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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Formal Complaint of LAVOY TOLBERT against GARKANE ENERGY COOPERATIVE, INC.	GARKANE ENERGY COOPERATIVE'S RESPONSE IN SUPPORT OF THE DIVISION'S RECOMMENDATION AND MOTION TO DISMISS
	Docket No. 20-028-01

Garkane Energy Cooperative, Inc. ("Garkane" or the "Cooperative") pursuant to Utah Code Ann. § § 63G-4-204(1) and Utah Admin. Code R746-1-203, R746-1-206 and R746-1-301, hereby moves to dismiss in its entirety, with prejudice, the formal complaint ("Complaint") filed by Mr. Lavoy Tolbert with the Public Service Commission of Utah (the "Commission") because Garkane has not violated Utah Code Ann. § 54-3-26, any provision of law, Commission order or Rule, or Tariff and the relief requested by Mr. Tolbert is outside the scope of the Commission's jurisdiction.

I. PRELIMINARY MATTERS

Communications regarding this Complaint should be addressed to:

By U.S. Mail:

LaVoy Tolbert
P.O. Box 61
Loa, Utah 84747

By Email:

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Office of Consumer Service

II. BACKGROUND

1. On March 20, 2020, Mr. Tolbert submitted an informal complaint to the Utah Division of Public Utilities (“Division”) alleging that the Cooperative unlawfully maintains unclaimed capital credits.

2. On May 18, 2020, Mr. Tolbert submitted a Formal Complaint (“Complaint”) against the Cooperative again, alleging that House Bill 266, (General Session 2016) and Utah Code Ann. § 54-3-26 (“Statute”) are in conflict with state and federal law. Mr. Tolbert argued that the Statute cannot be enforced and that the Cooperative may not lawfully maintain unclaimed capital credits.

3. On May 18, 2020, the Commission issued an Action Request to the Division to review the Complaint and to submit a recommendation to the Commission by June 17, 2020.

4. On May 26, 2020, the Commission issued Notice of Filing and Comment Period and a Supplemental Action request to identify issues raised in the Complaint and for a copy of the Cooperative's most recent Electric Cooperative Association Annual Report.

5. On June 15, 2020 the Division issued a response to the Action Request and indicated it had no recommendation in this docket. On June 16, 2020, the Cooperative provided a copy of the 2019 Annual Report for Garkane Energy Cooperative along with its response to the complaint.

6. The Cooperative's Response to Mr. Tolbert's Complaint requesting dismissal because Garkane was in compliance with provisions of H. B. 266.

7. On July 10, 2020, the Mr. Tolbert filed reply comments and again expressed concerns with the legality of H. B. 266.

8. On August 6, 2020 the Commission issued an Order to File Mandatory Reports directing Garkane to complete its 2019 annual report provide all information required under § 54-3-26(3) and "correct any deficiencies in reporting since 2016."

9. On August 12, 2020, the Commission issued a Second Supplemental Action Request directing the Division to review information and annual reports filed by Garkane between 2016 and 2019 to determine compliance with Utah Code Ann. § 54-2-26.

10. On August 24, 2020, the Commission received a letter from the Complainant, again, questioning the legality of H.B. 266 and the enforceability of § 54-2-26. The Complainant asked that the Commission "require Garkane Energy to file with the PSC all reports required by H.B. 266 for the years 1995-2016."

11. On September 2, 2020, Garkane filed its Response including copies of complete annual reports required under H.B. 266 between 2016 and 2019, in addition to other information provided to the Division.

12. On September 3, 2020, the Division issued its Action Request Response, attached as Exhibit A, finding that Garkane “is in compliance with the requirements outlined in Utah Code § 54-2-26.” The Division recommended the PSC dismiss the Complaint. *Id.* at 1.

13. On September 15, 2020, the Commission issued a Request for Complainant to File a Response. The Commission requested that if the Complainant wished to continue with his complaint, he must file a request for hearing by Tuesday September 29, 2020.

