

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JACKSON COUNTY RURAL ELECTRIC
COOPERATIVE CORPORATION, INC.

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)
) CASE NO. 10094
)
)

ALLEGED FAILURE TO COMPLY WITH
THE COMMISSION REGULATION 807
KAR 5:041, SECTION 3

O R D E R

On December 3, 1987, the Commission ordered Jackson County Rural Electric Cooperative Corporation, Inc., ("Jackson") to show cause why it should not be subject to the penalties of KRS 278.990¹ for its alleged failure to comply with Commission regulations.

On December 16, 1987, Jackson moved for dismissal of the show cause proceedings alleging that the Commission lacks jurisdiction to assess a penalty against it, arguing that the penalty provisions of KRS 278.990 apply only to "private corporations." Jackson contends that as a non-profit rural electric cooperative

¹ "If any such utility that is a private corporation violates any of the provisions of this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any lawful requirement or order of the public service commission, the utility shall for each offense forfeit and pay to the state treasurer, to be credited to the general fund, a sum not less than twenty-five dollars (\$25.00) nor more than one thousand dollars (\$1,000)."

corporation ("RECC"), it is a quasi-public corporation, and not a private corporation within the meaning of KRS Chapter 278.

On January 21, 1988, the Commission Staff filed a response to Jackson's Motion urging its denial. Staff argues that RECCs are private corporations and are, therefore, subject to the penalty provisions of KRS 278.990.

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Jurists and legal commentators have long recognized that corporations are of two classes: public and private.² A public corporation is an instrumentality of the State, founded and owned by the State in the public interest, supported by public funds and governed by managers chosen by the State. A private corporation is organized by individuals for private purposes, supported by stockholder (or member) contributions, and managed by officers and directors chosen by its stockholders (or members). The property of a private corporation belongs solely to its stockholders (or members).

RECCs have the attributes of private corporations. They are created for a private purpose -- to provide electricity to their members.³ Private individuals, not the State or any other

² See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 666 (Story, J., concurring); 18 Am.Jur.2d Corporations §30 (1972); Fletcher Cyclopedia on Corporations §57 (1978).

³ Only persons using electric energy supplied by an RECC may become a member. KRS 279.090. An RECC may supply electric energy to non-members, but no more than 25 percent of its business may be with non-members. KRS 279.120.

political entity, are responsible for their creation. KRS 279.020. Each RECC is governed by a board of directors elected by its members. KRS 279.080. Aside from an RECC's creditors, only a cooperative's members have an interest in cooperative property.⁴ Only an RECC's members have an ownership interest in the cooperative. KRS 279.100(1).

In City of Paris, Kentucky v. Federal Power Commission, 399 F.2d 983 (D.C. Circ. 1968), the U.S. Court of Appeals declared RECCs to be private corporations. The Court was asked to determine whether an RECC was a government instrumentality for the purposes of the Federal Power Act. In reaching its decision, it stated:

The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in rural electrification is also served thereby is not enough to make the cooperatives themselves instrumentalities.

REA-financed cooperatives are private nonprofit corporations organized for the benefit of their consumer owners. They are neither operated or controlled by any government, federal, state or local. Nor are they operated on controlled by the Rural Electrification Administration or any other government agency. The control and authority exercised by the REA relates primarily to the REA loan and the protection of the United States' security interest in the cooperatives' operations. But the voluntarily entered contract with

⁴ KRS 279.180(4). In the event a cooperative corporation is dissolved, the cooperative's assets are distributed to its members after all outstanding obligations have been satisfied.

REA does not, we think, alter the nature of the cooperatives' independent corporate existence. 'The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise.' (Emphasis added.)

Id., at 986.

Jackson has sought to distinguish RECCs from private corporations by emphasizing their non-profit nature.⁵ This emphasis is misplaced. Courts, including those of this state, have long held that non-profit corporations may be, and generally are, private corporations. See Hughes v. Good Samaritan Hospital, 158 S.W.2d 159 (Ky. 1942).⁶

Courts have viewed a corporation's ability to manage its own affairs, not its lack of a profit motive, as the controlling factor in its classification. In Moore v. Andalusia Hospital, Inc., 224 So.2d 617 (Ala. 1969), for example, the Alabama Supreme Court declared that any corporation incorporated under Alabama's Nonprofit Corporation Act was a private corporation by virtue of its authority to elect its own officers and directors. In Edson v. The Griffin Hospital, 144 A.2d 341 (Conn. 1956), a Connecticut court refused to hold that a non-profit corporation operating a charitable hospital was not a private corporation. After declaring that the absence of a profit motive was irrelevant to

⁵ "A rural electric cooperative shall be operated on a nonprofit basis for the mutual benefit of its members and patrons." KRS 279.095.

⁶ See also, Miller v. Davis, 150 S.W.2d 973 (Texas 1941); State ex rel Sams v. Ohio Valley General Hospital Association, 140 S.E.2d 457 (W.Va. 1965); Van Cap Camper v. Olean General Hospital, 147 N.E. 219 (1925).

its decision, the Court stated: "The test is whether, under the charter or corporate powers granted, they [corporations] have the right to elect their own officers and directors, with the power to manage their own affairs." Id., at 344. Only private corporations have this authority.

RECCs have the authority to manage their own affairs. Each RECC has a board of directors elected by its members. KRS 279.080(1). The board manages and conducts the business and affairs of the cooperative. KRS 279.080(2). It also adopts the rules and regulations which govern the every day operation of the cooperative.

Jackson argues that RECCs are quasi-public corporations, and therefore are distinguishable from private corporations. The Commission fails to grasp the significance of this argument. Quasi-public corporations are a class of private corporations which provide goods and services necessary to the welfare of the general public. See 18 Am.Jur.2d Corporations §31 (1972); Fletcher Cyclopedia on Corporations §63 (1978). Were the Commission to find that RECCs are quasi-public corporations, the penalty provisions of KRS 278.990 would still apply to them.

After considering the arguments of Jackson and Commission Staff, the Commission finds that RECCs are private corporations and are subject to the penalty provisions of KRS 278.990. Jackson's motion for dismissal should, therefore, be denied.

The Commission notes that its authority to assess KRS 278.990 penalties against RECCs is not dependent upon an RECC's status as a private corporation. Pursuant to KRS 279.210, "[e]very

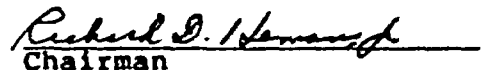
corporation formed under KRS 279.010 to 279.220 shall be subject to the general supervision of the energy regulatory commission and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990." (Emphasis added.) This statute reflects the legislature's intent to subject RECCs to the Commission's penalty powers. Certainly, the legislature would not provide for the regulation of RECCs, yet withhold the means to enforce that authority.


IT IS THEREFORE ORDERED that:

1. Jackson's motion be denied.
2. Jackson shall appear on March 31, 1988, at 1:30 p.m., Eastern Standard Time, in the Commission's offices at Frankfort, Kentucky, for the purpose of presenting evidence concerning its alleged violations of 807 KAR 5:041, Section 3, and of showing cause, if any it can, why it should not be subject to the penalties of KRS 278.990 for its failure to comply with Commission regulations.

Done at Frankfort, Kentucky, this 2nd day of March, 1988.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Executive Director