

Concordia Electric Cooperative, Inc. and Local Union 788, International Brotherhood of Electrical Workers, AFL-CIO. Case 15-RC-7801

December 15, 1994

DECISION ON REVIEW

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,
DEVANEY, BROWNING, AND COHEN

The question presented in this case is whether the Employer, an electrical cooperative, is exempt from the Board's jurisdiction as a political subdivision.¹ For the reasons that follow, we find, contrary to the Regional Director, that the Employer is not a political subdivision because it is not responsible to the general electorate and thus is subject to the Board's jurisdiction. Accordingly, we shall reinstate the petition and remand this case to the Regional Director for further proceedings consistent with this Decision on Review.

Background

The Employer is a nonprofit Louisiana corporation engaged in the distribution and sale of electrical energy to certain customers in Ferriday, Jonesville, and Jena, Louisiana, and the surrounding rural areas.² Annually, the Employer derives revenues in excess of \$250,000 from its operations.

The Employer was incorporated pursuant to the Louisiana Electrical Cooperative Law,³ which provides, *inter alia*, that only those persons receiving electrical power from a cooperative and the cooperative's incorporators may be members of the cooperative. Louisiana law further provides that "any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof, or any body politic" may be a member

¹On September 15, 1993, the Union filed a petition seeking to represent a unit of all service and maintenance employees at the Employer's Jonesville, Louisiana facility. On October 12, 1993, an election was conducted pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 15 on that same date. The tally of ballots showed 27 for and 5 against representation by the Petitioner, with no challenged ballots. On October 27, 1993, the Employer filed timely objections to the conduct of the election. On January 31, 1994, while those objections were pending before the Region, the Employer filed a letter asserting that, because it was a political subdivision exempt under Sec. 2(2) of the Act, the Board lacked jurisdiction over the Employer. On May 3, 1994, the Regional Director issued an order dismissing the petition in this case based on his finding that the Employer is a political subdivision. The Union filed a request for review of the Regional Director's decision, and the Employer has filed a brief opposing review.

²According to the Employer's opposition brief, the Employer is the exclusive provider of electrical service within its geographic service area. However, it also appears that another utility, Louisiana Power and Light Company, provides service to specific carved out areas within the outer boundaries of the geographic territory described above.

³La. R.S. 12:401 et seq.

of an electrical cooperative. La. R.S. 12:402. Pursuant to the Employer's bylaws, "[a]ny person, firm, corporation or body politic may become a member in the Cooperative by . . ." paying a \$5 membership fee, agreeing to purchase electrical power from the cooperative and to abide by the Employer's articles of incorporation, bylaws, and rules and regulations. The Employer's bylaws further provide that no such person, firm, corporation, or body politic may hold more than one membership and that a husband and wife may hold a joint membership. The Employer has approximately 8250 members. Included among the Employer's membership are natural persons of voting age resident in its service area, married couples, and entities such as churches, corporations, and businesses.

The Employer is governed by a board of directors elected by mail ballot. Each member is entitled to cast one vote for the election of each of the directors, who serve for 3-year staggered terms and may be removed during their term by vote of the membership on a petition signed by at least 10 percent of the members. Directors do not receive any compensation, although they may receive reimbursement for expenses incurred while attending functions or meetings on the Employer's behalf. Directors must be members in good standing and "bona fide" residents of the area served by the Employer, and may not hold or be a candidate for a paid elective public office.

The Employer is subject to regulation by the Louisiana Public Service Commission (PSC) with respect to its rates and quality of service.⁴ The PSC also investigates complaints concerning poor service, incorrect billing, and the like. Private investor-owned utilities, over which the Board has long exercised jurisdiction, also are subject to PSC regulation. In contrast, utilities owned or operated by the governing body of a political subdivision of the State are expressly exempted from the PSC's regulatory jurisdiction by the Louisiana Constitution. See La. Const. Art. 4, § 21(c).

Louisiana law also grants both electrical cooperatives and investor-owned utilities the power of eminent domain over private property. See La. R.S. 19:2(7). "The state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers" also have the power of eminent domain, but that power arises pursuant to a separate statutory provision, La. R.S. 19:2(1). There is no evidence or contention that the Employer has the authority to condemn public property.

