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## PSC STAFF OPINION 2022-0010

Mark David Goss  
Attorney for South Kentucky Rural Electric Cooperative  
Goss Samford PLLC  
2365 Harrodsburg Road, Ste. B-325  
Lexington, Kentucky 40505

RE: Request for a Staff Opinion – South Kentucky Rural Electric Cooperative and The People Fund, Inc.

Dear Mr. Goss:

Commission Staff acknowledges receipt on June 7, 2022, of your letter in which you request an opinion on behalf of South Kentucky Rural Electric Cooperative (South Kentucky RECC) regarding the charitable organization The People Fund, Inc. (The People Fund).

Your letter indicates South Kentucky RECC created The People Fund in November 2003 to collect donations and distribute them to charitable organizations in South Kentucky RECC's service territory. In February 2004, the Commission approved South Kentucky's Tariff R-32, which allowed members to round up their bill to the nearest dollar. South Kentucky RECC collected the rounded-up amount and distributed it to The People Fund. In May 2020, South Kentucky RECC filed to amend Tariff R-32 to allow members to add whole dollar amounts to their bill payment and have that amount transferred to The People Fund. The Commission initiated an investigation regarding the reasonableness of this proposed tariff.<sup>1</sup> Ultimately, it was discovered, among other things, that The People Fund had been legally dissolved by the Kentucky Secretary of State. South Kentucky RECC withdrew its proposed amendment to Tariff R-32.

Subsequently, the Commission opened a proceeding to investigate the relationship between South Kentucky RECC and The People Fund in Case No. 2020-

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<sup>1</sup> Case No. 2020-00205, *Electronic Tariff Filing of South Kentucky Rural Electric Cooperative Corporation to Revise the People Fund Tariff*.

00367.<sup>2</sup> Among other things, the Final Order in that case found The People Fund was an affiliate of South Kentucky RECC, and therefore, that South Kentucky RECC must comply with the affiliate transaction requirements in its relationship with The People Fund, unless a deviation is requested and obtained. To comply with KRS 278.2213(13) and 807 KAR 5:080, Section 6(1), the Final Order specifically required, within 6 months, that any bill or post on South Kentucky RECC's website that solicits a member to sign up for The People Fund or seeks to collect a donation for The People Fund indicate that a member is not required to pay the donation to The People Fund in order to continue to receive electric service.<sup>3</sup>

Based on the Final Order in Case No. 2020-00367, South Kentucky RECC stated it believes there are four options going forward: (1) comply with the affiliate transaction requirements; (2) seek a deviation from the affiliate transaction requirements for The People Fund; (3) dissolve The People Fund and distribute the remaining funds held by it to local charities; and (4) dissolve The People Fund as a separate legal entity and bring the program in house. South Kentucky RECC stated it believed this is the best option because it allows the worthwhile charitable program to continue without being held to the affiliate requirements.

South Kentucky RECC requested a Staff Opinion on the following question: If The People Fund Board of Directors properly dissolves The People Fund, would South Kentucky RECC be permitted to accept a deposit of The People Fund's remaining money and begin operating the program.

As an initial matter, Commission Staff interprets South Kentucky RECC's question as being only whether it would violate statutes and regulations within the Commission's jurisdiction, including the affiliate transaction requirements, to accept a deposit of The People Fund's remaining money and begin operating the program directly. Commission Staff do not read South Kentucky RECC's request as seeking an opinion regarding whether its proposal would violate other legal requirements such as those governing the disposition of funds from a charitable organization. If such a request were posed, Commission Staff would decline to offer an opinion on it, because it would be outside the jurisdiction of the Commission.

However, the question posed by South Kentucky RECC does raise issues within the Commission's jurisdiction.

KRS 279.020 authorizes the creation of electric cooperatives and defines the scope of activities the cooperative may engage in. The Kentucky Supreme Court has

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<sup>2</sup> Case No. 2020-00367, *Electronic Investigation of South Kentucky Rural Electric Cooperative Corporation, and the Reasonableness of Existing Tariff Sheet No. R-32, and the Affiliate Relationship with The People Fund.*

<sup>3</sup> Case No. 2020-00367 Final Order at 15 (Ky. PSC Jan. 10, 2020).

held the statute, “only authorizes activities that are consistent with the operation of an electric cooperative.”<sup>4</sup> KRS 279.020(2) does allow South Kentucky RECC to engage in nonregulated activities, if that unregulated activity is done through an affiliate.<sup>5</sup> The People Fund was created for charitable giving, which is not an activity consistent with the operation of an electric cooperative. Based upon the plain reading of KRS 279.020(2), The People Fund must be done through an affiliate.