14. On September 28, 2020, Mr. Tolbert submitted a response in which he did not request a hearing but requested that the Commission “not dismiss” his complaint.

III. MOTION TO DISMISS

Garkane respectfully requests that the Commission accept the Division’s recommendation and dismiss Mr. Tolbert’s complaint because Garkane has complied with § 54-3-26. Mr. Tolbert’s Formal Complaint alleges that Utah Code 54-3-26, as amended in 2016, is unlawful because it conflicts with other provisions of state law and violates “property rights of United States citizens.” Mr. Tolbert alleges that Garkane unlawfully maintained unclaimed capitol credits “rather than remitting [credits] to the state’s Unclaimed Property Division of the Office of State Treasurer.” Compliant (3/20/20). The Division has completed its investigation of Mr. Tolbert’s Complaint. The Division determined that Garkane is in compliance with the § 54-3-26. Further, both the Division and this Commission have already determined that Mr. Tolbert’s broad objections to state law are outside the scope of this Commission’s jurisdiction. For these reasons, the Commission must dismiss Mr. Tolbert’s Complaint.

A. Garkane Lawfully Maintains and Disperses Unclaimed Capital Credits.

Mr. Tolbert claims that Garkane is in violation of § 54-3-26 because Garkane does not submit unclaimed capital credits to “the Property Division of the Office of the State Treasurer, to be held in safekeeping.”¹ Mr. Tolbert broadly alleges that Garkane’s disbursements from credit

¹ Letter, page 1.

proceeds to scholarships and local community organizations is unlawful. Mr. Tolbert requests that the commission “question WHY Garkane administration is NOT remitting unclaimed property to the Unclaimed Property Division of the Office of the State Treasurer” (emphasis in original).

The answer to Mr. Tolbert’s question is simple: Utah Code § 54-2-26 does not require (and has never required) that a cooperative submit unclaimed capital credits to the State Treasurer.² The plain language of § 54-3-26(2) states that “a cooperative shall retain an unclaimed capital credit.” Garkane’s actions are explicitly lawful (and required) pursuant to § 54-3-26(2). Under rules of statutory construction “we look first to the statute’s plain language to determine its meaning.” *Nielsen v. Retirement Board*, 2019 UT App 89, ¶12, 443 P.3d 1264; *see also, State Le Monarrez v. Utah Dept. of Transp.*, 2016 UT 10, ¶ 11, 368 P.3d 846 (“Thus, we read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.”) (citation omitted). Section 54-3-26 does not make any reference to the Office of the State Treasurer. Further, the statute does not create an exception to allow a cooperative to submit unclaimed capital credits to the Treasurer. In fact, the statute contradicts the very position taken by Mr. Tolbert. The plain language of the § 54-3-26 unambiguously states that a cooperative “shall maintain” unclaimed capital credits. Garkane’s retention of capital credits is, therefore, required by, and not a violation of, Section 54-3-26.³

² The PSC notes that between 1995, when the Legislature first enacted the State, and May 2016, the Statute similarly allowed cooperatives to use retained unclaimed capital credits.” Aug. 6, 2020 Order, p. 3, fn. 4.

³ Mr. Tolbert’s September 28, 2020 letter makes a series of baseless (and frequently offensive) allegations, including for example that the unclaimed credits are, by some unidentified and imaginary means, transferred to Garkane’s “board and CEO.” This claim is not supported by any fact or evidence in the record or otherwise. There has been no violation of Utah law. There has been no transfer of member property to Garkane’s board and CEO. Garkane is not depriving its members of or otherwise retaining margins. Nor is Garkane “TAK[ING] FROM members rather than SAV[ING] FOR members.” Instead, Garkane undertakes diligent efforts to locate those who

