

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
AT RICHMOND, FEBRUARY 25, 2019

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SETH G. HEALD, *et al.*

v.

CASE NO. CLK-2018-00009

RAPPAHANNOCK ELECTRIC COOPERATIVE

ORDER ON CERTIFIED QUESTION

On July 26, 2018, Seth G. Heald, Michael F. Murphy and John C. Levasseur ("Petitioners") filed with the State Corporation Commission ("Commission") a Verified Petition for Declaratory and Injunctive Relief ("Petition") against Rappahannock Electric Cooperative ("REC"). In the Petition, the Petitioners requested, among other things, that the Commission (1) declare certain portions of REC's bylaws as being *ultra vires* and *void ab initio*; and (2) enjoin REC from enforcing these portions of its bylaws. The Petition was filed pursuant to Rule 5 VAC 5-20-100 (B)-(C) of the Commission's Rules of Practice and Procedure.<sup>1</sup> The Petitioners also filed a Motion for Preliminary Relief and/or for Partial Expedited Consideration ("Expedited Motion").

On August 16, 2018, REC filed an Answer and Counterclaim in response to the Petition and filed a response to the Expedited Motion. On August 30, 2018, the Petitioners filed a Reply in Support of the Expedited Motion. On September 6, 2018, the Petitioners filed an Answer to REC's Counterclaim.

On September 21, 2018, the Commission issued an Order Assigning Hearing Examiner, which docketed the Petition and appointed a Hearing Examiner to conduct all further proceedings on behalf of the Commission and to file a final report in this matter. The Hearing

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<sup>1</sup> 5 VAC 5-20-10 *et seq.*

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Examiner subsequently established a procedural schedule, including an evidentiary hearing to convene on December 11, 2018.

On October 19, 2018, a Motion for Leave to Participate or, in the Alternative, Submit Comments was filed jointly by: A&N Electric Cooperative; BARC Electric Cooperative; Central Virginia Electric Cooperative; Community Electric Cooperative; Craig-Botetourt Electric Cooperative; Mecklenburg Electric Cooperative; Northern Neck Electric Cooperative; Northern Virginia Electric Cooperative; Powell Valley Electric Cooperative; Prince George Electric Cooperative; Shenandoah Valley Electric Cooperative; Southside Electric Cooperative; and The Virginia, Maryland and Delaware Association of Electric Cooperatives (collectively, "Distribution Cooperatives"). The Distribution Cooperatives' request for intervention was granted, in part, as set forth in a Hearing Examiner's Ruling issued on November 1, 2018.<sup>2</sup>

On October 19, November 9, and November 13, 2018, direct testimony was filed by the Petitioners, the Distribution Cooperatives, and REC, respectively. On November 16, 2018, the Commission's Staff ("Staff") filed a response ("Staff's Response") in which the Staff recommended that the Commission find it lacks subject matter jurisdiction in this case. On November 28, 2018, the Petitioners filed rebuttal testimony.

On December 4, 2018, the Hearing Examiner issued a ruling – at the request of the parties – that suspended the previously scheduled December 11, 2018 hearing and established new procedures to address jurisdictional issues before any evidence is received into the record.

On December 28, 2018, after receiving pleadings on the issue of subject matter jurisdiction, including from the Petitioners ("Petitioners' Brief on Jurisdiction"), the Hearing Examiner issued a Ruling and Certification to the Commission ("Ruling and Certification"). The

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<sup>2</sup> Intervention was also requested, but denied, for Choptank Electric Cooperative, Inc.; Delaware Electric Cooperative, Inc.; and Old Dominion Electric Cooperative.

Hearing Examiner analyzed the jurisdictional issues attendant to each of the five enumerated counts contained in the Petition. The Hearing Examiner found, among other things, "that reasonable doubts have been raised about the Commission's exercise of subject matter jurisdiction over the Petition" and certified these issues to the Commission.<sup>3</sup> The Hearing Examiner directed the parties and the Staff to file any comments to the Ruling and Certification by January 22, 2019.

On January 22, 2019, comments on the Hearing Examiner's Ruling and Certification were filed by the Petitioners ("Petitioners' Comments") and by REC ("REC's Comments"). The Petitioners assert that the Commission has, and should exercise, jurisdiction over all five counts contained in the Petition. REC states that it "has no objection to the Commission exercising jurisdiction," but "concur[s] with the Staff's position that subject matter jurisdiction is lacking."<sup>4</sup>

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds that the Petition shall be dismissed.