As a result of its outstanding loans from the Federal Rural Electrification Administration (REA), the Employer is subject to certain operating and accounting restrictions imposed by the REA as a condition of re-

⁴Pursuant to La. R.S. 12:426, it appears that the PSC possesses this authority only pursuant to a vote by the Employer's membership requesting that the PSC assert jurisdiction over it.

ceiving those loans. However, once a cooperative repays any outstanding loans, the REA's authority over the cooperative ends. The REA's acting administrator has described its authority over electrical cooperatives as follows: "REA is not a regulatory agency and is not involved in the day-to-day operations and management of its borrowers. REA only exercises general oversight of its borrowers in matters pertaining to the Government's security interests as long as the loans remain outstanding."⁵

The Employer is exempt from Federal income and excise taxation pursuant to 26 U.S.C. § 501(c)(12) (mutual and cooperative associations). Louisiana law subjects the Employer to state sales and property taxes and to a PSC-levied inspection and supervision fee.⁶ The Employer is exempt from state income taxation pursuant to La R.S. 12:425, which provides that electrical cooperatives must pay an annual fee of \$10 for each 100 persons to whom it supplies electricity within the State, "but shall be exempt from all other [state] excise and income taxes."

Meetings of the Employer's members, as well as most meetings of its board of directors, are open to all members.⁷ However, the Employer may—and has—excluded nonmembers from such meetings. The Employer periodically files certain financial information concerning its operations with the REA and the PSC. Such filings generally are subject to disclosure by those agencies to the public on request. There is no evidence or contention that the Employer's records are otherwise open to inspection by the public.

Discussion

Section 2(2) of the Act exempts from the Board's jurisdiction, *inter alia*, "any State or political subdivision thereof . . ." (Emphasis added.) As noted in *Fayette Electrical Cooperative*, 308 NLRB 1071 (1992), the Supreme Court stated in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), that for an entity to be exempt from the Board's jurisdiction as a political subdivision, it must either: (1) have been created directly by a State, so as to constitute an arm or department of the Government; or (2) be administered by individuals who are responsible to public officials or to the general electorate. There is no evidence or contention in this case that the Employer was created directly by the Government

⁵This information was provided in a letter signed by REA Acting Administrator Robert Peters and submitted as an exhibit in this case by the Union. The Employer does not dispute the authenticity of this exhibit.

⁶It appears that in the past Louisiana has provided an exemption from its sales tax for rural electric cooperatives; however, that exemption was removed by the state legislature.

⁷The Employer closes directors' meetings to its members as well as to the general public when contract negotiations, personnel, wage, and "other confidential matters" are discussed.

of the State of Louisiana or that its board of directors is responsible to any public official of the State.⁸ Thus, we must determine whether the Employer is administered by officials who are responsible to the general electorate. After careful review, we find, contrary to the Regional Director, that the Employer's officials are not responsible to the general electorate of the state of Louisiana, and we therefore find that it is not exempt from the Board's jurisdiction as a political subdivision. Our reasons follow.

I. THE EMPLOYER IS NOT RESPONSIBLE TO THE ENTIRE ELECTORATE IN ITS SERVICE AREA

The Regional Director found that this case was "controlled by" the Board's decision in *Fayette Electrical Cooperative*, *supra*, in which the Board found that an electrical cooperative which was the exclusive provider of electricity to all residents of eight rural counties in Texas was an exempt political subdivision. We disagree. In *Fayette*, the Board found that the employer was exempt because its board of directors was elected by its membership, which, the Board emphasized, consisted of the entire electorate of the eight-county area served by the employer. The Board stated that "the evidence indicates that the membership in the Fayetteville Electrical Cooperative is coextensive with residency in the geographic area served. There are no persons residing in the geographical territory served by the Employer who are not members of the Employer." *Supra* at 1072. Indeed, the Board found in *Fayette* that the employer's directors "are elected not by a *subgroup* of the general electorate in the geographical area served, or by a defined insular class of voters, but by the *entire* electorate." *Id.* (Emphasis in original and footnote omitted.)