B. Garkane Provided Annual Reports and Additional Information Demonstrating Compliance With The Sec. 54-3-26.

Utah Code Ann. § 54-3-26(2) requires that “a cooperative shall retain an unclaimed capital credit.” The statute requires a cooperative to use the proceeds of retained unclaimed capital credits to provide low-income assistance, scholarships, and financial contributions to schools or organizations in the community it services. *Id.* at (3)(a)-(c). Section 54-3-26(3) requires that a Cooperative submit an annual report to the Public Service commission that describes “(a) the amount of unclaimed capital credits retained by the cooperative; (b) the amount and receipts of financial assistance disbursed under this section; and (c) the criteria used by the cooperative to determine the receipts and amount of financial assistance disbursed under this section.” Utah Code Ann. § 54-3-26(5).

On September 2, 2020, Garkane submitted its Response to the Complaint and provided annual reports filed between 2016 and 2019, and additional information including:

- WARM application and criteria;
- WARM Disbursements by recipient;
- Scholarship application and criteria and recipients (per Form 17a);
- Capital Credit and Unclaimed Capital Credit Balances (per Form 17); and
- Capital Credit Refund (Annual) (per Form 17)

The Division reviewed this information determined that Garkane is in compliance with §54-3-26.

The Division found that Garkane “filed its annual reports to the Division on a timely basis.” The Division determined that Garkane’s annual reports include the balance of unclaimed capital credits as well as amounts paid out for scholarships⁴ and low-income utility assistance” required

may be entitled to capital credits. And Garkane, as has been recognized in this very proceeding, is complying with the law while also reducing the returns timeframe. Mr. Tolbert’s unfounded accusations do not alter that fact.

⁴ Mr. Tolbert’s September 28, 2020 letter expresses discontent with providing scholarships to students to attend the Michael F. Peterson Leadership Camp, which is organized by the Utah Rural Electric Association. Contrary to Mr. Tolbert’s apparent understanding, this leadership

under § 54-3-26(3). The Division also determined that Garkane established valid criteria governing disbursement requirements and qualifications.

C. The Commission must dismiss Mr. Tolbert’s Complaint.

Under Article VI of the Utah Constitution, the legislative power of the state is vested in “the Legislature of the State of Utah and the people of the State of Utah.” *See Carter v. Lehi City*, 2012 UT 2, ¶48, 269 P.3d 141. The Commission is charged with executing law enacted by the Legislature. Although the PSC exercises broad authority over public utilities, the PSC is not empowered to disregard the plain language of § 54-3-26 and impose requirements that conflict with its specific written provisions. “It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.” *Mtn. States Tel. and Tel. Co. v. PSC*, 754 P.2d 928, 930 (Utah 1988). Pursuant to Utah Code Ann. § 54-7-21, the Commission is empowered to “see that the provisions of the Constitution and statutes of the state...are enforced and obeyed and that violations thereof are prosecuted.” The Commission does not have the authority to rewrite or disregard Utah Code enacted by the state legislature. Whatever Mr. Tolber’s policy objections to § 54-3-26 may be, “[w]ithout clear statutory authority, the Commission cannot pursue even worthy objectives for the public good.” *Mtn. States Tel.*, 754 P.2d at 933.

The Commission must, therefore, find that Garkane lawfully maintains capital credits and dismiss Mr. Tolbert’s Complaint. Garkane is complaint with § 54-3-26. The relief Mr. Tolbert’s seeks can be provided by State Legislature through a legislative enactment. The scope of Mr. Tolbert’s Complaint is, therefore, beyond the scope of the Commission’s jurisdiction.

Camp is held in Ephraim, Utah, not Washington D.C. and is not a “tour.” *See* <https://garkaneenergy.com/content/michael-f-peterson-youth-leadership-challenge> (last visited Sept. 29, 2020). Regardless of its location, the Camp serves Garkane’s constituent communities—to which Garkane is committed to serving—by developing leadership skills in the youth and future leaders of those communities. Mr. Tolbert’s complaint about these scholarships misses the mark.