The Petition

The Petitioners "challenge . . . several bylaw provisions unilaterally adopted by REC's board of directors ("Board") and" contend that those bylaws are inconsistent with the law, arbitrary and unreasonable, and in derogation of the statutory and common law rights of REC's member-owners."<sup>5</sup> Specifically, the Petitioners challenge Sections 1, 2(b), and 2(c) of Article XII of REC's bylaws, which state, in relevant part, as follows:

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<sup>3</sup> See Ruling and Certification at 20.

<sup>4</sup> REC's Comments at 4-5.

<sup>5</sup> Petitioners' Comments at 2.

SECTION 1: Amendment, Alteration or Repeal of Bylaws

... Any amendments to these Bylaws shall be adopted by the affirmative vote of not less than two-thirds (2/3) of the total membership of the Board of Directors at any regular or special meeting of the Board, or as applicable by an affirmative vote of not less than two-thirds of the members present in person or by proxy at any annual or special meeting of the members to alter or repeal the Bylaws. . . .

SECTION 2: Procedures for Bylaw Amendments, Alterations or Repeal

Notwithstanding anything to the contrary under this article or these Bylaws, for purposes of approving any proposed amendment, alteration, or repeal of these Bylaws by the members or the Board of Directors (as applicable herein), the following requirements shall first be satisfied and confirmed:

...

- b. For purposes of proposed member alterations or repeal only, the submission of a written petition in a form approved and provided by the Cooperative and that includes at a minimum:
  - i. original signatures (not electronic or other form) of those in support of the petition of no less than five hundred (500) members, with no more than the whole number equivalent of one-eighth (1/8) of the minimum of 500 members from any board region; and
  - ii. all members signing the petition shall be current members and in good standing; and
  - iii. all members signing the petition shall provide their respective full names and addresses; and
- c. All proposed alterations or amendments to or repeal of the Bylaws shall be in accordance with applicable state code, the Cooperative Articles of Incorporation and these Bylaws; ....<sup>6</sup>

As to subject matter jurisdiction, "[t]he Petitioners invoke two bases for the Commission's jurisdiction."<sup>7</sup> The Petitioners invoke the Commission's jurisdiction under the

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<sup>6</sup> See Petition, Exhibit C at 21-22.

<sup>7</sup> Petitioners' Comments at 2.

language of Code § 56-6 to review "anything done or omitted in violation of any of the provisions of this or any other chapter under this title," and "to enjoin obedience to the requirements of this law."<sup>8</sup> In addition, "the Petitioners ask the Commission to exercise its authority under Section 13.1-828 of the [Virginia Nonstock Corporation Act ('Nonstock Act'), Code § 13.1-801 *et seq.*] to review *ultra vires* corporate action."<sup>9</sup>

Code § 56-6 states in part (emphasis added):

*Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this or any other chapter under this title, by any public service corporation chartered or doing business in this Commonwealth, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this law, and the Commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth.*

For purposes of the above statute, the Petitioners assert that REC violated two provisions of Title 56 of the Code.

Specifically, the Petitioners assert that REC violated Code §§ 56-231.19 and 56-231.29,

which state as follows:

Code § 56-231.19

The natural persons executing the articles of incorporation shall be residents of the territory in which the principal operations of the cooperative are to be conducted who intend to use utility services to be furnished by the cooperative. The articles of incorporation shall be subscribed by at least five such persons and acknowledged by them before an officer authorized by the law of this Commonwealth to take and certify acknowledgments of deeds and conveyances. When so acknowledged the

<sup>8</sup> Code § 56-6; Petitioners' Comments at 2.

<sup>9</sup> Petitioners' Comments at 2 (citing Code § 13.1-828(B)(3)).

articles shall be filed in accordance with the provisions of Article 3 (§ 13.1-618 *et seq.*) of Chapter 9 or Article 3 (§ 13.1-818 *et seq.*) of Chapter 10 of Title 13.1. When so filed the articles of incorporation, or certified copies thereof, shall be received in all the courts of this Commonwealth and elsewhere as prima facie evidence of the facts contained therein, and of the due incorporation of such cooperative. All of the provisions of the Virginia Stock Corporation Act (§ 13.1-601 *et seq.*), and the Virginia Nonstock Corporation Act (§ 13.1-801 *et seq.*), insofar as not inconsistent with this article are hereby made applicable to such stock and nonstock cooperatives, respectively; provided, however, that subsections D through G of § 13.1-620 and subdivision 1 of § 13.1-825 shall not apply to any affiliate or subsidiary of a cooperative. When the charter is filed in the office of the State Corporation Commission, the proposed cooperative described therein, under its designated name, shall be and constitute a body corporate, and, with respect to its providing regulated utility services, with all of the applicable powers provided for in § 56-49. A cooperative formed prior to July 1, 1999, need not have a registered office or registered agent. A stock or nonstock cooperative formed thereafter shall comply with § 13.1-634 or § 13.1-833, respectively.

