>5</sup> The Lyons Farm was almost entirely outside Easton’s corporate limits prior to Easton’s annexation. Choptank has, and continues to serve residents on the Lyons Farm.

<sup>6</sup> POHE at 5.

“those in, or in the vicinities of, any towns or villages incorporated or unincorporated.”<sup>7</sup> Therefore, the Hearing Examiner concluded that Choptank has received the necessary authority from Talbot County to serve its portion of the Lyons Farm.<sup>8</sup>

#### B. Public Interest Issues

Easton argued that changes over time, including development of the annexed Lyons Farm, supports an alteration of the service area boundaries. Easton cited seven reasons why its petition is in the public interest: uniformity of rates, lower cost-based rates, consolidated billing, service center convenience, avoidance of customer confusion, reliability, and economic efficiency. Easton also cited its desire to have its municipal facilities in the development served by the EUC as well as the developer’s desire to have the EUC serve the entire development.

The Hearing Examiner noted that the Commission also found in its 1966 Service Areas Case<sup>9</sup> that adjustments might be required in the future due to changing circumstances. However, in *Re Mayor and Council of Federalsburg, Maryland (“Federalsburg”)*<sup>10</sup> the Commission stated that electric service area boundaries should not be changed without “strong and clear evidence of the need, equity, and practicality of the proposed change.”<sup>11</sup> Only proposed modifications that meet these tests are in the public interest.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *In Re Establishment of Service Areas of Electric Utilities Within the State of Maryland*, 57 Md. PSC 61 (1996) (“1966 Service Areas Case”). In the 1966 Service Areas Case, the Commission found that designating electric boundaries was in the public interest.

<sup>10</sup> 68 MD PSC 501 (1977).

<sup>11</sup> *Federalsburg*, 68 MD PSC 501, 504 (1977).

Based upon the record, the Hearing Examiner found that it is not in the public interest to grant Easton's petition to modify its electric service territory. The Hearing Examiner concluded that Easton did not provide clear and strong evidence of the need, equity and practicality of the proposed change.<sup>12</sup> The Hearing Examiner found that Choptank demonstrated that it is capable of providing reliable service to the entire Lyons Farm subdivision and therefore there is no need for Easton to take over as the provider.<sup>13</sup> Additionally, the Hearing Examiner stated that Choptank persuasively rebutted the equity reasons proffered by Easton, and that he concurred with Choptank's positions.<sup>14</sup> Furthermore, the Hearing Examiner concluded that the evidence supports Choptank's assertion that it is willing and able to provide service to the Lyons Farm subdivision; therefore the practicality test is satisfied.<sup>15</sup> For all of these reasons, the Hearing Examiner denied Easton's petition on January 18, 2002.

### III. EASTON'S APPEAL

On February 11, 2002 Easton filed a Notice of Appeal and a supporting Memorandum on Appeal ("Appeal") from the POHE. Easton asserts that the POHE is clearly erroneous for two reasons: (1) Choptank lacks the legal authority to install and maintain electric facilities within Easton's corporate limits and (2) maintenance of the existing boundary between the EUC and Choptank on the Lyons Farm will serve only the financial interests of Choptank and

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<sup>12</sup> POHE at 21.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 21 to 22.

<sup>15</sup> *Id.* at 22.

is contrary to the public interest. Easton concludes that the POHE should be reversed and its Petition should be granted.

#### A. Legal Issues

Easton argues that the Hearing Examiner's finding that Choptank has the legal authority to provide electric service to the Lyons Farm is clearly incorrect. First, the Town asserts that the franchise granted to Choptank by Talbot County applies only to **county** roads, etc. Easton disputes the Hearing Examiner's reading of Choptank's franchise that "the adjective 'county' modifies only 'roads and highways' and not 'streets, lanes, alleys and properties within Talbot County.'"<sup>16</sup> Easton asserts that this is a strained interpretation that leads to an absurd result, and therefore must be rejected. Easton argues that it "seems absurd...that the County Commissioners would restrict the grant of a franchise to County-owned and maintained 'roads and highways', but then extend it to *all* 'streets, lanes, alleys and properties within Talbot County'..."<sup>17</sup>

Easton also asserts that the Co-op Act<sup>18</sup> and §7-103 recognize the right of municipal corporations to control the granting of franchises within their corporate limits because these statutes require a utility to obtain the "proper assent" or "consent" of the municipal corporation or county before constructing facilities. Furthermore, while Article 25 §3(c) authorizes counties to grant franchises, Article 23A §2(b)(13) also grants municipal corporations the same authority.<sup>19</sup> According to Easton, these provisions must be read "in

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<sup>16</sup> See POHE at 5.