IV. CONCLUSION

WHEREFORE Garkane respectfully requests that the Commission accept the Division's recommendation and issue an order dismissing Mr. Tolbert's Complaint.

Dated this 29th day of September, 2020.

SNELL AND WILMER L.L.P.

/s/ Elizabeth M. Brereton

Elizabeth M. Brereton, Esq.

Counsel for Garkane Energy Cooperative

CERTIFICATE OF SERVICE

By U.S. Mail:

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By Email:

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Office of Consumer Service

/s/ Elizabeth M. Brereton _____

4853-0342-2411

EXHIBIT A



GARY HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah

Department of Commerce Division of Public Utilities

CHRIS PARKER
Executive Director

ARTIE POWELL
Director, Division of Public Utilities

Action Request Response

To: Public Service Commission of Utah

From: Utah Division of Public Utilities

Artie Powell, Director

Marialie Wright, Manager

Brenda Salter, Utility Technical Consultant Supervisor

Doug Wheelwright, Utility Technical Consultant Supervisor

Jeff Einfeldt, Utility Technical Consultant

Date: September 3, 2020

Re: **Docket No. 20-028-01**, Formal Complaint – LaVoy Tolbert v. Garkane Energy Cooperative, Inc.

Recommendation (Dismiss Complaint)

The Division of Public Utilities (“Division”) recommends the Public Service Commission of Utah (“Commission”) dismiss the LaVoy Tolbert Formal Complaint. Based on the Division’s review, Garkane Energy Cooperative (“Garkane” or “Company”) is in compliance with the requirements outlined in Utah Code § 54-3-26 concerning the retention and reporting of unclaimed capital credits by electric cooperatives.

Issue

The customer complaint deals primarily with H. B. 266 and a change to Utah Code § 54-3-26 that occurred in 2016. This change deals with the use of unclaimed capital credits and applies to all electric and telephone cooperatives and not exclusively to Garkane.

Background

On May 18, 2020, LaVoy Tolbert initiated a formal complaint against Garkane Energy concerning H. B. 266, and the Company's unclaimed capital credits. On May 18, 2020, the Commission issued an action request to the Division to review the complaint and make a recommendation with a response date of June 17, 2020. On May 26, 2020, the Commission issued a supplemental action request and asked the Division to include a copy of Garkane Energy's most recent Electric Cooperative Association Annual Report. On May 26, 2020, the Commission issued a notice of filing and comment period, establishing Garkane's response deadline as June 17, 2020, and the Complainant's reply deadline as July 2, 2020. On June 15, 2020 the Division issued a response to the action request and indicated it had no recommendation in this docket. On June 16, 2020, the Company provided a copy of the 2019 Annual Report for Garkane Energy Cooperative along with its response to the complaint. The response indicated that Garkane was in compliance with provisions of H. B. 266 and asked that the complaint be dismissed. On June 24, 2020, the Complainant requested a 15 day extension of his reply deadline and on June 25, 2020, the Commission amended the reply deadline to July 17, 2020. On July 10, 2020, the Complainant filed reply comments and again expressed concerns with the legality of H. B. 266. Mr. Tolbert believes the unclaimed capital credits should be remitted to the Utah State Treasurer's Office as unclaimed property and not retained by Garkane or any other co-op entity.

On August 12, 2020, the Commission issued a Second Supplemental Action Request directing the Division to investigate and provide any appropriate recommendation. The Commission asked the Division to review the enactment of House Bill 266 which amended certain sections of Utah Code Ann. § 54-3-26, Retention of unclaimed capital credits by electric and telephone cooperatives, the use of retained funds, and the reporting requirements. This memorandum represents the Division's response to the Commission's Action Request.

Discussion

The Second Supplemental Action Request asked the Division to evaluate the information provided in the Company's annual reports from 2016 through 2019 for compliance with Utah

Code § 54-3-26(5) and provide recommendations. The Division had several discussions with representatives from Garkane. The Company has been cooperative and responsive to the Division's request for additional information.

