COMMONWEALTH OF KENTUCKY

BEFORE THE ENERGY REGULATORY COMMISSION

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In the Matter of

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| THE APPLICATION OF TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION FOR AN ORDER AUTHORIZING THE CORPORATION TO BORROW AN AMOUNT NOT TO EXCEED $4,361,000.00 FROM THE UNITED STATES OF AMERICA (REA), AND $1,967,000.00 FROM THE NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION (OFFICIALLY DESIGNATED REA LOAN NO. AG-6-MACON), AND TO EXECUTE NOTES, AND CONTRACTS, AND DOCUMENTS NECESSARY FOR THE PURPOSE OF CONSUMATING THE LOANS AFORESAID, AND FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE PURPOSE OF FINANCING THE IMPROVEMENTS AND CONSTRUCTING THE FACILITIES PROVIDED FOR IN THE LOANS AFORESAID, AND IN THE ALTERNATIVE, FOR DETERMINATION THAT THE COOPERATIVE IS EXECPT UNDER THE PROVISIONS OF KRS 278.300(10) | ) | CASE NO. 7954 |

O R D E R

Tri-County Electric Membership Corporation (Tri-County), filed its application on September 4, 1980, for a certificate of convenience and necessity and for authorization to borrow the sum of four million three hundred sixty-one thousand dollars ($4,361,000) from the United States of America Rural Electrification Administration (REA) and the sum of one million nine hundred sixty-seven thousand dollars ($1,967,000) from the National Rural Utilities Cooperative Finance Corporation (CFC), and to execute its notes as security therefor. The funds acquired by these borrowings are to be used to make system improvements and to extend service to new customers. These improvements and additions, which are estimated to cost six million two hundred twenty-nine thousand six hundred and fifty dollars ($6,229,650) are more specifically described in the application and record. Tri-County requested, in the alternative, an order finding that by virtue of the supervision and/or control

provided by the governmental agencies of the Tennessee Valley Authority and the Rural Electrification Administration that it ( Tri-County ) should be exempted under the provision of 278.300(10) from the necessity of obtaining the order and certificate requested from this Commission.

The matter was set for hearing on September 16, 1980, at 10:00 a.m., Eastern Daylight Time, in the offices of the Energy Regulatory Commission at Frankfort, Kentucky. The hearing was held as scheduled and all parties of interest were allowed to be heard.

In support of its contention that it should be exempted from the requirement of obtaining loan approval from this agency, Tri-County established its wholesale power relationship with TVA and incorporated an affidavit from REA which set forth that agency's procedure in reviewing and approving loan applications by RECC's such as Tri-County.

The Commission, after consideration of the application, all evidence of record, and being advised, is of the opinion and FINDS:

1. The Tennessee Valley Authority does not exercise sufficient control over the financing of the cooperatives it serves under its wholesale power contracts. TVA's only concern is that the retail rates charged by its wholesale customers, such as West Kentucky, are consistent with the rates specified by TVA under the terms of its wholesale power contract. Moreover, the recent federal court decision 1/ relied upon by Tri-County adds nothing to its position on this point. That case simply affirmed the paramount authority of the TVA to establish and enforce uniform retail rates by all of its wholesale customers without interference by state authority. Therein, the Court specifically refused to rule on whether or not matters

1/ Tennessee Valley Authority v. Energy Regulatory Commission of Kentucky, Civil Action No. 79-0009-P (W.D. Ky., decided Sept. 25, 1979, unpublished)

other than rates (such as service and financing) were subject to federal (TVA) or state (ERC) authority.

2. The Commission is also of the opinion that the Rural Electrification Administration does not exercise the type of control over Tri-County's financing that is required for an exemption under KRS 278.300(10). As the affidavit of Mr. Feragen indicates, the REA's primary focus in approving loan applications to RECCs such as Tri-County, is to insure (1) that there is a need for the proposed new construction, and (2) that the RECC will be able to repay the loan. In this regard, the REA examines the overall financial condition of the utility with primary emphasis on its current revenues and expenses and a determination as to whether or not the current rates are "adequate."2/ However, rates that are adequate for the utility may not be "fair, just and reasonable" from the consumer's standpoint. It is this financial impact on the ultimate consumer which results from these borrowings that is the primary concern of this Commission under KRS 278.030. There is no comparable provision under REA's guidelines for assessing the impact of a proposed borrowing on the utility's customers.

KRS 278.300(4) specifies that this Commission "shall not approve any issue or assumption unless. . .the commission finds that the issue or assumption. . .is consistent with the proper performance by the utility of its service to the public * * *." Thus, the focus of this agency in approving borrowing applications is the financial impact on the ultimate consumer, while the focus of the REA is clearly on the financial impact to the utility itself. Under these circumstances this Commission finds that the interests of the consuming public are best served by continuing our past practice of requiring RECC's such as

2/ Feragen Affidavit, p. 7.

