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# THE "PUBLIC INTEREST" AND BANK AND SAVINGS AND LOAN EXPANSION IN VIRGINIA

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In the past, two phrases have been the subject of much evidence and legal argument in proceedings before the Virginia State Corporation Commission (SCC). The two phrases are *public need* and *public convenience and necessity*. Application of these two phrases has controlled the formation of new financial institutions and the expansion of existing ones. In 1976, the Virginia General Assembly eliminated in part these two phrases and in their place substituted a single phrase—*public interest*.<sup>1</sup> Elaborating on this term, the Code provides that new banking facilities

shall be deemed in the public interest if, based on all relevant evidence and information, advantages such as, but not limited to, increased competition, additional convenience, or gains in efficiency outweigh possible adverse effects such as, but not limited to, diminished or unfair competition, undue concentration of resources, conflicts of interest, or unsafe or unsound practices. . . .<sup>2</sup>

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Authors' Note: The opinions expressed herein are those of the authors and should not be interpreted as the position of either Technical Associates, Inc., or the Virginia State Corporation Commission.

1. The impetus for this change was provided by one of the recommendations in REPORT AND RECOMMENDATIONS FROM A STUDY OF THE BUREAU OF BANKING OF THE COMMONWEALTH OF VIRGINIA, prepared in February of 1976 by Golembe Associates, Inc. In reference to the use of two separate terms, the report stated: "This variety of terms would seem to offer unnecessary room for confusion without offering clear guidance to consideration of applications. It would be preferable to adopt a common expression, such as the 'public interest' and also to provide a guiding definition of that term. . . ." *Id.* at 103.

2. VA. CODE ANN. § 6.1-13 (Cum. Supp. 1976). *See also* sections 6.1-195.47, -39.1, and -39.2 which use the phrase "public interest." By an apparent legislative oversight, sections 6.1-39 and 6.1-195.48 using the phrase "public convenience and necessity" were not amended. It is anticipated that both sections will be changed in the 1977 Session of the General Assembly to correct these oversights, as a bill was pre-filed in June of 1976 which contained these changes.

Does this change in language mean that new standards are being implemented to control expansion of the financial industry? Are the criteria for expansion established in past decisions of the SCC and the Supreme Court of Virginia to be abandoned, or substantially altered? The primary purpose of this article is to review the interpretation of "public need" and "public convenience and necessity" by examining past decisions of the SCC and the review of those decisions by the Virginia Supreme Court. From this it may be possible to determine the extent to which the new phrase, *public interest*, will change future bank and savings and loan expansion. A secondary purpose is to examine factors which the SCC has considered in its application of the "public need" and "public convenience and necessity" criteria.

#### STATUTORY PROVISIONS FOR BANKING AND SAVINGS AND LOAN EXPANSION PRIOR TO JULY 1, 1976

Before beginning business, a state-chartered bank must obtain a certificate of authority from the SCC.<sup>3</sup> The Code directs the SCC to determine whether certain conditions exist before issuing a certificate. Section 6.1-13 of the Code previously provided that the SCC should determine that "there is public need for banking facilities . . . in the community where the bank is proposed to be. . . ."<sup>4</sup> Application of the second phrase, "public convenience and necessity," was necessary when an existing bank proposed to establish a branch.<sup>5</sup> Section 6.1-39 provided that the SCC, "when satisfied that the public convenience and necessity will thereby be served, may authorize banks . . . to establish branches. . . ."<sup>6</sup>

There are similar provisions in the Savings and Loan Act. Before beginning business, a proposed savings and loan association must first obtain from the Commission a certificate of authority.<sup>7</sup> Prior

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3. VA. CODE ANN. § 6.1-13 (Cum. Supp. 1976).

4. 1973 Va. Acts 702, ch. 454. The one notable exception to section 6.1-13 is found in VA. CODE ANN. § 6.1-40 (Repl. Vol. 1973), which went unamended though the terms of section 6.1-13 were changed. Section 6.1-40 eliminates the requirement of proving "public need" in certain situations and should be updated to use the new phrase "public interest."

5. VA. CODE ANN. § 6.1-39 (Cum. Supp. 1976). As previously mentioned, the legislators overlooked changing the sections using the term "public convenience and necessity." See note 2 *supra*.