<sup>17</sup> Easton Appeal at 3-4.

<sup>18</sup> Chapter 179 of the Laws of Maryland of 1976. See Section 4(j).

<sup>19</sup> Easton incorrectly cited Article 23A §2(b)(3).

pari materia” so as to give effect to both.<sup>20</sup> Finally, Easton states that the streets in the Lyons Farm development will be owned and maintained by Easton, not the county. Easton says that it is clear that under Article 25 §2(a) that Talbot County has no jurisdiction over these facilities because incorporated towns are excepted from county jurisdiction.

Easton also asserts that Choptank has previously recognized the necessity to obtain a franchise from a municipal authority before providing service therein. In the *Federalburg* case and in *Re Delmarva Power and Light Company of Maryland*,<sup>21</sup> (“*Cambridge*”) the Commission affirmed Choptank’s right to continue providing service in areas annexed by Federalburg and Cambridge respectively. The Commission noted in both cases that Choptank already held a franchise to serve the annexed areas from the municipalities. Therefore, Easton concludes that Choptank has recognized the need to obtain authority from a municipality before serving an annexed area.

Easton argues that the Commission’s inclusion of most of the Lyons Farm in Choptank’s service area in 1966 did not and does not grant Choptank a franchise to serve that area. According to Easton, the Commission cannot grant a franchise because it is a regulatory body and the granting of a franchise is a legislative function.

Finally, Easton disagrees with Choptank’s claim that Easton’s arguments were rejected in *Mayor and Council of Berlin v. Delmarva Power & Light Company* (“*Berlin*”).<sup>22</sup> Easton says that the *Berlin* Court held that Delmarva had a valid franchise to provide service in the town of Berlin because a predecessor company had been authorized pursuant to State

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<sup>20</sup> Easton Appeal at 5.

<sup>21</sup> 70 MD PSC 197 (1979).

<sup>22</sup> 95 MD. App. 585 (1993).

law to furnish power in the city. Easton says that law is now §7-103, but that as presently codified it requires an electric company to obtain the consent of the municipality or county before providing service. Easton claims that the requirement for municipal consent was not added until 1910. Therefore, Easton concludes that *Berlin* is not applicable where, as here, Choptank is incorporated pursuant to the Co-op Act, which has had a municipal assent requirement since 1941.

#### B. Public Interest Issues

Easton asserts that granting its Petition will serve the public interest. According to Easton, the Hearing Examiner misapplied the *Federalburg* test, which requires strong and clear evidence of the need, equity and practicality for a proposed change in service boundaries. According to Easton, the Commission in *Federalburg* noted that before Choptank's application was filed with the PSC, Choptank had obtained the "necessary" municipal franchise to serve, had installed facilities to serve, and was actually serving several businesses in the industrial park. Easton argues that its Petition to revise the electric service areas was filed several months before construction of the Lyons Farm development had even begun. Easton claims that the PSC has not held that the same standard applies to a yet-to-be-developed subdivision.

Citing the Commission's *1986 Service Areas Case*,<sup>23</sup> Easton asserts that the Commission, in denying Berlin's request, noted that under different circumstances it might reach a different result. The Commission noted that it may be more inclined to approve a service area modification in an annexed area where the development has not yet begun



because of the possible benefits of a municipality providing electric service to all customers within its corporate limits, such as uniformity of billing and avoidance of customer confusion.<sup>24</sup> Easton argues that the Hearing Examiner failed to take cognizance of this statement and erroneously decided the case as if Easton's Petition had not been filed until after the subdivision had been constructed and was actually being served by Choptank.

