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*Public Utility Commission of Texas*

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DEC 27 2002

December 19, 2002

RQ-0009-GA

OPINION COMMITTEE

The Honorable Greg Abbott  
Attorney General of Texas  
209 West 14<sup>th</sup> Street  
Austin, Texas 78701

FILE # ML-42942-02  
I.D. # 42942

Re: Request for Attorney General Opinion

Dear General Abbott:

The Public Utility Commission of Texas respectfully requests your opinion under section 402.042 of the Texas Government Code on the following issue:

Pursuant to what statutory authority may a not-for-profit electric cooperative organized under the Electric Cooperative Corporation Act<sup>1</sup> use a conversion plan to transform itself into a for-profit corporation organized under the Texas Business Corporation Act?<sup>2</sup>

The Public Utility Commission must decide whether to transfer certificates of convenience and necessity held by a not-for-profit electric cooperative to another, for-profit corporation under section 37.154 of PURA. To transfer these certificates, the Commission must determine, at a minimum, that the for-profit corporation can provide adequate service.<sup>3</sup> The Commission believes that before it can approve the requested transfer, it is necessary to know whether the for-profit corporation is a legally formed successor to the not-for-profit electric cooperative created through a conversion plan.

The electric cooperative, which currently holds the certificates, was organized under the Electric Cooperative Corporation Act,<sup>4</sup> and is operated on a not-for-profit basis.<sup>5</sup> The other corporation is the purported successor to the electric cooperative and is organized as a for-profit corporation under the Texas Business Corporation Act.<sup>6</sup>

<sup>1</sup> TEX. UTIL. CODE ANN. §§ 161.001-254 (Vernon 1998 & Supp. 2003).

<sup>2</sup> TEX. BUS. CORP. ACT ANN. arts. 1.01-13.08 (Vernon 1980 & Supp. 2002).

<sup>3</sup> See TEX. UTIL. CODE ANN. § 37.154(a).

<sup>4</sup> *Id.* §§ 161.001-254.

<sup>5</sup> *Id.* § 161.059.

<sup>6</sup> TEX. BUS. CORP. ACT ANN. arts. 1.01-13.08).

The minutes of the cooperative's board reflect that the members and board of the cooperative approved a conversion plan under which the cooperative attempted to create a for-profit corporation and transfer its assets to that corporation in exchange for shares of the corporation. The former employees and managers of the cooperative are now the employees and managers of the corporation. Under the terms of the conversion plan, three concluding scenarios are possible. First, the shares of the corporation held by the cooperative could be distributed to the members of the cooperative and the cooperative dissolved, leaving the corporation to provide electric service. Second, the corporation could continue as the subsidiary of the cooperative with electric service provided through the parent-subsidiary arrangement. Finally, the transfer of assets could be reversed, leaving the cooperative to provide electric service. The cooperative appears to be pursuing the first scenario: shares of the corporation held by the cooperative were distributed to the members of the cooperative on February 8, 2002, but articles of dissolution for the cooperative have not been filed with the secretary of state. The Commission understands that articles of dissolution will not be filed until transfer of the certificates to the for-profit corporation. The corporation is purportedly now the only member of the cooperative.

The Commission notes that the powers of a cooperative organized under the Electric Cooperative Corporation Act are derived from and measured by that act.<sup>7</sup> There is no explicit authority in the Electric Cooperative Corporation Act to allow a cooperative to transform into a for-profit entity, through a plan of conversion or otherwise. The provision of this act may be supplemented, however, by the provisions of the Texas Non-Profit Corporation Act<sup>8</sup> to the extent not inconsistent with the provisions of the Electric Cooperative Corporation Act.<sup>9</sup> There is no provision in the Non-Profit Corporation Act that expressly provides that a non-profit corporation may transform through a conversion plan (or otherwise) into a for-profit corporation.

