STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 10, 2017

Opinion No. 17-25

Sale of Electricity by a Solar Electricity Generating Facility

Question 1

Is a solar electricity generating facility that provides power directly and exclusively to owners and/or tenants located on the same or adjacent premises "affected by and dedicated to the public use," such that the facility would be prohibited from selling the power to those owners and/or tenants under Tenn. Code Ann. § 65-34-103?

Opinion 1

A solar electricity generating facility that comes within the statutory definition of "public electric system" is prohibited from selling power in certain geographical territories. Tenn. Code Ann. § 65-34-102(4), § 65-34-102(5), and § 65-34-103. The question assumes that a solar generating facility meets all of the Tenn. Code Ann. § 65-34-102(5) definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use." Whether its property is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

Question 2

Is the owner of the solar facility described in the previous question a "public utility" as defined in Tenn. Code Ann. § 65-4-101(6)?

Opinion 2

If the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

ANALYSIS

In 1989 the Tennessee Legislature enacted a statutory scheme[1] entitled the "Geographic Territories of Electric Utility Systems." Tenn. Code Ann. §§ 65-34-101 through 108. That legislation was designed to prevent duplication of electric system facilities because the Legislature found that such duplication results in excessive consumer costs and environmental and aesthetic problems. Tenn. Code Ann. § 65-34-101. To avoid duplication of electric system facilities and to protect consumer investment in those facilities, the Legislature deemed it in the public interest to keep in place geographic territories it had established in 1968 for electric utilities and to limit "utilities that are not consumer owned" from expanding "service into areas already served by consumer-owned municipal and cooperative electric system." Tenn. Code Ann. § 65-34-101.

To that end, the "Geographic Territories of Electric Utility Systems" statutory scheme prohibits a "non-consumer owned electric system" from constructing, acquiring, and maintaining facilities and equipment for the "distribution or sale of electricity outside its current geographic territory," and from providing, "by sale or otherwise, electricity to any parcel of land located outside its current geographic territory." Tenn. Code Ann. § 65-34-103. It also prohibits municipalities from expanding the territories of non-consumer owned electric systems. Tenn. Code Ann. § 65-34-107(b).

If a solar electricity generating facility is a "non-consumer owned electric system" these statutory prohibitions would apply to it. But even if it does meet the definition of a non-consumer owned electric system (i.e., even if it is a public electric system), it may still enter into an agreement with another public electric system serving an adjacent geographic territory to modify the territories and transfer the right to provide service from one to another. Tenn. Code Ann. § 65-34-108.

A "non-consumer owned electric system" is a "public electric system" (other than a municipal electric system or a community service cooperative). Tenn. Code Ann. § 65-34-102(4). A "public electric system" is any entity or individual that owns, operates, manages, or controls any electric power system, plant, or equipment in Tennessee "affected by and dedicated to public use." Tenn. Code Ann. § 65-34-102(5).

Question 1 assumes that a solar generating facility meets all the definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use."[2] The phrase "affected by and dedicated to public use" is legal shorthand for the concept that "[a] distinguishing characteristic of a public utility is a devotion of private property by the owner to service useful to the public, which has a right to demand such service so long as it is continued with reasonable efficiency under proper charges." 73B C.J.S. *Public Utilities* § 1 (2016).

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[1] The Tennessee Court of Appeals has referred to this statutory scheme as a "labyrinth," and one that "leave[s] a large void" in some respects. *Electric Power Bd. v. Middle Tennessee Electric Membership Corp*., 841 S.W.2d 321, 323, 324 (Tenn. Ct. App. 1992).

[2] We assume that the solar electricity generating facility at issue is not a community service cooperative (as defined in Tenn. Code Ann. § 65-25-102(4)) or a municipal electric system within the meaning of Tenn. Code Ann. § 65-34-102(3).

Whether an entity should be deemed to have dedicated its property to public use is a question that turns on the specific facts of each particular case. Just because its services are available to the public does not necessarily make the service provider a public utility. Similarly, an entity that sells all its product or services under contract to public utilities (which in turn sell that product to consumers) is not by that fact alone a public utility. On the other hand, the number of customers is not controlling; a facility is not rendered non-public just because a limited number of customers may have occasion to buy its services. And an entity that does other business in addition to providing a public service may nevertheless be a public utility subject to regulations. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016).

The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals. To answer this question, courts will consider the totality of the particular circumstances, including how the company actually conducts business, what the company's articles of incorporation and bylaws provide for, what its stated purpose is, whether it is providing a good or service in which the general public has an interest, whether it accepts substantially all requests for its services, how its service contracts are structured, and whether it is in actual or potential competition with other entities that are public utilities. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016). *See also Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 480 (1946) (charter conclusively authorized gas company to do business as a public utility).

In sum, whether the property of any particular solar electricity generating facility is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

The "public use" element in the statutory definition of "public electric system" in Tenn. Code Ann. §§ 65-34-102(5) is common in—indeed integral to—most statutory definitions of "public utility."[3] Not surprisingly, "public use" appears as a key element in the statutory definition of "public utility" in Tenn. Code Ann. § 65-4-101(6)(A). The §101(6)(A) definition of "public utility" encompasses providers of other services in addition to providers of electric services, but is otherwise essentially the same as the definition of "public electric system" in Tenn. Code Ann. § 65-34-102(5). A "public utility" includes all individuals and entities that

> own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, *affected by and dedicated to the public use . . . .*

Tenn. Code Ann. § 65-4-101(6)(A) (emphasis added).

[3] In fact, the Tennessee Supreme Court has found it "abundantly clear" that "the terms *'public use'* and *'public utility'* are synonyms." *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 479-80 (Tenn. 1946)(emphasis in original).

Thus, if the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

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