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RQ-966

Antonio O. Garza, Jr.

Secretary of State

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APR 07 1997

Opinion Committee

April 4, 1997

The Honorable Dan Morales
Attorney General
State of Texas
Price Daniel Sr. Building
Austin, Texas 78701

FILE # ~~46-39571-97~~ ^{RQ-966}
I.D. # ~~39500~~
39743

Re: Request for a written opinion
Non-profit corporations and cooperatives

Dear General Morales:

The Corporations Section of this agency has received articles of incorporation for a corporation to be named "Poka Lambro Communications Cooperative, Inc." (Poka). A copy of those articles is enclosed. The purpose of the corporation is "to engage in the cooperative purchase, primarily by contract with third parties, of various utility and utility-related services which may include, but are not limited to, voice and data transmission communications, security and monitoring services, cable television and electric services, and for all lawful business for which cooperative non-profit corporations may be organized under Texas law." We seek your opinion on the following questions regarding these articles.

In Article III of its articles of incorporation, Poka proposes to incorporate pursuant to the Texas Non-Profit Corporation Act, TEX. REV. CIV. STAT. ANN. art. 1396-1.01 et.seq. (Vernon 1997) (TNPCA); but in Article IX sets out its intention to "operate on a cooperative basis", as that term is defined in the Cooperative Association Act, TEX. REV. CIV. STAT. ANN. art. 1396-50.01 (Vernon 1997) (Co-op Act). The TNPCA provides that no corporation may be organized thereunder if any one or more of its purposes is to engage in certain types of activities, including several cooperative activities. TNPCA art. 2.01B.(3). The activities set forth in the statute are ones for which corporations may be formed under specific statutes governing certain cooperative activities. (See e.g. the Electric Cooperative Corporation Act, TEX. REV. CIV. STAT. ANN. art. 1528b (Vernon 1997); the Telephone Cooperative Act, TEX. REV. CIV. STAT. ANN. art. 1528c (Vernon 1997); Farmer's Cooperative Societies, TEX. AGRIC. CODE ANN. ch. 51 (Vernon 1995); and Cooperative Credit Associations, TEX. AGRIC. CODE ANN. ch. 55 (Vernon 1995).

There is no prohibition in the TNPCA against forming a non-profit corporation to engage in other types of cooperative activities, and your office has previously held that a non-profit corporation may be formed for the purpose of acquiring and operating an apartment building to be used by the

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members on a cooperative basis. Op. Tex. Att'y. Gen. No. WW-849 (1960). Subsequent to that opinion however, the Texas Legislature enacted the Co-op Act. Since its enactment, this office has required corporations which intend to be cooperatives but for which there is no specific statute to incorporate under the Co-op Act and not the TNPCA.

In light of the foregoing, we ask the following question:

1. May a corporation which intends to be a cooperative incorporate under the TNPCA when there is no specific statute providing for incorporation for that specific cooperative purpose, or must the corporation be incorporated under the Co-op Act?

It is clear that the TNPCA applies to cooperatives incorporated under the Co-op Act to the extent the provisions of the two acts do not conflict. Co-op Act §3. It is not clear however, whether the Co-op Act would have any applicability to the operation of a cooperative incorporated under the TNPCA. The provision in Article IX of the articles of incorporation of Poka that it will "operate on a cooperative basis as that term is defined in the [Co-op Act]" leads to our second question:

2. If your answer to question one is that a cooperative may be formed pursuant to the TNPCA, may that corporation operate on a "cooperative" basis as that term is defined in the Co-op Act?

The TNPCA defines a non-profit corporation as a corporation no part of the income of which is distributable to its members, directors, or officers. TNPCA art. 1396-1.02A.(3). Further, Article 1396-2.24 of the TNPCA clearly proscribes the payment of dividends or the distribution of income in any manner to the members, directors or officers of the corporation. Under these provisions, this office has consistently refused to approve the incorporation of a non-profit corporation the articles of incorporation of which provide or imply some distribution of dividends or income to the members, directors or officers. Article VII of the articles of incorporation of Poka sets out that the corporation's patrons will be members of the corporation and Article IX provides for a distribution to the patrons of the "net savings" after payment of operating expenses and reasonable reserves for capital. "Net savings" is defined in the Co-op Act as "the total income of an association less the costs of operation." Co-op Act §2(3). This leads to our third question, which is:

3. If your answer to question one is that a cooperative may be formed pursuant to the TNPCA, may that corporation make distributions to its members after payment of its operating expenses and establishment of reasonable reserves?

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Thank you for your advice and counsel with regard to this matter. Please direct questions that you may have to Bill Didlake, Deputy Director for Corporations, 463-5586.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Garza, Jr.', with a large, stylized flourish at the end.

Antonio O. Garza, Jr.

AOG:mf

Enc.

ARTICLES OF INCORPORATION
OF
POKA LAMBRO COMMUNICATIONS COOPERATIVE, INC.