In this case, by contrast, it is clear that the Employer's membership does not meet the standards outlined in *Fayette*. Thus, the Employer concedes that some individuals within its service area are not members of the cooperative.⁹ The Employer's membership also is not coextensive with residence in the geographic area served, as its members may include persons who do not reside for voting purposes in the geographical territory served by the Employer, and may even include individuals who do not reside for voting purposes in the State of Louisiana. In addition, the Employer admits to membership entities such as corporations, associations, Federal and state agencies and the like, which cannot be said to be "residents" of the geographic area and are not entitled to vote in any state or Federal elec-

⁸This was the issue before the Court in *Hawkins County*. Thus, the Court did not consider what factors determine whether an electric cooperative or other entity is "responsible . . . to the general electorate."

⁹In particular, a single household may have more than one voting age resident, yet have only one membership.

tions. These factors, which were not presented to the Board in *Fayette*, establish that the Employer's membership is **not** "coextensive with residency in the geographic area served," and that there **are** "persons residing in the geographical territory served by the Employer who are not members of the Employer." Therefore, we cannot find that the Employer's board of directors is elected by the "entire electorate" of its service area, and thus responsible to the "general electorate" as in *Fayette*.¹⁰

II. THE EMPLOYER'S MEMBERSHIP IS NOT EQUIVALENT TO THE GENERAL ELECTORATE

We recognize that, in determining whether an entity's administrators are "responsible to the general electorate," the Board has found that this requirement may be satisfied if the employer's governing board is elected by a "limited group of electors." *Woodbury County Community Action Agency*, 299 NLRB 554, 555 fn. 8 (1990). In *Woodbury*, the Board found that members of an antipoverty agency's board of directors who were elected by low income residents of Woodbury County, Iowa, were responsible to the "general electorate" where Federal and state law mandated the selection process and required that the elections for directors be conducted "in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served" Id. at 554. Federal and state laws required similar assurances of a democratic process to ensure representation of the poor in the service area in *Economic Security Corp.*, 299 NLRB 562 (1990), in which board members of the antipoverty program were elected by residents of the four-county area served by the agency. Pursuant to these requirements, these programs held elections for directors in which *all* low income

¹⁰The Employer contends that it is "highly likely" that the employer in *Fayette* also included among its members corporations and government agencies, and excluded some voting age electors. However, no evidence of this character was cited in the Board's decision.

Electrical District No. 2, 224 NLRB 904 (1976), also cited by the Regional Director, is similarly distinguishable from this case in several crucial respects. In that case, the electrical district found by the Board there to be exempt as a political subdivision was governed by a board elected by all individuals owning at least five acres of irrigable land in a district created within Pinal County, Arizona. The district was created in an election on the filing of a petition with the county supervisors, all individuals residing in the district could vote for the removal of incumbent directors, state law provided that the district was a political subdivision of the State, and the district had the power of eminent domain over private and public property and the power to levy taxes, and was exempt from all property taxes. None of these factors is present in this case. Even focusing solely on the process for electing directors, *Electrical District No. 2* is distinguishable from this case as there was no evidence cited in the decision in that case that corporations, government agencies, and other such entities were eligible to vote.

persons within the area served by the employer were eligible to vote. Id.¹¹

The Regional Director found that the Employer here is similarly responsible to a subgroup of the general electorate—its members—and hence is an exempt political subdivision. We disagree. Certainly, *some* of the Employer's members are likely to be individuals eligible to vote in state elections, and as such would be members of the general electorate. However, the Board has never found that this fact alone, without more, is sufficient to confer political subdivision status. Indeed, if this were the case, any corporation whose board of directors is elected by shareholders who are eligible to vote in state elections would also be an exempt political subdivision.

Rather, we find that the phrase "general electorate," as used in *Hawkins County*, means those individuals who are eligible to serve as electors in state governmental elections. This interpretation is consistent with the Board's prior decisions in the cases cited above, because in each of those decisions the "electorate" was limited to natural persons eligible to vote in state governmental elections. Likewise, the Board's decisions in *Woodbury* and *Economic Security Corp.* emphasized that the exempt entity's governing board was elected using "democratic selection procedures."

The text and legislative history of Section 2(2) of the Act also support our determination that it was intended to exempt only entities which were closely identified with state government bodies. Thus, Section 2(2) exempts from the Board's jurisdiction states or "political subdivisions thereof" The Supreme Court has stated that "Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal *governments*, since governmental employees did not usually enjoy the right to strike." *Hawkins County* at 604 (emphasis added). For all the foregoing reasons, we will find an entity "responsible to the general electorate" only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular political control.