In its Appeal, Easton again emphasizes seven reasons why its Petition is in the public interest. The first is uniformity of rates. Easton says that if its Petition is granted, future residents of the Lyons Farm subdivision will pay the same electric rates as other Town residents. According to Easton, the only (current) residences in Easton not served by the EUC are "the few existing dwellings on the Lyons Farm that have continued to be served by Choptank since that property was annexed by the Town."<sup>25</sup> Furthermore, Easton contends that Choptank's rates for residential customers are about 14% higher than the EUC's. Easton notes that its per customer cost of service is lower than Choptank's because the EUC's service area is predominately urban/suburban in character while Choptank's is mostly rural. Easton concludes that the Commission has never held that it must "blindly disregard" longstanding and significant differences in rates. Easton asserts that it would be "grossly inequitable" to require (most) Lyons Farm residents to pay higher rates than other Town residents.<sup>26</sup>

A third reason advanced by Easton is consolidated billing. If its Petition is granted then all Lyons Farm residents would receive a consolidated bill each month for electric and

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<sup>23</sup> *In Re Establishment of Service Areas of Electric Utilities Within the State of Maryland, 77 MD PSC 108, (1986), ("1986 Service Areas Case")*.

<sup>24</sup> See 77 MD. PSC 108, 112 (1986).

<sup>25</sup> Easton Appeal at 11.

<sup>26</sup> Easton Appeal at 12-13.

gas usage, and every third month the bill would include water and sewage services. In addition, Easton cites service center convenience; the EUC service center is only 2.5 miles from the development while Choptank's is about 18.5 miles away.

Easton also argues that granting its Petition will result in the avoidance of customer confusion and complaints. Easton notes that some Lyons Farm residents would be served by the EUC, while most would be served by Choptank, unless its Petition is granted. Easton also asserts that the POHE violates the Commission's "policy of authorizing only one utility to serve a new subdivision."<sup>27</sup> Easton argues that no party offered any explanation or rationale for the existing, "seemingly arbitrary" division of the Lyons Farm between Easton and Choptank.

Another public interest reason advanced by Easton is reliability. Easton claims that it can serve the Lyons Farm more reliably than Choptank because the EUC owns and maintains generators, located in Easton, with sufficient capacity to serve its entire load while Choptank has only a partial indirect ownership interest in two plants in Virginia. Easton also claims that its distribution system will provide a higher degree of reliability to the Lyons Farm than Choptank could offer. Finally, Easton asserts that because its distribution system is located adjacent to Phase I of the Lyons Farm development, while Choptank's is about one-half mile away from Phase I, economic efficiency supports Easton's Petition.

#### IV. CHOPTANK'S REPLY

##### A. Legal Issues

In Reply, Choptank asserts that when Talbot County granted it a franchise to provide electricity that Talbot County intended to grant Choptank a franchise to serve *all* properties, whether public or private. Choptank says that if its franchise was restricted to “county” properties, there would be large gaps in Choptank’s franchise resulting from intervening private properties. Furthermore, it would have to obtain the permission of hundreds of landowners before it could install electric facilities in Talbot County. Choptank says that such a result would be absurd. Choptank concludes that its franchise includes all property in Talbot County, limited only by the Commission’s designation of electric service territories.

Choptank also asserts that the clear language of the Co-op Act and §7-103 provide that the required approval for a franchise may be obtained from *either* the municipal or county authorities.<sup>28</sup> Choptank admits that Easton has the authority to grant franchises within the Town, but argues that this authority must conform to applicable law. Citing *Berlin*, Choptank asserts that a utility that holds a franchise in a subsequently annexed area does not need a municipality’s consent to continue providing service in the annexed area.<sup>29</sup> Finally, Choptank says that Article 25 §2(a) merely requires the county to take care of all roads in the county, except those in incorporated towns, and therefore does not affect or limit county commissioners’ authority to grant utility franchises.

Choptank acknowledges that in the *Federalburg* and *Cambridge* cases that it held municipal franchises (in addition to county-wide franchises). Choptank argues that “[t]hese facts, however, are irrelevant to the decisions in the two cases and in no way support Easton’s

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<sup>27</sup> Easton Appeal at 13.

