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Opinion No. 03-144

Claiborne County Utility District

QUESTIONS

1. How are the members of the Board of Commissioners of the Claiborne County Utility District to be selected since the District became a gas utility district in 1998?

2. To the extent that the District has improperly selected any of its commissioners under the Utility District Law since becoming a gas utility district in 1998, what action is required on the part of the District to remedy the error?

3. If the District passes three separate resolutions, one for each of its three commissioners, voted on in each case by the other two commissioners, that (i) affirms the commissioner's selection as of the date of the resolution under Tenn. Code Ann. § 7-82-307(n) for the remainder of what should have been the commissioner's four-year term; (ii) declares the intent of the District to elect the commissioner *nunc pro tunc* as of the date he should have first been elected under the statute; and (iii) ratifies the acts of the commissioner since his first appointment by the Claiborne County Executive after March 1998, will this action properly remedy any legal issues regarding the Board of Commissioners' election under the statute since becoming a gas utility district in 1998?

4. Assuming that the District passes the resolutions described in Question 3 and follows any additional recommendations suggested in Question 2, will the otherwise legally authorized actions and resolutions of the Board of Commissioners since March 1998 be legally valid and enforceable?

OPINIONS

1. As the terms of the current commissioners expire, new commissioners should be selected in accordance with Tenn. Code Ann. § 7-82-307(n)(1).

2., 3., and 4. We think a court would conclude that the current commissioners are *de facto* commissioners of the District. The acts of *de facto* officers are valid as to third parties and members of the public. No further action is necessary to reach this result.

ANALYSIS

1. Selecting Commissioners of the Claiborne County Utility District

This opinion concerns the selection of the Board of Commissioners of the Claiborne County Utility District (the "District"). The District was created and operates under the Utility District Law of 1937, Tenn. Code Ann. §§ 7-82-101, *et seq.* (the "Act"). The District was established as a water utility district in 1945. The District's service boundary was expanded in 1964 and 1973. In 1998, the District was authorized to provide natural gas service throughout Claiborne County. Research indicates that the District operates a natural gas pipeline system that is regulated by the Tennessee Regulatory Authority. The District has had more than one thousand customers since 1984. Beginning in 1979, commissioners for the District have been appointed by the Claiborne County Mayor under the process described in Tenn. Code Ann. § 7-82-307(a). Under this process, the county mayor selects the new member from a list of three nominees submitted by the Board of Commissioners of the utility district.

The reason for this opinion is that the District has been authorized to provide natural gas service since 1998. The Act contains special provisions for natural gas utility districts. Under Tenn. Code Ann. § 7-82-103(b)(2)(A), "districts distributing and selling natural gas" are excepted from several provisions of the Act. The statute provides the following reasons for the exception:

> (i) All natural gas districts in Tennessee purchase their requirements from six (6) natural gas pipelines operating in interstate commerce, with their rates, services, and supplies, regulated by the federal power commission, and therefore, every rate of the gas supply has been tested and approved by a regulatory body at the time of the purchase by the gas district;
> (ii) All safety standards applicable to the transmission and distribution facilities of natural gas districts are established by the Natural Gas Pipe Line Safety Act of 1968 (49 U.S.C. §§ 1671-1684) administered under the department of transportation; and
> (iii) All bonds issued for the construction or replacement of facilities can only be issued after the approval has been granted by the securities exchange commission and/or other federal regulatory bodies.

Subdivision (b)(2)(B) provides:

> (B) Therefore, it is declared that the legislative intent shall be that §§ 7-82-102, 7-82-307(m), 7-82-402(b) and 65-4-105 shall not apply to the gas districts where the cost of their purchased gas, the safety standards of their transmission and distribution facilities, and the financial restrictions relative to the issuance of their bonds are all

> severally and/or collectively regulated by federal administrative commissions and/or boards.

The Act also provides special provisions for the method of selecting members of the Board of Commissioners of a natural gas utility district. Tenn. Code Ann. § 7-82-307(e)(1) states that "[n]o provision of subsections (a)-(e) applies to any gas utility district for the reason set out in § 7-82-103." Since the District was selecting commissioners under Tenn. Code Ann. § 7-82-307(a), it appears that the District was required to change its method of selecting commissioners once it was authorized to distribute and sell natural gas.[1]

The question then becomes the method by which District commissioners should now be selected. Subsection (m) is the next relevant provision of Tenn. Code Ann. § 7-82-307. Under subsection (m), district commissioners are selected by the county mayor from a list of three nominees submitted by the Board of Commissioners. The process is similar to that provided in Tenn. Code Ann. § 7-82-307(a), under which the District has been operating. But, as previously stated, by operation of Tenn.Code Ann. § 7-82-103(b)(2)(B), subsection (m) of Tenn. Code Ann. § 7-82-307 does not apply to districts distributing and selling natural gas. Subdivision (n)(1) of Tenn.Code Ann. § 7-82-307 provides in relevant part:

> *In districts coming within the provisions of § 7-82-103(b)(1) and (2),* the terms of office of the members of the board of commissioners first appointed shall be two (2), three (3) and four (4) years respectively from date of appointment, and thereafter the term of office of the members shall be four (4) years. Members shall hold office until their successors are elected and qualify. Any vacancy shall be filled and new commissioners shall be elected or old commissioners shall be reelected upon the expiration of any term of office by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county mayor within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county mayor shall appoint a third commissioner to fill such vacancy . . ..