Tri-County to first obtain preliminary approval from the REA for a proposed borrowing, and then seek final approval from this agency where the impact on the consumer will be fully assessed. For these reasons, we reject Tri-County's argument that they be exempted under the terms of KRS 278.300(10) from the jurisdiction of this agency over utility financing.

3. Finally, the Commission must address itself to what appears to be the underlying issue in this whole argument--the relationship of KRS 278.300(10) to all other provision in Chapter 278. Chapter 278 represents a specific mandate from the legislature to this Commission to insure that the consuming public, which is dependent on utility services for its health and well-being, shall not be burdened with excessive and unjustified costs for obtaining this necessary service.3/ This state power is constitutionally-derived and cannot be abridged by federal authority absent an expression of the United States Congress with the specific intention of pre-empting the field. This agency's authority over any matter affecting the rates of utilities subject to its jurisdiction is, therefore, paramount over any authority a federal agency (such as REA) may have over financing which would eventually affect such rates.

For this reason, a majority of this Commission interprets KRS 278.300(10) to have no validity except in those cases where a utility may obtain monies from a federal agency under circumstances that would have no ultimate effect on the utility's rates to its customers.4/ Any other interpretations would serve to nullify Chapter 278's overall intent of insuring that every aspect of a utility's financing will be subject to

3/ Southern Bell Telephone & Telegraph Company v. City of Louisville, 96 SW 2d 695 (Ky. 1936).

4/ A common example would be where a generating utility might obtain a grant from the Environmental Protection Agency to test new pollution equipment or receive federal money to assist in conversion to 100% coal-fired units.

this Commission's final authority so as to guarantee the consuming public "fair, just and reasonable rates." Despite the somewhat ambiguous language of KRS 278.300(10), we simply do not believe that the legislature intended to remove from the purview of this Commission any portion of a utiliity's financing which would ultimately effect the utility's rates to its customers. As the Kentucky Court of Appeals stated in 1936, "...the presumption that the state has surrendered its power of regulation by a constitutional provision will not be indulged unless such intention is clearly expressed in the instrument or is necessarily implied."[5/] Clearly, if such a presumption is invalid in the face of a constitutional provision, the lesser legislative pronouncement in KRS 278.300(10) cannot serve to negate the intention underlying all of the other provisions of KRS Chapter 278.

4. Turning to the merits of the instant case, the Commission finds that the public convenience and necessity requires that such construction as is proposed by Tri-County in its application be performed, and that a certificate of convenience and necessity should be granted. The Commission further finds that the proposed borrowing is for a lawful object within the corporate purposes of the utility, is necessary and appropriate for and consistent with the proper performance by the utility of its service to the public, and will not impair its ability to perform that service and is reasonably necessary and appropriate for such purpose.

IT IS THEREFORE ORDERED that Tri-County Rural Electric Cooperative Corporation hereby is granted a certificate of convenience and necessity to proceed with the construction as set forth in the application and record.

IT IS FURTHER ORDERED that Tri-County be and it hereby

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5/ Southern Bell Telephone & Telegraph Company v. City of Louisville, supra, 698.

is authorized to borrow a sum in the principal amount of $4,361,000 from REA at an interest rate of five percent (5%) per annum over a thirty-five year period with payments of the principal being deferred for three years.

IT IS FURTHER ORDERED that Tri-County be and it hereby is authorized to borrow an additional sum from CFC in the principal amount of $1,967,000 over a thirty-five year period at an interest rate of nine and one-half percent (9 1/2%) per annum for an initial period of seven years. Subsequently, the interest rate and its period of application may be modified by CFC based upon its prevailing cost of funds.

IT IS FURTHER ORDERED that Tri-County shall submit semi-annual reports to the Commission setting forth in detail the status of the construction authorized herein as well as the status of the funds authorized for said construction.

Nothing herein contained shall be deemed a warranty or finding of value of securities or financing authorized herein on the part of the Commonwealth of Kentucky or any agency thereof.

Done at Frankfort, Kentucky this 24th day of October, 1980.

ENERGY REGULATORY COMMISSION

I dissent for the reasons set forth in case 7890.

Chairman

Vice Chairman

Commissioner

ATTEST:

Secretary

DISSENTING OPINION OF

CHAIRMAN PERRY R. WHITE, JR.

At issue is the interpretation of a state statute which by its terms excludes review by this agency of a co-op loan proposal if the co-op loan is subject to control or supervision of a federal agency.

An equal issue is whether the United States has pre-empted the regulation of Tennessee Valley Authority distribution co-ops.

I dissent. My heart is with the majority opinion, but regretfully, I do not believe the opinion correctly states the law.

Conclusions:

(1) This co-op, (a TVA distributor) in this loan application, is "subject" to the control and supervision of TVA and REA, federal agencies, and therefore comes within our state law which exempts its loan application from review by this agency.

