

N.D.A.G. Letter to O'Connell (May 9, 1991)

May 9, 1991

Honorable David O'Connell
District 6
RR 1, Box 78
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your March 27, 1991, letter requesting my opinion on whether retained earnings of for-profit subsidiaries constitute proceeds or revenues to the nonprofit electric cooperative corporation parent.

Your letter states that the nonprofit North Dakota electric cooperative corporation organized pursuant to North Dakota Century Code (N.D.C.C.) chs. 10-13 and 10-15 has two wholly owned subsidiary business corporations both organized pursuant to N.D.C.C. ch. 10-19.1. You state that both subsidiaries are governed by separate boards of directors, though in both cases at least the majority of the directors are also directors of the parent. You further state that the parent cooperative corporation is compelled by general rules of the Financial Accounting Standards Board to consolidate subsidiary earnings with those of the parent on the parent's financial statements when such earnings are retained at the subsidiary.

It is my opinion that the retained earnings of the for-profit subsidiary corporations constitute revenue to the parent non-profit electric cooperative corporation which is subject to N.D.C.C. § 10-13-06. It is my further opinion that the provisions of N.D.C.C. § 10-15-33 do not apply to electric cooperative corporations.

N.D.C.C. ch. 10-13 which regulates electric cooperative corporations does not define revenue. N.D.C.C. § 10-13-06 provides as follows:

The revenues of an electric cooperative shall be devoted first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations, and thereafter, to such reserves for improvement, new construction, depreciation, and contingencies as the board of directors from time to time may prescribe. Revenues not required for the purposes set forth in this section shall be returned from time to time to the members of the cooperative in cash, in abatement of current charges for electrical energy, or otherwise as the board of directors may determine on a pro rata basis according to the amount of business done with each during the period. Such return may be made by way of general rate reduction to the members if the board of directors so elects.

N.D.C.C. § 10-13-06. Under the Uniform System of Accounts found in REA Bulletin 181-1 all earnings of a subsidiary corporation constitute non-operating income for the parent electric cooperative. Absent any state law affecting the treatment of the income of the subsidiary or the non-operating income of the parent, the parent electric cooperative would determine through its bylaws whether such income must be distributed or allocated. Neither the Internal Revenue Service nor the REA require non-operating income to be distributed.

Absent a statutory definition, words in a statute are to be given their ordinary meaning. N.D.C.C. § 1-02-02. "Revenue" generally is understood to mean all income or earnings i.e., "the gross income returned by an investment . . . the total income produced by a given source." Webster's New Collegiate Dictionary at p. 991 (1975). Consequently, all earnings, whether or not retained, would constitute revenue.

Therefore, in my opinion, as a matter of law, the retained earnings of the subsidiary for-profit corporation constitute revenue to the parent non-profit electric cooperative corporation and are subject to N.D.C.C. § 10-13-06. Whether they are required to be returned to the members of the cooperative at any given time is a question of fact to be determined by the board of directors of the parent electric cooperative corporation using the criteria found in N.D.C.C. § 10-13-06.

N.D.C.C. § 10-15-33 governs how net proceeds are to be determined and distributed by cooperative associations. However, N.D.C.C. ch. 10-15 in general does not apply to electric cooperative corporations which are governed by N.D.C.C. ch. 10-13.

All foreign and domestic cooperatives are governed by the provisions of this chapter except that they shall not apply to cooperatives governed by title 26 or by chapters 6-06, 10-12, 10-13, 36-08, or 49-21, except where the laws governing such associations clearly adopt or refer to any provisions of this chapter or refer to provisions of the general law governing cooperatives.

N.D.C.C. § 10-15-60. The provisions of N.D.C.C. § 10-15-33 are not adopted or referred to within N.D.C.C. ch. 10-13. Rather N.D.C.C. 10-13-06 is the equivalent provision for electric cooperative corporations.

I trust this satisfactorily answers your question.

Sincerely,

Nicholas J. Spaeth

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