<sup>28</sup> Choptank Reply Memo at 6.

<sup>29</sup> 95 Md. App. 585, 590 (1993).

argument that Choptank must now obtain the assent of Easton before it can *continue to serve an area it has been serving for 60 years.*”<sup>30</sup>

Choptank states that it does not dispute the Town’s observation that the Commission cannot grant a franchise. However, Choptank says this is irrelevant because Choptank already has a valid franchise from Talbot County. Furthermore, Choptank reiterates that Easton’s arguments in this case were considered and rejected in *Berlin*. Choptank states that the date of its incorporation is irrelevant because Choptank has a county-wide franchise and thus meets the requirements of PUC §7-103, which requires the consent of the municipality **or** county. Furthermore, according to Choptank, the *Berlin* Court found: (1) that the incumbent utility did not need the municipality’s consent to provide service in the disputed area; (2) a municipality could not on its own extend electric service into a utility’s service area; and (3) only the PSC (through what is now §7-210) can alter the service boundaries between a municipality and an electric utility.<sup>31</sup>

Choptank concludes that because it holds a valid franchise from Talbot County, and the Commission has authorized it to exercise that franchise, that Choptank does not need Easton’s consent to continue serving its portion of the Lyons Farm. Further, §7-210(d)(2) does not permit Easton to usurp the Commission’s exclusive power to determine the public interest in these instances.

#### B. Public Interest Issues

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<sup>30</sup> Choptank Reply at 7.

<sup>31</sup> Choptank Reply at 9.

According to Choptank, the evidence demonstrates that Choptank is capable of providing reliable service to the entire subdivision, Choptank has persuasively rebutted the equity reasons proffered by Easton, and the evidence supports Choptank's assertion that it is willing and it is practical for Choptank to serve the Lyons Farm subdivision. Choptank agrees with the Hearing Examiner's finding that the evidence in this matter supports maintaining the present electric service boundaries.

Choptank takes issue with Easton's challenge to the application of the *Federalburg* standard in this case and asserts that Easton previously stipulated to this standard and its witness addressed these considerations. Choptank notes the Commission's statement in the 1986 Service Areas Case that advantages of billing uniformity and avoidance of customer confusion are less significant where a municipality serves an area beyond its corporate limits.<sup>32</sup> The Commission also observed in the *1986 Service Areas Case* that Delmarva had been assigned the disputed area in 1966 and thus no action was required to implement its right to serve in the annexed area.<sup>33</sup> Choptank notes that in this case it also was assigned the area in dispute in 1966 by the Commission. According to Choptank, the Commission further noted the importance of a municipality obtaining the agreement of the incumbent utility for the municipality to serve the area before it is annexed, which Easton did not do.<sup>34</sup>

Choptank also rebuts Easton's positions on the specific public interest factors raised. Choptank argues that the PSC has never accepted rate uniformity as a factor in determining

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<sup>32</sup> Choptank Reply at 11.

<sup>33</sup> Choptank Reply at 11.

<sup>34</sup> *Id.*

the public interest. Nor has the Commission altered service territories based upon lower utility rates. Choptank argues that the difference in rates in this case is “negligible.” Choptank also states that the EUC issues multiple bills for services and therefore consolidated billing is not an important issue. Furthermore, if or when supplier choice becomes available to EUC customers then a consolidated bill will be meaningless.

Choptank asserts that proximity to a service center is irrelevant to the public interest and that in any event its customers believe its center is sufficiently convenient. Addressing the customer confusion issue, Choptank states that it is not uncommon for utility customers in Maryland to receive service from one company while their neighbors receive service from another. As for reliability, Choptank emphasizes that the evidence demonstrates that it can, and will, provide safe, adequate, and reliable service to the Lyons Farm subdivision. Finally, Choptank says that no cost study supports Easton’s economic efficiency theory, and in any case Choptank’s system is closer to certain phases of the development than Easton’s.