6. VA. CODE ANN. § 6.1-39 (Cum. Supp. 1976). See notes 2 and 5 *supra*.

7. *Id.* § 6.1-195.47.

to the issuance of the certificate, section 6.1-195.47 requires the Commission to determine that "there is public need for savings and loan facilities . . . in the community where the savings and loan association is proposed to be located. . . ." <sup>8</sup> Before allowing a savings and loan to establish a branch, the SCC had to be "satisfied that the public convenience and necessity [would] be served. . . ." <sup>9</sup>

To summarize, prior to July 1, 1976, the Code required proposed new banks and savings and loan associations to demonstrate public need before beginning business, and, after they began business, to demonstrate that the "public convenience and necessity" would be served before establishing branch offices. <sup>10</sup>

In this article, no attempt is made to distinguish between the banking and savings and loan industries in the application of the terms "public need" and "public convenience and necessity." From a review of SCC opinions, it appears that the two terms have been applied similarly to both industries.

#### INTERPRETATIONS OF "PUBLIC NEED" AND "PUBLIC CONVENIENCE AND NECESSITY"

There were relatively few applications for new financial institutions or branches between the Depression and the early 1950's. The lingering memories of bank failures and Virginia's restrictive branching laws were the major reasons for this. <sup>11</sup> By the early 1950's, however, Virginia's economy was beginning to expand at an unprecedented rate and with it came the need to expand the financial industries. <sup>12</sup>

A 1955 decision of the SCC, *Merchants & Farmers Bank*, <sup>13</sup> pro-

8. 1973 Va. Acts 195, ch. 156.

9. VA. CODE ANN. § 6.1-195.48 (Cum. Supp. 1976). Here is another instance of lack of uniformity. "Public need" in the preceding statute was changed. "Public convenience and necessity" here was not changed. See note 2 *supra*.

10. In the case of national banks, the establishment of branches is governed primarily by relevant state statutes. See the McFadden Act, 12 U.S.C. § 36(c) (1970), which established the "dual banking system," whereby national banks are given the same privileges as the state banks.

11. D. Parcell, *State Banks and the State Corporation Commission—An Historical Review* (1974).

12. *Id.*

13. Case No. 12738, [1955] Va. S.C.C. Rep. 165 (Catterall opinion).

vided an interpretation of the term "public convenience and necessity." In this opinion,<sup>14</sup> the Commission set forth four guidelines for determining public convenience and necessity: first, convenience to the public must be substantially increased; second, necessity for expansion need not be absolute; third, the public interest should be the most important consideration and fourth, competition among banks must be controlled.<sup>15</sup> The Commission stated that the public interest requires enough banks and branches to serve the public, but not so many that competition would weaken them.<sup>16</sup> It further stated that the SCC must consider, in determining the public convenience and necessity, the welfare of the overall banking system in a community and its ability to serve the public.<sup>17</sup> This opinion, written over twenty years ago, gives an interpretation and application of the term "public convenience and necessity" which has been followed in subsequent decisions of the SCC and the Supreme Court of Virginia. In examining the requirements of public convenience and necessity, the Commission indicated that it was specifically

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14. On the subject of competition, the Commission noted: "The phrase 'public convenience and necessity', in whatever context it appears, always means that there is not to be unrestricted competition in the regulated business." *Id.* at 167. Later the Commission elaborated as follows:

§ 6-26 [now section 6.1-39] . . . imposes on the Commission the duty of determining how much competition is too much. The general rule declared by § 6-26 is that there are to be no branch banks. The exception is when the Commission is 'satisfied that public convenience and necessity will thereby be served.' The burden of persuasion is thus placed on the applicant. 'Satisfied' is a strong word. It does not mean beyond a reasonable doubt; but it means more than a slight preponderance. The legislature intended that authority to establish branch banks should not be granted as a matter of right or as a matter of course. The Commission's duty to decide whether or not to authorize a branch bank is one of the most important duties imposed on it by law. The Commission always holds a public hearing if a competing bank or financial institution requests one and sometimes when there is no such request. Likewise it has denied an application even when there was no opposition to it.

Each bank, of course, and properly so, consults its own competitive interest in deciding whether to apply for a branch. The Commission, representing the public, is required to consider the public interest. The public interest is to have enough banks and branches to serve the public, but not so many that competition among banks will tend to weaken the banks. . . . The Commission, in considering the public convenience and necessity, has to look at all the banks and branches in the community, and has to consider them as a *system* of banking facilities regardless of the ownership of each bank and of each branch.