As noted above, the Employer's membership does not satisfy this basic requirement, in that it includes entities such as corporations, associations, Federal and

¹¹In addition to the cases cited above, see also *Salt River Project*, 231 NLRB 11, 12 (1977) (property owners within district); *Electrical District No. 2*, supra (property owners who were qualified voters in state and service area).

We note that the Employer's service area, which determines the composition of its membership, does not correspond to any legislatively approved boundaries, in contrast to the boundaries in the cases cited above. In light of our finding below, however, we find it unnecessary to pass on this factor in deciding this case.

state agencies, and the like, which are not part of the “general electorate,” as they are not entitled to vote in any state or Federal elections. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests”). Thus, we find that the Employer’s inclusion in its membership of entities which are not eligible voters in state elections precludes its exemption as a political subdivision under Section 2(2) of the Act.¹²

III. OTHER FACTORS IN THIS CASE ALSO ESTABLISH THAT THE EMPLOYER IS NOT A POLITICAL SUBDIVISION

Our finding that the Employer is not a political subdivision is consistent with the decisions of other Federal and state authorities, which have uniformly found electrical cooperatives to be wholly private entities. Thus, as one court of appeals observed, electrical cooperatives are “private nonprofit corporations organized for the benefit of their consumer-owners. They are neither operated nor controlled by any government, Federal, state or local.” *City of Paris v. Federal Power Commission*, 399 F.2d 983, 986 (D.C. Cir. 1968). As noted above, the REA has likewise disavowed any power to regulate the day-to-day affairs of an electrical cooperative. See also *Matter of General Electric*, 54 Comp. Gen. 791 (1975) (electrical cooperatives are not federal instrumentalities).

Likewise, Louisiana courts and administrative agencies have uniformly rejected claims that electrical cooperatives are instrumentalities of the State. See *Cajun Electric Power Cooperative v. Louisiana Public Service Commission*, 544 So. 2d 362 (La. 1989) (electrical cooperatives are public utilities subject to state PSC regulation, and are not entitled to exemption applicable to utilities “owned, operated, or regulated by a political subdivision’s governing body”); Op. Atty. Gen. (La.) 84-510 (June 14, 1984) (electrical cooperatives not subject to Louisiana election code for public elections); Op. Atty. Gen. (La.) 83-358 (September 19, 1983) (electrical cooperatives “are considered to be private corporations governed by a board of directors”).

Further, we find no inconsistency between our reliance on the State of Louisiana’s unwavering determinations that electrical cooperatives are private entities rather than subdivisions of the State, and the Supreme Court’s instruction in *Hawkins County* that “[f]ederal, rather than state, law governs the deter-

mination, under § 2(2), whether an entity created under state law is a ‘political subdivision’ of the State and therefore not an ‘employer’ subject to the Act.” *Hawkins County*, supra at 602–603. The question before the Court in *Hawkins County* was whether a state determination that an entity was a political subdivision of the State was dispositive of the Board’s jurisdiction. In answering that question in the negative, the Court did not suggest that the converse was true, i.e., that a state determination that an entity was *not* one of its political subdivisions was irrelevant to the Section 2(2) inquiry. Indeed, in finding that the employer in *Hawkins County* was a political subdivision the Court referred extensively to state law provisions supporting that finding, such as the applicability to the employer of the State’s General Ouster law, which provided a procedure for citizens to remove public officials from office, the requirement under state law that the employer publish its annual report in a newspaper of general circulation, the entity’s complete exemption from state taxation, its power of eminent domain over both public and private property, and a statutory appeals process for the entity’s rulings—evidence of political subdivision status which is not present in this case. It would be anomalous, then, for the Board to find that the Employer here is a political subdivision of the State of Louisiana, in light of the other factors present in this case, when the State itself considers the Employer a purely private entity.

Finally, in *Fayette*, the Board found that the employer’s exemption from certain state and Federal taxes and its regulation by the state public service commission and the REA further supported the Board’s finding of political subdivision status. These factors are also present here.¹³ Thus, as noted above, the Employer similarly is exempt from Federal income and excise taxes and from certain state taxes and is subject to similar REA and PSC controls. Upon further consideration, we find that these factors, as explicitly detailed herein, although cited in *Fayette*, do not support a finding of exempt political subdivision status, and we therefore overrule *Fayette* to the extent that it is inconsistent with this determination.