Choptank concludes that the Commission must consider the broader public interest at stake in this case. Just as the Commission did in the *Federalburg* case, the focus should be on providing and maintaining a reliable electric system in Maryland, and not on short-term rate advantages for a few customers. Furthermore, the Commission must consider the effect of its decision on Choptank as well as Easton.

## V. ANALYSIS

Easton has asserted several legal arguments as well as public policy positions in support of its Petition to serve the entire Lyons Farm subdivision, which it annexed in 1993.

Choptank has strenuously responded to these challenges arguing that its present electric service territory should remain unchanged. The Staff and OPC concur with Choptank that its service area should not be altered. In his Proposed Order, the Hearing Examiner concluded that Easton had not justified its Petition as required by §7-210(d) and therefore denied the Town's Petition. For the reasons explained herein, the Commission will affirm the Hearing Examiner.

A. Legal Issues

The Commission has carefully reviewed the legal arguments advanced by the parties and the Hearing Examiner's analysis. The Commission concludes that the law is well settled in this matter and concurs with the Hearing Examiner that Choptank possesses the necessary authority from Talbot County and this Commission to provide electric service to the Lyons Farm subdivision.

Maryland law provides authority for both county and municipal governments to grant utility franchises. Article 25 §3 provides:

(a)(1) The county commissioners of each county in this State, in addition to, but not in substitution of, the powers which have been or may be granted them, have the following express powers.

(c) To grant franchises as provided under existing public general or public local laws.

Article 23 A §2(b)(13) provides such authority to municipalities.<sup>35</sup> Similarly, the Co-op Act and §7-103(b) require the assent of either the municipal authorities **or** county before a utility may construct or operate its facilities.

The record in this case demonstrates that Choptank obtained a franchise from the County Commissioners of Talbot County in 1940 to provide electric service in the county, including most of the Lyons Farm.<sup>36</sup> As the Hearing Examiner correctly found, that franchise is limited only by this Commission's designation of electric service territories.<sup>37</sup> In the *1966 Service Areas*

*Case*, the Commission designated the area at issue as part of Choptank's territory.

Easton filed its Petition pursuant to §7-210(d), which provides:

(d) If the boundaries of a municipal corporation are enlarged by annexation, the municipal corporation may acquire the exclusive right to supply electricity within the annexed area if:...

(2) the Commission determines that modification of the service territory of an electric company and the transfer of a franchise or right under the franchise is in the public interest.

This statute is directly on point in this case. In 1993, Easton annexed the Lyons Farm. Now, Easton seeks to replace Choptank as the authorized electric utility. Whether Easton should be authorized to replace Choptank as the service provider is to be determined by the Commission, based upon the public interest standard in §7-210(d)

In *Berlin*, the Court explained that municipalities are granted limited franchises to provide electric service by the Legislature, "but the exercise of that franchise, like the exercise

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<sup>35</sup> Article 25 §2(a), which provides that county commissioners shall have control over all public roads, except those in incorporated towns, is not relevant to the issue of granting a utility franchise.

<sup>36</sup> Easton's argument that the Commission lacks authority to grant a franchise is also irrelevant. Choptank has a valid franchise from Talbot County.



of any public service company's franchise, is subject to the jurisdiction and authority of the PSC."<sup>38</sup> The Court also stated that what is now §5-201(a) "served as the requisite authority for the PSC, in its 1966 Order, to allocate service territories to the various companies subject to its jurisdiction."<sup>39</sup> Furthermore, the Court clearly stated that a municipality has "no right to extend its service area beyond that allocated to it by the PSC without prior PSC approval."<sup>40</sup> The Court also noted that enactment of §7-210(d) was not a new grant of power to the PSC but merely confirmed existing PSC authority.<sup>41</sup> Finally, the Court stated that the extent to which a utility is, or was, actually exercising its franchise within the disputed territory is "irrelevant."<sup>42</sup> Thus, Easton may not displace Choptank as the electricity provider to the Lyon's Farm, unless the Commission finds that it is in the public interest.<sup>43</sup>

One last point deserves brief mention. Easton relies upon the *Federalburg* and *Cambridge* cases for the proposition that Choptank previously recognized that municipal assent is required for it to serve the annexed Lyons Farm. In contrast, Choptank contends that the fact that it held municipal franchises (in addition to county-wide franchises) in those cases is irrelevant to the decisions therein. In *Federalburg*, Choptank already had a county franchise to serve the annexed area since 1941 and this territory was included in Choptank's service area by the Commission in 1966. The Commission simply affirmed Choptank's right to continue providing service in the annexed area. In the *Cambridge*, both Choptank and

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<sup>37</sup> POHE at page 5.