Code § 56-231.29

The board of directors of a cooperative shall have power to do all things necessary or incidental in conducting the business of the cooperative, including, but not limited to the power:

1. If authorized by the articles of incorporation, or by resolution of its members having voting power, to adopt and amend bylaws for the management and regulation of the affairs of the cooperative, subject, however, to the right of the members to alter or repeal such bylaws. The bylaws of a cooperative may make provisions, not inconsistent with law or its articles of incorporation, regulating the admission, suspension or expulsion of members; the transfer of membership, the fees and dues of members and the termination of membership on nonpayment of dues or otherwise; the number, times and manner of choosing, qualifications, terms of office, official designations, powers, duties and compensation of its officers and directors; defining a vacancy in the board or in any office and the manner of filling it; the number of members, not less than 2.5 percent of the total number of members, to constitute a quorum at meetings; the date of the annual meeting and the giving of notice thereof and the holding of special meetings and the giving of notice thereof; the terms and conditions upon which the cooperative is to render service to its members; the disposition of the revenues and receipts of the cooperative; and regular and special meetings of the board and the giving of notice thereof.

2. To appoint agents and employees and to fix their compensation and the compensation of the officers of the cooperative.
3. To execute all instruments.
4. To make its own rules and regulations as to its procedure.

In asserting that REC violated the above statutory provisions, the Petitioners have directly challenged the validity of Sections 1, 2(b), and 2(c) of Article XII of REC's bylaws. As explained by the Staff, the circuit courts of the Commonwealth of Virginia have original and general jurisdiction over such cases.<sup>10</sup> Specifically, Code § 17.1-513 expressly states that the circuit courts "shall have original and general jurisdiction of ... cases involving ... the validity of an ordinance or bylaw of *any* corporation" (emphasis added). The Petitioners have not contested the circuit courts' jurisdiction over their claims in this matter.<sup>11</sup>

The Commission finds that the Petitioners' claims are more properly brought before the appropriate circuit court. This conclusion is consistent with Commission precedent. Specifically, the Commission has previously declined to exercise jurisdiction over a petition that challenged the lawfulness of an electric cooperative's bylaws.<sup>12</sup>

In addition, an internal management issue involving a utility's bylaws – where the circuit courts have general jurisdiction – is clearly distinguishable from management issues that impact a utility's specific public duties or public service obligations. For example, as discussed in the

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<sup>10</sup> See Staff's Response at 12-13.

<sup>11</sup> See, e.g., Petitioners' Brief on Jurisdiction at 23-24. The Staff further noted that "[a]t least one Circuit Court has concluded that the Circuit Courts' 'original and general jurisdiction' under the Code over a particular subject matter gives them 'exclusive subject matter jurisdiction' in the first instance." Staff's Response at 13 n.56 (quoting *New Life Christian Church v. Dynabilt Tech. Int'l Corp.*, 59 Va. Cir. 399, 2002 WL 31990270 at \*3 (Norfolk Cir. Ct. 2002) (emphasis added)). The Petitioners assert that circuit court jurisdiction over this case is not exclusive. Petitioners' Brief on Jurisdiction at 24.

<sup>12</sup> Final Order, *Commonwealth of Virginia, ex rel., Russell F. Walker v. Southside Elec. Coop.*, Case No. PUE-2003-00509, 2004 S.C.C. Ann. Rep. 384-85, (Mar. 9, 2004).

pleadings herein, the Commission has exercised jurisdiction over utility management issues involving affiliate arrangements, compliance with prior Commission orders, and a utility's performance of its public service obligation to provide reliable electric power at just and reasonable rates.<sup>13</sup> That is not the case here.