*Id.* at 167-68.

15. *Id.* at 167.

16. *Id.* at 168.

17. *Id.*

concerned with the public welfare, competition within the banking industry and the impact of a new branch on the total banking system—in short, its concern was with the overall requirements of the public interest.

In a second opinion in 1955, *Bank of Cradock*,<sup>18</sup> the Commission emphasized the importance of finding "public necessity" in addition to "public convenience." It indicated that merely demonstrating additional convenience does not satisfy the statutory criteria; rather, there must be some balance between the convenience and the necessity.<sup>19</sup> Further elaboration on this point was provided in a 1956 case which involved the applications of three parties competing for the same location.<sup>20</sup> The SCC stated that, while necessity does not connote absolute necessity, it does require that the demand for additional banking facilities be great enough to support them prosperously.<sup>21</sup> The Commission felt it could not allow a new bank to open unless it could expect it to operate successfully.<sup>22</sup>

Not until 1968 did the Supreme Court of Virginia rule upon the Commission's determination of public convenience and necessity. In *Security Bank & Trust Co. v. Schoolfield Bank & Trust Co.*<sup>23</sup> the Commission opinion in question stated that the necessity requirement does not mean that the facility be absolutely essential or indispensable, nor does the existence of adequate banking facilities deprive the Commission of its authority to authorize additional banking facilities when for "the public good."<sup>24</sup> The Supreme Court of

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18. Case No. 12716, [1955] Va. S.C.C. Rep. 155.

19. Commissioner King, writing for the majority, expressed it this way:

It is not sufficient that the evidence establishes some convenience to some of the public. Every proposed branch bank will serve some public convenience, and it is difficult to imagine how any bank could seriously propose a branch which would not be convenient to some members of the public. That, however, is not the statutory criterion. The Legislature used the words 'public convenience and necessity', and those words obviously require more than mere convenience.

*Id.* at 161.

20. *Bank of Annandale*, Case No. 12666, [1956] Va. S.C.C. Rep. 15.

21. *Id.* at 16. The opinion emphasized the SCC purpose as follows: "The reason the State Corporation Commission is required by law to pass on this question instead of leaving it to the intelligent self-interest of free enterprises is because of the disastrous consequences to the public of the failure of a bank." *Id.*

22. *Id.*

23. 208 Va. 458, 158 S.E.2d 743 (1968). From SCC decisions, appeals as a matter of right may be taken to the Virginia Supreme Court. VA. CONST. art. IX, § 4.

24. *Schoolfield Bank & Trust Co.*, Case No. 18015, [1967] Va. S.C.C. Rep. 36, 39.

Virginia affirmed,<sup>25</sup> stating that the primary legislative concern was "maintenance of sound and adequate banking facilities and protection of the public from the evils of unsound and imprudent banking."<sup>26</sup> In interpreting "public convenience and necessity," the Commission may authorize additional banking facilities when there has been a showing of public need and such authorization will not "jeopardize the financial soundness" of existing banks.<sup>27</sup> Most notably, *Schoolfield* implicitly endorsed the Commission's interpretation of public convenience and necessity, and recognized its duty to protect the public.

In 1971, in *Petersburg Mutual Savings & Loan Association*,<sup>28</sup> the Commission provided some insight into the role of competition in determining public convenience and necessity. The opinion stated: "While competition is to be considered, it should be considered only to the extent that it does not deter or restrict the needs of the public. *The interest of the public is always paramount.*"<sup>29</sup> Finally, in *New Bank of Culpeper*,<sup>30</sup> the Commission found that the proposed bank would "stimulate the economy of the community which it intends to serve, [would] stimulate competition among the banks in that market, and [would] not jeopardize the financial soundness of the two existing banks."<sup>31</sup> It is notable that this language is very similar

25. *Security Bank & Trust Co. v. Schoolfield Bank & Trust Co.*, 208 Va. 458, 158 S.E.2d 743 (1968).

The court operated under this standard of review:

Under § 156(f) of the Constitution of Virginia [of 1902], the order of the Commission authorizing *Schoolfield* to establish a branch must be regarded by us as 'prima facie just, reasonable and correct.' We have many times said that such an order will not be disturbed by us 'unless it is contrary to the evidence or without evidence to support it.'