With respect to the Employer’s tax exempt status, we note that the Employer concedes that its Federal tax exemption is pursuant to 26 U.S.C. § 501(c)(12),

¹² As noted above, we have already found that the Employer’s exclusion from membership (and thus from the right to vote for its directors) of certain individuals resident in its service area establishes that it is not responsible to the entire electorate under *Fayette* and thus may not be found to be an exempt political subdivision on that basis.

¹³ In *Fayette*, the Board also noted that “most of” the employer’s financial records and meetings were open to the public, and found that these facts also supported its finding of political subdivision status. As noted above, in this case the Employer’s meetings and records are not accessible to the public to nearly the same extent, and there is no evidence that any access which the Employer does provide to its meetings and records is pursuant to any state laws requiring governmental bodies to provide for such disclosure to the public. Accordingly, we cannot find that the public accessibility of the Employer’s meetings and financial records supports a finding that the Employer is a political subdivision.

which applies to mutual or cooperative associations. This exemption requires no proof of political subdivision status, but turns instead on the Employer's non-profit status.¹⁴ Of course, the Board routinely exercises jurisdiction over other nonprofit entities, including nonprofit organizations such as hospitals and colleges, which are exempt from the same Federal taxes as the Employer pursuant to other subsections of § 501(c). We decline to find that the Employer's tax exemption under these circumstances supports a finding of political subdivision status.

Similarly, the Employer is subject to Louisiana sales and property taxes, and to a PSC-levied inspection and supervision fee,¹⁵ and, while it is exempt from state income taxes, as noted above that exemption is, like the corresponding Federal exemption, based on its non-profit status and not on any finding that it is a political subdivision. Although the Employer is subject to regulation by the PSC, that regulation is indistinguishable from that imposed on investor-owned utilities, over which the Board has unquestioned jurisdiction and is, in any event, voluntarily assumed.¹⁶ Moreover, under Louisiana law, **municipal** utilities are exempt from the PSC regulations to which the Employer is subject.¹⁷

¹⁴By contrast, there is no evidence that the Employer has ever sought, or obtained, Federal tax exemption pursuant to 26 U.S.C. § 115, which does require a determination of political subdivision status. Accordingly, we need not pass on the effect, if any, which an exemption on that basis would have on the question of an entity's political subdivision status under Sec. 2(2).

¹⁵There is no evidence that instrumentalities of the State are subject to these taxes.

¹⁶Likewise, the REA's authority over the Employer's operations is akin to the role which any lender would play with a private entity/borrower. Moreover, the REA has expressly disclaimed any general authority over or relationship with its electrical cooperative borrowers.

¹⁷Although not mentioned by the Regional Director, we note that the Employer has power of eminent domain only over private property and pursuant to a statutory provision separate from the provision according eminent domain powers to state government bodies. In

Because the Employer's tax status, regulation by the PSC and REA, and its power of eminent domain are not distinguishable from those applicable to indisputably private entities subject to the Board's jurisdiction, we find that these factors do not support, and indeed tend to negate, the Employer's claim that it is exempt from the Board's jurisdiction, and we will not view evidence of comparable tax exemptions or regulation by other entities as support for a finding of political subdivision status.

Conclusion

In sum, prior to *Fayette*, the Board had consistently asserted jurisdiction over electrical cooperatives for more than 30 years—both before and after the Supreme Court's decision in *Hawkins County*. See *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1958). See also *Natchez Trace Electric Power Assn.*, 193 NLRB 1098 (1971), *enfd.* 476 F.2d 1042 (5th Cir. 1973). For all the foregoing reasons, we find no basis for exempting the Employer from the Board's jurisdiction as a political subdivision. As noted above, the Employer annually derives gross income in excess of \$250,000 from the distribution and sale of electrical energy to its member/customers. We therefore find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it would effectuate the purposes of the Act to assert jurisdiction.

ORDER

It is ordered that the petition filed in Case 15-RC-7801 is reinstated, and this proceeding is remanded to the Regional Director for Region 15 for further proceedings consistent with this decision.

contrast, the entities found to be exempt political subdivisions in *Hawkins County* and *Electrical District No. 2* had the power of eminent domain over both public and private property.