The undersigned natural person, over the age of 18, acting as an incorporator, adopts the following Articles of Incorporation of Poka Lambro Communications Cooperative, Inc.

ARTICLE I

Name

The name of the corporation shall be Poka Lambro Communications Cooperative, Inc.

ARTICLE II

Term

The term of existence is perpetual.

ARTICLE III

Authority

The Corporation is organized as a non-profit cooperative corporation pursuant to the Texas Non-Profit Corporation Act, Article 1396, Tex. Rev. Civ. Stat.

ARTICLE IV

Purpose

The purpose for which the Corporation is incorporated is, on behalf of its patrons, to engage in the cooperative purchase, primarily by contract with third parties, of various utility and utility-related services which may include, but are not limited to, voice and data transmission communications, security and monitoring services, cable television and electric services, and for all lawful business for which cooperative non-profit

corporations may be organized under Texas law. The Corporation may do business under a variety of assumed names in conjunction with the corporate name.

ARTICLE V

Cooperative Information

The street address of the initial registered office of the Corporation is 1722 Broadway, Lubbock, Texas 79401, and the name of its initial registered agent at such address is Don R. Richards.

ARTICLE VI

Directors

The directors of the Corporation shall be elected, and be subject to removal, by majority vote of the Board of Directors of Poka Lambro Telephone Cooperative, Inc., P.O. Box 1340, 11 Miles North of Tahoka on Highway 87, Tahoka, Texas 79373. The number of directors of the Corporation shall be at least three (3) and no more than nine (9). The number of directors constituting the initial Board of Directors is four (4), and the names and addresses of the persons who are to serve as initial directors are:

1. Ralph Williams, RR 01, Box 300, Lamesa, Texas 79331;
2. Wendell Morrow, P. O. Box 207, New Home, Texas 79383;
3. Mickey L. Sims, P. O. Box 1340, Tahoka, Texas 79373; and
4. David R. Pierce, 1300 Avenue J, Seagraves, Texas 79359.

ARTICLE VII

Membership

The Corporation's patrons will be members. There will be no member voting rights. The members shall not be liable for the debts, liabilities or obligations of the corporation.

ARTICLE VIII

Incorporator

The name and address of the incorporator of these Articles of Incorporation is as follows:

Name: Don R. Richards
Address: McWhorter, Cobb and Johnson, L.L.P.
P. O. Box 2547
Lubbock, Texas 79408

ARTICLE IX

Cooperative Operation

The Corporation shall operate on a cooperative basis as that term is defined in the Texas Cooperative Act, Article 1396-50.01, Tex. Rev. Civ. Stat. The net savings after payment of operating expenses and reasonable reserves for capital, as determined by the directors of the Corporation, shall be allocated and/or distributed to its patrons in proportion to their patronage or retained by the enterprise for the actual or potential expansion of its services, the reduction of charges to the patrons, or for other purposes consistent with the best interest of the Corporation as determined by its Board of Directors. The Board of Directors may adopt by-laws and/or policies for patronage allocation and/or distribution based on patron activities in the best interest of the Corporation. The method by which a surplus will be distributed on dissolution of the Corporation is among those patrons on the basis of aggregated patronage during at least a five (5) year period immediately proceeding dissolution, or as a gift to any cooperative association or other non-profit enterprise which may be designated by the Board of Directors.

ARTICLE X

Indemnity

The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (whether or not by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorney's fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding to the fullest extent permitted by either (1) any

applicable law in effect on the date of incorporation of the corporation, or (2) any law which becomes effective during the existence of the corporation and which is applicable to it, including, but not limited to, and in accordance with Article 1396-2.22(A) of the Texas Non-Profit Corporation Act, as the articles now exist or may hereafter be amended.

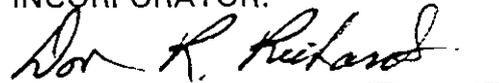
ARTICLE XI

Waiver of Claim Against Director

To the fullest extent not prohibited by law, a director of the corporation shall not be liable to the corporation or its shareholders or members for monetary damages for an act or omission in the director's capacity as a director, except that this Article XIII does not eliminate or limit the liability of a director to the extent the director is found liable for: (1) a breach of a director's duty of loyalty to the corporation or its shareholders or members; (2) an act or omission not in good faith that constitutes a breach of duty of the director to the corporation or an act or omission that involves intentional misconduct or a knowing violation of the law; (3) a transaction from which a director received an improper benefit, whether or not the benefit resulted from an action taken within the scope of the director's office; or (4) an act or omission for which the liability of a director is expressly provided by an applicable statute.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 11th day
of March, 1997.

INCORPORATOR:



Don R. Richards

STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

I hereby certify that on this date personally appeared before me the undersigned authority, to me well-known and well-known to me to be the person who executed the foregoing instrument and acknowledged before me that he executed the same freely and voluntarily for the uses and purposes therein set forth and expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on this, the 11th day of March, 1997.

Nancy O. Piper

Notary Public, State of Texas