(2) Any ERC regulation of a TVA co-op is at the sufferance of TVA and may be terminated by TVA at any time. The United States via the Tennessee Valley Authority has pre-empted the state.

(3) Lastly, the correct resolution of this case would properly imply that in instances where a non TVA co-op secures a loan whereby it is "subject" to the control or supervision of REA, (a federal agency), ERC's approval or disapproval of the loan is in a legal context meaningless, and the co-op may proceed without ERC approval.

KRS 278.300 (10) specifically and clearly exempts co-op loan applications from the scrutiny of this agency where a co-op is subject to federal control or supervision over a loan:

> This section (granting ERC jurisdiction) does not apply in any instance where the issuance of securities or evidences of indebtedness is subject to the supervision or control of the federal government or any agency thereof....(Emphasis added)
> KRS 278.300 (10)

REA, which proposes to make the loan, is a federal agency and the evidence abundantly shows that its right to control and supervision is exercised over loans it makes to the co-op.

TVA concurs with this writer's position as to lack of jurisdiction, but further alleges that TVA is exercising a degree of supervision and control.* The evidence does not, in my opinion, support the proposition that TVA (also a federal agency) exercises control or supervision, formal or informal, over loans advanced by REA or any other source of funding. In any event, the Kentucky exemption statute does not require this, or that there be a multiple of federal agencies exercising control or supervision. Therefore, my belief that TVA does not exercise such control or supervision does not affect the conclusions herein reached.

In 1935 Section 10 of the Tennessee Valley Authority Act was amended to provide that:

> ...the (TVA) Board is authorized to include in any contract for the sale or power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this act...(Emphasis added) 49 Stat. 1076 (1035), 16 U.S.C. § 831 i (1976).

Assuming that the evidence does not support the proposition that TVA exercises control or supervision over loans, is the co-op "subject" to such dominance? (KRS 278.300 (10)) I believe it is. See Section 10 above.

While TVA may suffer Kentucky to scrutinize and pass on loan applications, it clearly has the right to exercise the prerogative to stop the review.

The Federal Act supports the conclusion that this co-op is "subject" to control or supervision over its borrowings and that TVA could implement the processes of control and supervision at will.

Setting aside the exemption of KRS 278.300 (10), there are further grounds present in this case supporting a lack of jurisdiction by this Commission over "rates" (in a broad sense of the word) by this and other TVA co-ops that do not apply to the State's other twenty-two (22) co-ops.

In a recent opinion of the U. S. District Court, the Court found a "...direct conflict...between an exercise of federal authority granted TVA by Congress and an exercise of state authority granted ERC by General Assembly of Kentucky." Tennessee Valley Authority, et al v. Energy Regulatory Commission of Kentucky (USDC, W.D. Ky.,

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*See TVA General Counsel letter dated July 25, 1980 and filed July 28, 1980

September 25, 1979). In that case this agency had attempted to force the TVA co-oops to follow the Kentucky fuel adjustment clause regulation. The regulation certainly impacted "rates. The Court did not sustain the Kentucky position. The Court held that ERC had no right to influence rates charged by TVA distributors. The Court further stated:

> When compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority.

While the federal case dealt with rates and the fuel adjustment clause it appears that TVA's right to control goes beyond retail rates. It may enact any rule or regulation which promote the purposes of the federal Act. Indeed it has prescribed a termination of service standard different that Kentucky's standard.

Setting aside the federal question and TVA co-ops, it is my considered opinion that the Kentucky statute should not grant this exemption to non TVA distribution co-ops, but it does. This writer concedes that the right to pass on loan applications is as important as rate setting itself. Few, if any, loans will not impact rates. The right to approve or deny the borrowing of money is an integral part of the rate-making process.

But, this opinion is based on what the writer perceives the law to be and not what the writer believes it should be. The writer agrees that public policy would be better served by the Commission's review of all loan applications. The scrutiny of public review offered by ERC's review process is not equaled by a non-adversary administrative review process. The public questions of need, reasonableness of costs, method of financing and resultant effect on consumers can best be determined in the hearing forum. This view, however, becomes irrelevant in the face of clear contrary opinions expressed by Congress, the federal court, and the Kentucky General Assembly.

The majority opinion cites the statutory chapter which grants broad authority to ERC to regulate co-ops. The General Assembly

has long followed a custom of qualifying broad grants of authority by specific language of limitations. These limitations, especially when they are clearly stated, are not to be rationalized away. They represent a clear statement of legislative intent. The limitations placed on this Commission by KRS 278.300(10) are just as binding and clear as those of 278.300 (8) & (11). It is not for administrative bodies or the courts to give strained interpretation to statutes to substantiate their decisions of what ought to be. It is the prerogative of the legislative branch (Federal & State) to limit the authority of this administrative body to review and pass on TVA distribution co-ops and other co-op loan applications. We have absolutely no right to pick and choose that which we deem to be socially desirable.

Perry R. White, Jr.
Chairman
Energy Regulatory Commission