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Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

Table of Contents

AG Opinion: Municipally Owned Electrical Systems and Electric Cooperatives

Tenn. Op. Atty. Gen. No. 91-106 **Reference Number**: MTAS-1888
Office of the Attorney General
State of Tennessee

Opinion No. 91-106
December 23, 1991

Municipally Owned Electrical Systems and Electric Cooperatives — Funding Economic and Community Organizations

Phillip E. Pinion
109 War Memorial Building
Nashville, TN 37243

Question
Can municipally owned electrical systems and electric cooperatives legally put money into economic and community organizations?

Opinion
It is the opinion of this office that municipally owned electrical systems may be barred, and electric cooperatives are barred, by the statutes which govern their operations from using their revenues to fund economic and community organizations; further, each may be barred from such use of revenues by documents executed in connection with the issuance of any bonds to finance or refinance the system notwithstanding the lack of any specific bar to such action in the governing statutory scheme.

Analysis
Both municipally owned electrical systems and electric cooperatives are creatures of statutes and it is to those statutes to which we must look, at least in part, for the answer to the question posed. Moreover, for purposes of this opinion, we assume that the phrase “economic and community organizations” means those organizations which are customarily thought of as tax-exempt or charitable organizations and that any appropriation by a municipality would be made in accordance with *T.C.A.* § 6-54-111, which provides guidelines for a municipality’s appropriating money for the financial aid of any nonprofit charitable organization or any nonprofit civic organization. In addition, we assume that the question posed is concerned with the use of surplus system revenues from operations and not with the use of bond proceeds.

The Tennessee judiciary has held that, in the absence of statutory prohibition, a municipality may divert its profits from the sale of a public works commodity to other municipal purposes. *Killion vs. City of Paris*, 192 Tenn. 466, 241 S.W.2d 524 (1951). In Killion, the city of Paris issued its general obligation debt to construct and acquire a water works system. Subsequently, the city passed an ordinance providing that a portion of the water works fees would be applied to retire debt service on all of the city’s bonded indebtedness. Water customer Killion sued to have the ordinance stricken.

The court noted that if the water works system were acquired under the authority of *T.C.A.* § 7-35-401 et seq., then surplus revenues would have to be applied exclusively to the improvements, extensions or additions to the water works system pursuant to *T.C.A.* § 7-35-417, 418. However, plaintiff in Killion did not allege application of the above cited statutes. Consequently, the Court held these statutes to be wholly inapplicable, and in the absence of any statutory prohibition, “a municipality may divert its profits from the sale of water to its customers to municipal purposes other than those of the water works enterprise.” 192 Tenn. at 453.

Also, we have opined previously that a municipality owning a gas system could apply surplus revenues from that system to other municipal purposes where the gas system was financed pursuant to the Municipal Recovery and Post War Aid Act of 1945, *T.C.A.* § 7-36-101 et seq. (repealed effective July 1, 1988, but not as to bonds issued before that date, 1988 Tenn. Public Acts Ch. 750, Sections 22 and 71). Op. Tenn. Atty. Gen. No. 87-03 (January 9, 1987); Op. Tenn. Atty. Gen. No. U87-47 (April 24, 1987).

In examining the statutory scheme governing the organization and operation of municipally owned electrical systems, we find that a municipally owned electrical system may be governed by one of a number of statutes. Some of these statutory schemes have been repealed and no longer govern municipally owned electrical systems, except in those cases where bonds were issued prior to the repeal of the statutes to finance or refinance the system.

Under current law, a municipality may organize a municipally owned electrical system pursuant to the Municipal Electric Plant Law of 1935, *T.C.A.* § 7-52-101 *et seq.*, and issue its debt for the acquisition and improvement of the system pursuant to the Local Government Public Obligations Act of 1986, *T.C.A.* § 9-21-101 *et seq.* ("LGPOA"). Neither the Municipal Electric Plant Law of 1935 nor the LGPOA contains prohibitions against the municipality's applying revenues from the municipally owned electrical system to economic and community organizations. Therefore, absent restrictive covenants in any bond documents executed in connection with financing or refinancing of the electrical system, the decision in Killion should permit a municipally to apply revenues from a municipally owned electrical system to economic and community organizations.