Cooperatives are accountable to members and not to corporate shareholders. Capital Credits are cooperative's margin, or money left after all expenses have been paid for the year. Co-op members are allocated a share of the annual margins based on the proportion of electricity used during the year. Cooperatives retain the capital credits for working capital needs which reduces the need for debt financing and additional interest expense. After a period of time determined by the Board of Directors, a portion of the accumulated credits are paid to members.

Garkane is currently on an approximate 30 year rotation cycle for capital credits. The goal of the Board of Directors is to have the Garkane capital credit rotation down to a 25 year rotation by 2023. In 2016 and 2017, the Garkane Board authorized the return of \$400,000 in capital credits to members. This amount was increased to \$1.0 million in 2018 and \$1.1 million in 2019. Capital credits are considered to be unclaimed three years after they have been authorized. Utah Code § 54-3-26 allows unclaimed capital credits to be retained and used to pay all or a portion of low-income utility bills, provide scholarships to high school seniors, or provide financial assistance to a school, non-profit or community organization in the area served by the co-op.

The Company has filed its annual reports to the Division on a timely basis and copies of the reports for 2016 – 2019 have been included with this response. The annual reports include Tab 17 which identifies the balance of unclaimed capital credits as well as the amounts paid out for scholarships and low income utility assistance payments. The report also includes Tab 17a which identifies the name and amount of each of the scholarship recipients. The item that has not been included in the Company's annual report is the criteria used by the cooperative to determine the recipients and the amount of financial assistance.

In response to the Division's request, the Company provided a copy of its High School Scholarship application as well as its Winter Assistance for Rural Members ("WARM")

application to support the criteria that is used to determine financial assistance. The scholarship application states;

Garkane's Board of Directors will select scholarship recipients based on scholastic achievement, financial need, extracurricular and service activities, and the essay required in the scholarship application.

The application also states dependents of Garkane Energy employees, management, or directors are not eligible for the scholarship award. A total of 22 - \$1,000 scholarships may be awarded with two scholarships intended for each of Garkane's eleven director districts.

In order to qualify for the Company's utility assistance or WARM Program, applicants must first qualify for the Home Energy Assistance Target ("HEAT") Program. The HEAT program provides energy assistance for low-income households throughout Utah. In order to qualify for the HEAT Program, the total household income must be at or below 150% of the Federal Poverty Level. Applicants that have not been approved for the HEAT Program are directed to first contact the local Department of Social Services. The maximum amount of assistance for the WARM Program is \$50 per year. In both the scholarship and the energy assistance programs, the criteria and guidelines are in place to determine eligibility. Copies of the Company's scholarship and WARM Program applications have been included with this memo.

The Company has also provided additional information concerning the annual amount and ongoing balance of unclaimed capital credits. The Division is satisfied that reporting capital credits to members is taking place and efforts are made to locate and pay capital credits to former members. Internal accounting procedures for current and unclaimed capital credits are in place as well as the criteria used to determine the recipients and amount of financial assistance.

Conclusion

The Division has reviewed the complaint filed by LaVoy Tolbert, the requirements as outlined in Utah Code § 54-3-26, and the information provided by Garkane. Mr. Tolbert's complaint deals primarily with H. B. 266 and a change to Utah Code § 54-3-26 that occurred in 2016. Garkane has cooperated with the Division's request and has provided a detailed accounting of the annual changes to the Capital Credits account for each year in question. While the Company did not

provide the criteria for determining financial assistance in its annual reports, the criteria is in place and has been documented by the Company. Based on the Division's review, Garkane is in compliance with the requirements outlined in Utah Code § 54-3-26 concerning the retention and reporting of unclaimed capital credits by electric cooperatives. The Division recommends the Commission dismiss the LaVoy Tolbert Formal Complaint.

Cc: Neal Brown – Garkane Energy Cooperative Inc.
LaVoy Tolbert