

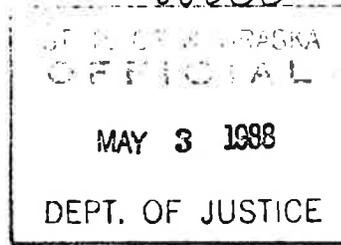
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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 \* STATE CAPITOL \* LINCOLN, NEBRASKA 68509

# 88030



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DATE: April 29, 1988

SUBJECT: Exemption from Taxation of Property Owned by Electric Cooperative Corporations and Rural Power Districts

REQUESTED BY: Donald S. Leuenberger  
State Tax Commissioner

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to whether real and personal property owned by entities organized as electric cooperative corporations (Neb.Rev.Stat. §§70-701 to 70-738 (Reissue 1986 and Supp. 1987)) or rural power districts (Neb.Rev.Stat. §§70-801 to 70-808 (Reissue 1986)) is exempt from taxation.

Article VIII, Section 2, of the Nebraska Constitution, provides in part as follows: "The property of the state and its governmental subdivisions shall be exempt from taxation." Consistent with this constitutional directive, the Legislature has enacted Neb.Rev.Stat. §77-202(1)(a) (Supp. 1987), which includes among the property exempted from taxation "[t]he property of the state and its governmental subdivisions; . . . ." The answer to your question as to the taxation of property owned by electric cooperative corporations or rural power districts thus requires a determination of whether such entities constitute "governmental subdivisions" of the state within the intent and meaning of these exemption provisions.

In Platte Valley Public Power and Irrigation District v. County of Lincoln, 144 Neb. 584, 14 N.W.2d 202 (1944), the Nebraska Supreme Court held that a public power and irrigation district was a "governmental subdivision" of the state within the meaning of the constitutional provision exempting from taxation the property of the state and its governmental subdivisions. In reaching this conclusion, the court announced the following rule:

A public corporation authorized by the legislature and organized to engage in the public use of the waters

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of our natural streams for irrigation and the development of power, the use of which waters has been dedicated to the people of the state for beneficial purposes under sections 4, 5, and 7, art. XV of our Constitution, is a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920, and all its property, both real and personal, is exempt from taxation.

Id. at 585, 14 N.W.2d at 203 (Syllabus of court).

In addition to the above-quoted rule, the decision sets forth the following broad language regarding the exemption contained in Article VIII, Section 2:

[A] public corporation, authorized by the legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the legislature and therefore a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920.

Id. at 592, 14 N.W.2d at 206.

Chief Justice Spencer, in a concurring opinion, cautioned against construing the majority opinion as inferring that ". . . a public corporation organized for a public purpose is ipso facto a governmental subdivision of the state." Id. at 597, 14 N.W.2d at 208 (Spencer, C.J., concurring). In this regard, the Chief Justice stated:

The majority do not undertake to define a "governmental subdivision." There is a vast difference between corporations, described either by the legislature or the courts as "public corporations," and "governmental subdivisions." The term "public corporation" is a general, all-inclusive term, applied loosely by courts and legislatures to all corporations that are not private corporations. A governmental subdivision is one created for the purpose of aiding in the administration of the law, and through which the state exercises some of its governmental functions and powers by a delegation of a part of its sovereignty. Not all subdivisions of the state are exempt from taxation under section 2, supra. It is only those that are "governmental" in character. A "governmental

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subdivision" falls within a far more restricted classification than a "public corporation."

Id. at 597, 14 N.W.2d at 208-209 (Spencer, C.J., concurring).