*Id.* at 461, 158 S.E.2d at 745. The Constitution of Virginia of 1971 eliminated the phrase relied on above; however, the court has stated that "a presumption of correctness still attaches to actions of the Commission," despite the change. *Farmers & Merchants Nat'l Bank v. Commonwealth*, 213 Va. 401, 404, 192 S.E.2d 744, 747 (1972). Likewise, the SCC determination will not be disturbed unless "contrary to the evidence or without evidence to support it." *Id.* at 405, 192 S.E.2d at 747.

26. *Security Bank & Trust Co. v. Schoolfield Bank & Trust Co.*, 208 Va. 458, 461, 158 S.E.2d 743, 745 (1968).

27. *Id.* at 462, 158 S.E.2d at 746.

28. Case No. 18893, [1971] Va. S.C.C. Rep. 72.

29. *Id.* at 74 (emphasis in original).

30. Case No. 19224, [1974] Va. S.C.C. Rep. 133, *aff'd per curiam*, 215 Va. 132, 210 S.E.2d 136 (1974).

31. [1974] Va. S.C.C. Rep. at 138.

to that used in the definition of public interest adopted by the legislature in 1976.<sup>32</sup>

In summary, the principles established twenty years ago in *Merchants & Farmers* have weathered well and, if anything, are more pertinent today than they were then. The banking system of the Commonwealth has undergone a significant transformation in recent years,<sup>33</sup> but the phrases "public need" and "public convenience and necessity" have remained critical elements before the SCC. It is apparent from a review of the opinions that the *public interest*, as recently defined, has long been paramount in the Commission's regulation of banking and savings and loan expansion.

#### SPECIFIC AREAS ADDRESSED BY THE COMMISSION

It can also be found, in reviewing past opinions, that the SCC has applied the public interest principle in two specific areas of controversy frequently encountered in bank expansion proceedings.

##### *Need for New Bank vs. Branch*

Often in proceedings before the SCC, a new bank and an existing bank will be vying to serve the same area. In this encounter, two points have evolved. First, it has been established that, other things being equal, a new bank can better serve the public need than a branch of an existing bank. The Commission stated in *Bank of Annandale*<sup>34</sup> that "preponderant weight" must be given to the needs of the public rather than the needs of the competing banks, and that a new bank would better serve the public.<sup>35</sup>

Conversely, the second point is that the establishment of a new bank is a more serious matter than creating a branch due to the possibility of failure.<sup>36</sup> As the Commission has noted: "A mistake in establishing a branch is less serious than a mistake in establishing a bank."<sup>37</sup> It seems that proving public need for a new bank is more

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32. See VA. CODE ANN. § 6.1-13(4) (Cum. Supp. 1976).

33. For a thorough analysis of Virginia's banking structure, see Ileo & Parcell, *Evolution of the Virginia Banking Structure 1962-1974: The Effects of the Buck-Holland Bill*, 16 WM. & MARY L. REV. 567 (1975).

34. Case No. 12666, [1956] Va. S.C.C. Rep. 15.

35. *Id.* at 16.

36. Springfield Bank, Case No. 13333, [1957] Va. S.C.C. Rep. 66.

37. *Id.* at 67.

difficult than proving public convenience and necessity for a branch but, on the other hand, if there is need for a new bank the public would be better served than by a branch of an existing bank.

### *Large Bank vs. Small Bank*

A second area of conflict arises when two banks both apply for permission to establish a branch at the same location. For example, in 1960 Mountain Trust Bank and the Bank of Salem were involved in such a dispute.<sup>38</sup> There the Commission found that the public would be better served by allowing the smaller bank to expand.<sup>39</sup> A similar situation arises when two banks apply for branches, and one bank already serves the area and the other does not. Such was the case in a 1972 dispute between Bank of Virginia-Potomac and First Manassas Bank and Trust Company.<sup>40</sup> The Commission found that it was better to permit a bank without an existing branch in the market to establish a new office than to allow a bank with an existing branch to establish an additional branch.<sup>41</sup>

### FACTORS CONSIDERED

This section examines, in a more direct sense, the factors which the Commission has considered in its application of the "public need" and "public convenience and necessity" criteria. It must be emphasized, however, that the SCC has made its determination of public need (and public convenience and necessity) on the total merits of each individual case based upon the evidence presented. Therefore, the citing of certain factors previously considered by the SCC should not be construed as a list of facts and figures which must exist and be demonstrated before a finding of public need is made. Rather, these factors are listed here in order to demonstrate some of the Commission's specific considerations in applying the "public need" and "public convenience and necessity" criteria.