Furthermore, in exercising jurisdiction over management-related issues, the Commission has cautioned that "[a]bsent a compelling need, the Commission does not intend to become involved in the management affairs of [the utility]."<sup>14</sup> In this regard, the Commission does not find a compelling need to exercise jurisdiction over the electric cooperative's management affairs at issue herein. Rather, the Commission continues to find that matters such as the instant case, where the validity or implementation of an electric cooperative's bylaws is challenged, are more properly brought in the circuit court possessing general jurisdiction of such dispute.<sup>15</sup>

Finally, the Commission finds that the authority provided under the Nonstock Act does not alter our decision herein. Code § 13.1-828 of the Nonstock Act states in part (emphases added):

- A. Except as provided in subsection B, corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
- B. A corporation's *power to act* may be challenged:

<sup>13</sup> See, e.g., Order Establishing Investigation and Rules to Show Cause, *Commonwealth of Virginia, ex rel., State Corp. Comm'n v. Dominion Res., Inc.*, Case No. PUE-1994-00040, 1994 S.C.C. Ann. Rep. 406, 407 (June 17, 1994).

<sup>14</sup> *Id.*

<sup>15</sup> The Commission notes that in addition to challenging the validity of Section 2(b) Article XII of REC's bylaws, the Petitioners also allege that REC's Board violated such provision "by refusing to provide them with the form-petition necessary to comply with the Board-imposed amendment procedures." *Petitioners' Brief on Jurisdiction at 15.* To be clear, the Commission finds that this claim, as with the others in the Petition, should be heard in the circuit court. As with the other claims, the Petitioners have not established that the circuit courts lack general jurisdiction over such bylaw-related challenges. Indeed, in support of this particular allegation, the Petitioners cite Virginia precedent regarding bylaw violations for their argument that the "Board is bound by and must comply with REC's Bylaws." *Id.* (citing *Virginia High Sch. League v. J.J. Kelly High Sch.*, 254 Va. 528, 531 (1997)). The cited precedent originated in the circuit court.

1. In a proceeding by a member or a director against the corporation to enjoin the act;
- ... or
3. In a proceeding against a corporation *before the Commission*.

Code § 56-231.19 of the Utility Consumer Services Cooperatives Act ("Cooperatives Act") applies the above statute to cooperatives: "All of the provisions of the ... [Nonstock Act], insofar as not inconsistent with this article are hereby made applicable to such ... nonstock cooperatives[.]"

As quoted above, Code § 13.1-828(B) permits challenges to REC's "power to act." The parties agree that this only confers jurisdiction over *ultra vires* (*i.e.*, void) acts, not voidable acts that lie within REC's power to act.<sup>16</sup> In this regard, a void act is one where "a corporation lacks power to act," whereas a voidable act "is within the lawful scope of a corporation's power."<sup>17</sup>

The Petitioners contend that the challenged amendments to REC's bylaws "are inconsistent with the Nonstock and Cooperatives Acts, and therefore *ultra vires* and void *ab initio*."<sup>18</sup> Conversely, the Staff asserts that REC's Board has the authority to adopt bylaws regarding amendment, alteration, or repeal of the bylaws, including procedures attendant thereto.<sup>19</sup> In other words, if the bylaw provisions challenged by the Petitioners "were permitted subjects for amendment," then REC "had the power to make such changes."<sup>20</sup> Under the Staff's analysis, and as explained by the Supreme Court of Virginia, if "adoption of the [challenged

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<sup>16</sup> See, e.g., Ruling and Certification at 10-11.

<sup>17</sup> *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 467 (2003).

<sup>18</sup> Petitioners' Brief on Jurisdiction at 4.

<sup>19</sup> See, e.g., Staff's Response at 10; Code §§ 56-231.28 and 56-231.29.

<sup>20</sup> *Kappa Sigma Fraternity*, 266 Va. at 466.

provisions] was within [REC's] power conferred by statute, the Board's approval of those amendments was a voidable, rather than a void, act of the [cooperative]."<sup>21</sup>

Having declined to exercise jurisdiction as explained above, the Commission does not need to reach this question. That is, even if the Commission assumes without deciding that the challenged actions would be void (as opposed to voidable) acts under Code § 13.1-828, the Commission continues to find that the Petitioners' claims are more properly brought before the appropriate circuit court. This "approach is consistent with our effort to decide cases on the best and narrowest grounds available."<sup>22</sup>

Accordingly, IT IS SO ORDERED, and this matter is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

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<sup>21</sup> *Id.*

<sup>22</sup> *Bd. of Supervisors of Loudoun Cty. v. State Corp. Comm'n*, 292 Va. 444, 453 & n.8 (2016) ("We need not reach the question of whether subsection (I) prohibits the Commission from substituting new tolls under subsection (D) until after January 1, 2020, and will assume without deciding that subsection (D) is controlling for purposes of this case. ... This approach is consistent with our effort to decide cases on the *best and narrowest grounds available*." ) (emphases added) (internal quotation marks and citations omitted).