In addition, a municipality can organize and finance its municipally owned electrical system pursuant to the Revenue Bond Law, *T.C.A.* § 7-34-101 *et seq.* The Revenue Bond Law restricts the municipality in its use of surplus system revenues to fund economic and community organizations and provides that all surplus revenues can be used only to reduce rates. T.C.A. § 7-34-103(b) and § 7-34-115.

Under law prior to July 1, 1988, a municipality could both organize and finance a municipally owned electrical system under the Municipal Electric Plant Law of 1935. The portions of that law dealing with financing municipally owned electrical systems have now been repealed pursuant to 1988 Tenn. Pub. Acts, Ch. 750. However, prior to that repeal, *T.C.A.* § 7-52-130 (now repealed) states that the supervisory body of the municipally owned electric plant shall devote all moneys in the electric plant fund derived from any source other than the issuance of bonds to or for certain listed items of expenditure (not including funding economic and community organizations) and that any surplus thereafter remaining, after the establishment of proper reserves, if any, shall be devoted solely to the reduction of rates (the use of bond proceeds is governed by *T.C.A.* § 7-52-129 (now repealed), which also precludes the use of bond proceeds to fund economic and community organizations).

Tenn. Pub. Acts, Ch. 750, Section 71, states that nothing in the act affects the validity or enforceability of any bond, note or other obligation legally issued by a local government under any law existing prior to the effective date of the act. If bonds were issued pursuant to the Municipal Electric Plant Law of 1935 prior to its repeal, we interpret the repealing act to mean that the restrictions on the use of system revenues or bond proceeds could survive the repeal until the bonds were retired. If those restrictions affected the "enforceability" of the payment of the bonds, then we think they would survive the repeal. For example, if the system revenues were pledged for payment of the bonds, then we think the restrictions would survive since diversion of these revenues could affect the enforceability of the bonds by affecting the money available for payment of the bonds. However, we caution that each bond financing is unique and we cannot opine as to any one financing without reviewing it. If no such bonds are outstanding, then the use of system revenues would be governed by the Municipal Electric Plant Law of 1935 as now in effect (which as earlier noted does not contain restrictions precluding the use of system revenues to fund economic and community organizations).

In contrast to the multiple statutes which could govern a municipally owned electrical system, electric cooperatives are organized pursuant to and their operations governed by the Rural Electric and Community Cooperative Law, *T.C.A.* § 65-25-201 et seq. Revenues in excess of those necessary to pay certain listed items of expenditure are required by *T.C.A.* § 65-25-212 to be distributed by the cooperative to its patrons in the form of refunds or general reduction of rates. The permitted uses of revenues listed in the statute do not include payments to economic or community organizations and, therefore, such excess moneys must be distributed to the patrons in the form of refunds or general reduction of the rates. Although the statute permits a cooperative, prior to reducing rates or making refunds to patrons, to provide a "fund for education in cooperation and for the dissemination of information concerning the effective use and conservation of electric power and energy and concerning any other services made available by the cooperative," we do not think that this provision would permit a payment to the organizations with which we are concerned. Thus, we conclude that an electric cooperative organized pursuant to this law cannot use its revenues to make payments to economic and community organizations.

In conclusion, for both municipally owned electrical systems and electric cooperatives, restrictions on funding economic and community organizations with surplus system revenues may be imposed by the statutes which govern their organization, financing and operation. Restrictions on such use of surplus system revenues may also be imposed by documents executed in connection with bonds issued to finance or refinance the construction of the electrical system. We cannot emphasize enough the importance of examining carefully those statutes and documents.

Sincerely,
Charles W. Burson, Attorney General and Reporter
John Knox Walkup, Solicitor General
H. Phillip Carnes, Assistant Attorney General