Further, in Texas Attorney General Opinion No. JC-0015, which addresses the ability of a for-profit corporation to convert to a non-profit corporation through articles of conversion,<sup>10</sup> your office stated "that the legislature did not desire to enable a non-profit corporation to convert to a for-profit domestic corporation."<sup>11</sup> In this opinion, your office also stated that a conversion of a non-profit corporation to a for-profit corporation "may implicate charitable trust concerns."<sup>12</sup> Finally, an electric cooperative is "prohibited from creating and owning for-profit companies."<sup>13</sup>

In addition, in 1999, the legislature added the definition of electric cooperative in section 11.003(9) of the Public Utility Regulatory Act (PURA)<sup>14</sup> to read in part:

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<sup>7</sup> See *State ex rel. Southwestern Gas and Elec. Co. v. Upshur Rural Elec. Coop. Corp.*, 156 Tex. 633, 638, 298 S.W. 805, 807 (1957); see also *Midlothian Butane Gas Co. v. HILCO Elec. Coop.*, 43 S.W.3d 677, 678 (Tex. App.—Waco 2001, pet. granted) (No. 01-0336; oral argument held on March 20, 2002).

<sup>8</sup> TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 to -11.01 (Vernon 1997 & Supp. 2002).

<sup>9</sup> See *id.* art. 1396-10.04(C).

<sup>10</sup> See Tex. Bus. Corp. Act Ann. arts. 5.17-20.

<sup>11</sup> Op. Tex. Att'y Gen. No. JC-0015 at 7 (1999).

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Midlothian*, 43 S.W.3d at 678, 681.

<sup>14</sup> TEX. UTIL. CODE ANN. § 11.003(9) (Vernon Supp. 2003).

“Electric cooperative” means:

(A) a corporation organized under Chapter 161 or a predecessor statute to Chapter 161 and operating under that chapter;

(B) . . . ; or

(C) a successor to an electric cooperative created before June 1, 1999, in accordance with a conversion plan approved by a vote of the members of the electric cooperative regardless of whether the successor later purchases, acquires, merges with, or consolidates with other electric cooperatives.

The Commission has concluded that section 11.003(9)(C) of PURA simply instructs it as to the regulatory treatment to be afforded a successor to an electric cooperative that is created in accordance with other legal authority, but does not itself grant a cooperative the authority to transform through a conversion plan to any other type of entity. The Commission believes that if this authority exists, it exists outside of PURA. The Commission has reviewed various corporation acts, opinions of the attorney general, and court opinions, and believes that the answer to the issue presented may require the interpretation of laws that are beyond the purview of this Commission.

Based upon the foregoing authority, the Commission cannot identify the authority under which an electric cooperative may transform to a successor, for-profit corporation through a conversion plan. Consequently, the Commission respectfully requests your opinion on the submitted issue.

Respectfully,

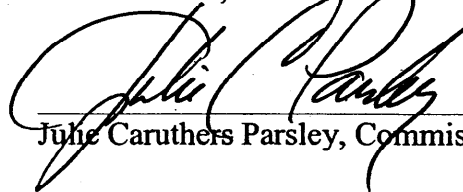
Public Utility Commission of Texas



Rebecca Klein, Chairman



Brett Perlman, Commissioner



Julie Caruthers Parsley, Commissioner

cc: The Honorable Rick Perry, Governor  
The Honorable Bill Ratliff, Lt. Governor  
The Honorable James E. “Pete” Laney, Speaker of the House

**Chairman Steven Wolens**

**Chairman Troy Fraser**

**Representative Kim Brimer**

**Representative David Counts**

**Representative Debra Danburg**

**Representative Sylvester Turner**

**Senator Teel Bivins**

**Senator Frank Madla**

**Senator Jane Nelson**

**Senator John Whitmire**

**Daniel Madru, Special Assistant Senate Business and Commerce Committee**

**Mr. Mark Bruce, Committee Policy Analyst for the Electric Utility Restructuring**

**Legislative Oversight Committee**

**Barbara Henderson, Committee Clerk Senate Business and Commerce Committee**

**All Parties of Record Docket No. 24577**

**Theresa Gage**

**Susan Durso**