<sup>38</sup> 95 Md. App. 585, 591 (1993).

<sup>39</sup> *Id.* at 592.

<sup>40</sup> *Id.* at 592.

<sup>41</sup> *Id.* at 592.

<sup>42</sup> *Id.* at 592.

<sup>43</sup> Contrary to Easton's view, the Commission finds *Berlin* is directly applicable here. The date the local utility received its franchise is immaterial to the Court's findings noted above.

Delmarva had municipal and county franchises to provide service in an area subsequently annexed by the municipality. Since the Commission determined that both utilities could provide reliable service to the proposed subdivision, it assigned the entire subdivision to Choptank because three-fourths of the service area was within Choptank's territory. As this discussion makes clear, the fact that Choptank held municipal franchises was not a determining factor in those Commission cases.<sup>44</sup>

#### B. Public Interest Issues

Easton raised seven reasons to support its claim that modifying the electric service areas is in the public interest. The Hearing Examiner rejected Easton's arguments finding: 1) that there is no need for Easton to replace Choptank, 2) that Choptank persuasively rebutted Easton's equity arguments, and 3) that it is practical for Choptank to continue serving the Lyons Farm.<sup>45</sup> The Commission concurs with the Hearing Examiner's application of the *Federalburg* test and affirms the Proposed Order.

Easton asserts that if its Petition is granted that future residents of the Lyons Farm subdivision and other Town residents will have uniform rates and that customer confusion can be avoided. However, the record in this case shows that the EUC serves an area of 53 square miles while Easton's corporate limits are only 12 square miles. Therefore, it is doubtful that much, if any, customer confusion will arise as a result of the EUC and Choptank both serving the Lyons Farm. It is not unusual for neighbors to have different providers of utility or other services. Furthermore, the Commission has noted that "there are other cases where more than

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<sup>44</sup> It is Easton's interpretation that obtaining the municipal franchise was "necessary." In the *Federalburg* case the Commission observed that Choptank had obtained a municipal franchise in 1973 – the Commission did not comment upon the "necessity" for doing so.

one electric utility has been authorized to provide service within the corporate limits of a municipality.”<sup>46</sup> The Commission also concludes that Easton has not demonstrated that any appreciable amount of customer confusion will result if both the EUC and Choptank serve the Lyons Farm. In this regard, the Commission notes that Choptank is presently serving some Lyons Farm residents and customer confusion does not appear to be an issue. In fact, customer confusion may be avoided by not forcing these Choptank customers to become EUC customers.<sup>47</sup>

Another issue raised by Easton was lower rates. It contends that EUC’s residential electric rates are approximately 14% lower than Choptank’s rates. Choptank counters that “the alleged rate disparity for a 1,000 kWh per month residential customer is almost negligible at this time when Choptank patronage credits and EUC’s fuel rate adjustment charges are properly reflected.”<sup>48</sup> Regardless of the parties positions on the rate disparity, the Commission has previously concluded that there is another overriding issue in these matters. In *Federalburg*, the Commission stated emphatically that granting a petition for a change in service area boundaries when neighbors seek to lower their short-term electric costs “would not serve the larger public interest of providing and maintaining a reliable electric system in

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<sup>45</sup> POHE at 21-22.

<sup>46</sup> *Id.* at 114. The record reflects that all five of Maryland’s municipalities that are served by a municipal electric system are also presently served by another utility within their corporate limits without any problem.