The earliest SCC opinion significantly outlining the factors utilized in determining public need was in 1964 in *Guaranty Bank &*

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38. Mountain Trust Bank, Case No. 14972, [1960] Va. S.C.C. Rep. 105.

39. *Id.*

40. Bank of Virginia-Potomac, Case No. 19087, [1972] Va. S.C.C. Rep. 402.

41. *Id.* at 404.

*Trust Co.*<sup>42</sup> The SCC described the proposed bank site as a "prime location" for a bank, citing such factors as its strategic position in terms of traffic patterns, traffic counts, existing businesses nearby and the projection of additional businesses in a proposed shopping center.<sup>43</sup> Also described in the opinion were the population in the primary service area and the fact that Fairfax County was the fastest growing area in Virginia and one of the fastest growing areas in the nation.<sup>44</sup> In addition, mentioned as relevant factors were the existence of branch applications in the same area by protesting banks, and a petition signed in support of the application by local businesses.<sup>45</sup>

In *Schoolfield Bank & Trust Co.*, the Commission again cited the factors of traffic counts and proximity to businesses in finding a branch convenient and necessary.<sup>46</sup> Also listed were the bank's volume of existing business in the area of the proposed location and indications of the area's economic health, including bank debits, new car registrations and per capita income and population.<sup>47</sup> Finally, the Commission stated its desire to give Schoolfield a "reasonable opportunity to compete."<sup>48</sup>

The opinion in *Stonewall Jackson Bank & Trust Co.*<sup>49</sup> cited a wealth of economic factors, including the growth and levels of population, persons per banking office, retail sales income, bank deposits and loans, location and employment patterns and home construction.<sup>50</sup> Another 1973 decision cited much of the same.<sup>51</sup> The Commission list included population, income and employment.<sup>52</sup> Also considered were the availability of real estate loans in the area and the adequacy with which existing institutions had served the needs of the public.<sup>53</sup>

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42. Case No. 16592, [1964] Va. S.C.C. Rep. 19.

43. *Id.* at 20-21.

44. *Id.* at 21.

45. *Id.*

46. *Schoolfield Bank & Trust Co.*, Case No. 18015, [1967] Va. S.C.C. Rep. 36, 37.

47. *Id.* at 37-38.

48. *Id.* at 39.

49. Case No. 19161, [1973] Va. S.C.C. Rep. 121.

50. *Id.* at 123-24.

51. Home Savings & Loan Ass'n, Inc., Case No. 19185, [1973] Va. S.C.C. Rep. 130.

52. *Id.* at 131.

53. *Id.* at 132.

A third 1973 opinion, *Miner's & Merchant's Bank & Trust Co.*,<sup>54</sup> listed the deposit growth of the existing banks, retail sales, income, tourism, the loan-deposit ratios of existing banks, the adequacy of existing banking facilities to serve the needs of the public and the effect of the coal industry on the area's economy.<sup>55</sup> Finally, in a 1974 proceeding, the SCC examined the accessibility of the site and the number of parking spaces, the population pattern and growth rate, the changing nature of the area economy from a rural and agricultural base to a commercial and industrial base, employment patterns, income growth and bank deposit growth.<sup>56</sup>

### CONCLUSION

Only the Virginia State Corporation Commission, in its interpretation and implementation of the amended language of the Code, subject to appeals to the Supreme Court of Virginia, can determine whether the change to a "public interest" standard mandates a change in criteria for determining banking expansion. However, it is the opinion of the authors that no change in criteria is required. Past decisions on bank and savings and loan expansion have turned on public interest; the Commission has considered virtually all of the factors listed by the General Assembly as relevant to the public interest. The Commission, and the Virginia Supreme Court, have treated both "public need" and "public convenience and necessity" as mandates to consider the public interest.

The replacement of the conventional terms with the singular term "public interest" would thus appear to represent a change to simplicity and should serve this purpose. On the other hand, as this article has attempted to show, the public interest has been a paramount consideration of the SCC for many years and, consequently, the recent change in terminology should not produce any shift in emphasis.

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54. Case No. 19198, [1973] Va. S.C.C. Rep. 141.

55. *Id.* at 143-45.

56. New Bank of Culpeper, Case No. 19224, [1974] Va. S.C.C. Rep. 133, 136-38.