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[1] It could be argued that, because the statute refers to districts "distributing and selling natural gas," the exception in the statute does not apply until the district is actively engaged in operating a pipeline. We think, however, that the exception was intended to apply to a utility district from the time it is authorized to distribute natural gas. Any other interpretation would require a utility district formed solely to provide natural gas to operate under one set of statutes while organizing, and then switch once it begins actually operating a pipeline. We do not think the General Assembly intended this awkward and inconvenient result.

(Emphasis added). If subdivision (n)(1) applies, therefore, new commissioners of the District should be selected by the other two members.[2]

The next question, then, is whether subdivision (n)(1) was intended to include the District. Based on the facts presented and preliminary research conducted by this Office, the District is distributing and selling natural gas. Therefore, it falls within Tenn. Code Ann. § 7-82-103(b)(2). Claiborne County, however, does not fall within any of the population brackets listed in Tenn. Code Ann. § 7-82-103(b)(1). Thus, it does not fall within *both* (b)(1) *and* (b)(2).

The phrase "[i]n districts coming within the provisions of § 7-82-103(b)(1) and (2)," at the beginning of Tenn. Code Ann. § 7-82-307(n)(1), does not actually appear in legislation; instead, it appears that it was inserted when the Code Commission implemented several changes to Tenn. Code Ann. § 7-82-103 and § 7-82-307 in 1987. 1987 Tenn.Pub.Acts Ch. 422, §§ 2 & 3. As codified in 1986, Tenn. Code Ann. § 7-82-103 contained four different subsections, which appear to have been disjunctive. Tenn. Code Ann. § 7-82-103 (Supp. 1984). Section 2 of the 1987 act deleted two out of the four subsections of § 7-82-103.

Section 3 of the 1987 act amended subsection (b)(1) of § 7-82-307. When the 1987 act amended it, subsection (b)(1) applied to "districts coming within the provisions of subdivisions (1)-(4) of § 7-82-103[.]" Tenn. Code Ann. § 7-82-307(b)(1) (Supp. 1986). The 1987 act amended (b)(1) by deleting the last two sentences and adding the following sentence to subsection (b):

> In all districts which were subject to subsection (b) of this section upon the effective date of this act, successor commissioners shall be selected as herein provided.

1987 Tenn.Pub.Acts Ch. 422, § 3. The Code Commission apparently inserted the first sentence of (n)(1), therefore, to reflect changes to both statutes. For this reason, we do not think the use of the phrase in the present (n)(1) was intended to include only districts that came within *both* subdivisions (1) *and* (2). Under rules of statutory construction, the words "and" and "or" may be used interchangeably when necessary to carry out the legislative intent. *City of Knoxville v. Gervin,* 169 Tenn. 532, 89 S.W.2d 348 (1963), *cited in Stewart v. State,* 33 S.W.3d 785, 792 (Tenn. 2000). For these reasons, we think a court would conclude that the commissioners of natural gas utility districts, including the District, should be selected under Tenn. Code Ann. § 7-82-307(n)(1).

2., 3., and 4. Effect of Failure to Comply with Tenn. Code Ann. § 7-82-307(n)(1)

Questions 2., 3., and 4. address the effect of the failure to comply with Tenn. Code Ann. § 7-82-307(n)(1). Based on the discussion above, it appears that District commissioners should have been selected under this subdivision instead of subdivision (a) once the District was authorized to

[2] We assume that the first phrase need not be followed in this case because the terms of the District commissioners were already staggered when any new selection method became applicable.

provide natural gas service within its service area. But we think the current commissioners are *de facto* officers. The term "*de facto* officer" has been defined as one whose acts were exercised under color of a known election or appointment that is void because the officer was not eligible for the office, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in the exercise of the appointing power. *Evers v. Hollman*, 196 Tenn. 364, 369, 268 S.W.2d 102 (1954) (acts of a beer board appointed by the wrong appointing authority held valid). *See also State ex rel. Smith v. Bomar*, 212 Tenn. 149, 368 S.W.2d 748 (1963) (acts of the legislature which had not been constitutionally reapportioned since 1901 held valid); *and* 63C Am.Jur.2d, *Public Officers and Employees* § 31 (1997)(an illegal election may furnish the necessary color of title sufficient to give the incumbent standing as a *de facto* officer where such election is consistent with an honest misapprehension of the law, and not evidence of a palpable disregard of its provisions.)

Generally, the acts of *de facto* officers are valid as to third persons and the public. *State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995), *cert. denied* 376 U.S. 915, 84 S.Ct. 670, 11 L.Ed.2d 612 (1964); *Bankston v. State*, 908 S.W.2d 194, 196 (Tenn. 1995); *Country Clubs, Inc. v. City of Knoxville*, 217 Tenn. 104, 113, 395 S.W.2d 789 (1965) (the law validates the acts of *"de facto"* officers as to the public and third persons on the ground, though not officers *de jure*, they are in fact officers whose acts, public policy requires, should be considered valid)*; Ridout v. State*, 161 Tenn. 248, 30 S.W.2d 255 (1930). Under these cases, therefore, the District commissioners are *de facto* officers whose official actions are valid against third persons and the public. This doctrine should continue to apply to the acts of the current commissioners until their title to office has been found to be invalid by a court of competent jurisdiction in a direct proceeding challenging their title to office. *See, e.g., State v. O'Reilly*, 784 So.2d 768 (La. 2001). While the proposed resolutions may be a useful cautionary device, they are not necessary to make the commissioners *de facto* officers. As the terms of the current commissioners expire, new commissioners should be selected in accordance with Tenn. Code Ann. § 7-82-307(n)(1).

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