<sup>47</sup> As an analogous matter, Easton asserts that the POHE violates the Commission’s “policy of authorizing only one utility to serve a new subdivision.” (Easton Appeal at 13). However, in the *Cambridge* case and in *Barrington Ridge* (Order No. 76466 in Case No. 8800, September 22, 2000) the contesting utilities mutually agreed that only one utility should serve the entire subdivision. Here, Choptank vigorously opposes any change. Under these circumstances, the Commission concludes that its general preference for one utility to serve a subdivision is not applicable.

<sup>48</sup> Choptank Reply at 13.

Maryland.”<sup>49</sup> Nothing in Easton’s presentation persuades the Commission to modify this position which has served to support the maintenance of reliable electric service systems in Maryland for many years.

As for consolidated billing and service center convenience, the Commission finds that Easton’s argument is not persuasive. Choptank noted that Easton issues multiple bills for services and Easton did not rebut this assertion. Therefore, the Commission concludes that there is little merit to this issue. As for service center convenience, Easton only demonstrated that its customer service center was somewhat closer to the Lyons Farm than Choptank’s. Easton did not show that existing Choptank customers feel inconvenienced.

Easton did raise two very important public policy issues in its Petition, reliability and economic efficiency. Easton asserted that the EUC owns and maintains generators located in Easton with sufficient capacity to serve its entire load. On the other hand, Easton asserted that Choptank has only a partial indirect ownership interest in two plants in Virginia. While these facts may, as part of a larger picture, indicate that one utility may be more reliable than another, they do not by themselves demonstrate which utility is more reliable. Many municipal systems and cooperative systems lack any generation sources of their own. In fact, as of July 1, 2000 Maryland’s four large investor-owned utilities divested themselves of their generation assets, although affiliates may own the assets. Choptank stated that it is willing and able to serve the Lyons Farm. The Hearing Examiner concluded that “Choptank’s testimony showed that its existing facilities are capable of providing reliable service to the entire [Lyons Farm] subdivision and therefore there is no necessity or need that Easton take

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<sup>49</sup> *Federalsburg*, 68 MD PSC 501 at 504 (1977).

over as the provider of electricity to [the Lyons Farm].”<sup>50</sup> Easton has not demonstrated anything in its Appeal to convince the Commission to find otherwise.<sup>51</sup> Therefore, since both utilities are capable of providing reliable service, Easton has not supported its Petition for modifying the service areas of the EUC and Choptank. As for economic efficiency, the record shows that Choptank can serve Phase I of the Lyons Farm at a negligible additional cost and that its facilities are actually closer to Phase 6 than the EUC’s.

In *Federalburg*, the Commission discussed the necessity for a utility to satisfy a three-part test in order to support a change in electric service areas. The Commission reaffirms its support for that test – a test based upon need, equity and practicality. Furthermore, this test provides an appropriate standard regardless of the stage of development of an annexed area. Whether an area is fully developed may affect the Commission’s conclusions about whether an applicant has satisfied the standard; it does not change the standard itself. In this proceeding, Easton has not shown that there is a need to displace Choptank as the electricity provider in the Lyons Farm subdivision because the record demonstrates that Choptank can and will provide reliable service. In terms of equity, Easton’s assertions are not supported by the record. Finally, as a practical matter, Choptank is ready, willing, and able to serve the Lyons Farm subdivision, and in fact is doing so today. Inasmuch as Easton has failed to satisfy the *Federalburg* test, the Proposed Order of Hearing Examiner must be affirmed and Easton’s Petition must be denied.

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<sup>50</sup> POHE at 21.

<sup>51</sup> Because the Commission reaches this conclusion, it is not necessary to address the issue of Easton’s possible requirement to provide electric customer choice if its Petition were granted.

**IT IS, THEREFORE,** this 9th day of May, in the year Two-Thousand and Two,

**ORDERED:** (1) That the Petition filed in this case by the Town of Easton to modify its electric service territory is denied,

(2) That the Proposed Order of the Hearing Examiner is affirmed,  
and

(3) That all motions not granted herein are denied.

Catherine I. Riley, Chairman /s/

Claude M. Ligon, Commissioner /s/

J. Joseph Curran, III, Commissioner /s/

Gail C. McDonald, Commissioner /s/

Ronald A. Guns, Commissioner /s/