Additionally, the Final Order of Case No 2020-00367 stated, “...The Commission cautions that continued issues in the operation of The People Fund, particularly any failure to maintain a separate corporate form for The People Fund, will likely result in the Commission eliminating Tariff R-32.”<sup>6</sup> This makes clear that the Commission is requiring South Kentucky RECC to conduct The People Fund as an affiliate.

A review of the regulations and statutes surrounding the affiliate rules also make clear that The People Fund would still be an affiliate even if the program is brought in house as South Kentucky RECC has proposed in the request for staff opinion. KRS 278.010(18) defines an affiliate as, “a person that controls or that is controlled by, or is under common control with, a utility.” KRS 278.010(19) defines control as, “the power to direct the management or policies of a person through ownership, by contract, or otherwise.”

The Commission has adopted regulations that further define an affiliate. 807 KAR 5:001, Section 1(1) defines an affiliate as an entity:

- (a) that is wholly owned by a utility;
- (b) in which a utility has a controlling interest;
- (c) that wholly owns a utility;
- (d) that has a controlling interest in a utility; or
- (e) that is under common control with the utility.

The regulations also define controlling interest in 807 KAR 5:001, Section 1(4) as:

(4) “Controlling interest in” and “under common control with” mean a utility or other entity if the utility or entity:

(a) Directly or indirectly has the power to direct, or to cause the direction of, the management or policies of another entity; and

(b) Exercises that power...

6. Through direct or indirect means.

Under the facts presented in the request if The People Fund is brought in house there would be an eligibility committee made up of South Kentucky RECC employees and

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<sup>4</sup> *Lewis v. Jackson Energy Co-Op*, 189 S.W.3d 87, (Ky. 2005), at 91.

<sup>5</sup> KRS 279.020(2).

<sup>6</sup> Case No. 2020-00367 Final Order, at 6.

the fund would distribute the money collected through published eligibility criteria. South Kentucky RECC would choose the members of the committee and creating the eligibility criteria for charities. Reading the statutes and regulations together make clear that South Kentucky RECC would have control over The People Fund. This makes The People Fund an affiliate of South Kentucky RECC, whether it is in house or not.

Since, The People Fund is an affiliate, and the Commission has stated it should keep a separate corporate form, South Kentucky RECC must adhere to the affiliate rules found in KRS 278.2201 through 278.2219 and the regulations found in 807 KAR 5:080. South Kentucky RECC may request a deviation from any or all of the affiliate rules pursuant to KRS 278.2219 and 807 KAR 5:080, Section 5.

South Kentucky cited the Final Order in 2020-00367 as a signal that the Commission would not grant deviations for The People Fund. However, when reviewing the Order, it becomes clear that the Commission was making a finding that the request for a deviation in a response to a request for information was not proper.<sup>7</sup> This was consistent with the Commission's other cases where, the Commission held a request for a deviation must be specific and properly made.<sup>8</sup> The Commission did not address the likelihood of the grant or denial of the affiliate transaction statutes or regulations in the Final Order in 2020-00367. The Commission already granted South Kentucky RECC a deviation of the disclaimer needed pursuant to KRS 278.2213(13) and 807 KAR 5:080, Section 6.<sup>9</sup>

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. The opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Heather Temple at (502) 782-2021 or [heather.temple@ky.gov](mailto:heather.temple@ky.gov).

Sincerely,



Nancy J. Vinsel  
General Counsel

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<sup>7</sup> Case No 2020-00367 Final Order, at 14.

<sup>8</sup> Case No. 2020-00215, *Electronic Application Of Kenegy Corp. for a Wavier Pursuant to KRS 278.2219*, Final Order (Ky. Psc. Oct. 22, 2020).

<sup>9</sup> Case No. 2020-00367 Final Order, at 10-11.