With the foregoing in mind, we will endeavor to address your question regarding the taxability of property owned by electric cooperative corporations and rural power districts. With regard to the former, Neb.Rev.Stat. §70-703 (Reissue 1986) provides: "Cooperative, nonprofit, membership corporations may be organized for the purpose of engaging in rural electrification and the furnishing of electric energy to persons in rural areas not served with electrical energy through existing facilities within such rural areas." Pursuant to §77-704, electric cooperative corporations are granted various corporate powers and enjoy the same powers exercised by public light and power districts or private corporations as to the use of public streets, highways, or lands; the power of eminent domain; and the powers of electric light and power corporations and districts regarding the use of public highways, and the manner of construction and physical operation of plants, systems, and transmission lines. Neb.Rev.Stat. §77-704(9) and (10) (Supp. 1987). Electric cooperative corporations may be organized by any 20 or more residents of the territory to be served by the corporation, upon the execution and filing of articles of incorporation with the Secretary of State. Neb.Rev.Stat. §§70-705 to 70-709 (Reissue 1986). The affairs of the corporation are governed by a Board of Directors, which are to be elected at annual meetings. Neb.Rev.Stat. §§70-706(4) and 70-718 (Reissue 1986). The corporation is required to be operated without any profit to its members, and any earned surplus not necessary for operations is to be returned to users of the services or products of the corporation. Neb.Rev.Stat. §§70-725 and 70-726 (Reissue 1986).

In our view, the above-listed characteristics associated with electric cooperative corporations are sufficiently different from those associated with public power and irrigation districts established pursuant to Neb.Rev.Stat. §§70-601 to 70-681 (Reissue 1986 and Supp. 1987) to compel the conclusion that electric cooperative corporations are not "governmental subdivisions" of the state within the exemption contained in Article VIII, Section 2. Public power and irrigation districts are formed following the approval of a petition submitted to the Nebraska Power Review Board, and are obligated to provide service to customers within their designated operating areas. Neb.Rev.Stat. §§70-603 to 70-604.02 (Reissue 1986). Furthermore, the Board of Directors governing the operations of a public power and irrigation district is elected by registered voters residing within the

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operating territory of the district. Neb.Rev.Stat. §70-610 (Reissue 1986).

In contrast to these characteristics, cooperative corporations are generally recognized as organizations established for the purpose of providing services or profits to their members. Linnton Plywood Association v. State Tax Commission, 403 P.2d 708 (Or. 1965). Among the class of cooperative corporations, the formation of rural electric membership corporations or cooperatives such as those authorized under Neb.Rev.Stat. §§70-701 to 70-738 (Reissue 1986) has been recognized as an increasingly common phenomenon. 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §68 (Rev. Perm. Ed. 1983). In assessing whether such electric cooperatives should be considered government entities, we believe the decision in City of Paris v. Federal Power Commission, 399 F.2d 983 (D.C. Cir. 1968), is instructive in this regard. The court in this case held that cooperatives established pursuant to the federal Rural Electrification Act (REA) were not "government instrumentalities" exempt from regulation under the Federal Power Act. In reaching this conclusion, the court noted the following:

The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in rural electrification is also served thereby is not enough to make the cooperatives themselves instrumentalities.

Id. at 986 (Footnotes omitted). Similarly, we do not believe that electric cooperative corporations, organized under Neb.Rev.Stat. §§70-701 to 70-738 (Reissue 1986 and Supp. 1987) can be considered "governmental subdivisions" of the state. Accordingly, we conclude that the property of such cooperatives is not exempt from taxation under Article VIII, Section 2.

We believe a different conclusion must be reached, however, with regard to the question of the taxation of property owned by rural power districts established pursuant to Neb.Rev.Stat. §§70-801 to 70-808 (Reissue 1986). In particular, we note the formation of a rural power district requires the submission of a petition for approval by the Nebraska Public Power Review Board, in much the same manner as is required for the formation of a public power and irrigation district. Neb.Rev.Stat. §70-803 (Reissue 1986). Furthermore, subsection (7) of §70-803

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specifically requires a statement providing that the proposed district, when created, ". . . shall be a public power district subject to and governed by the provisions of article 6, Chapter 70, and all other provisions of law, insofar as the same are applicable to public power districts in this state after their creation." In essence, the difference between public power and irrigation districts and rural power districts is based on the fact that the latter are designed exclusively to provide for the furnishing of electrical service in rural areas. Neb.Rev.Stat. §70-803 (Reissue 1986). We also believe it is significant to note that the terms public power district and district are defined in both Neb.Rev.Stat. §§70-601(1) and 70-802(2) (Reissue 1986) to include public power and irrigation districts organized under Article 6, Chapter 70, and Article 8, Chapter 70. Under these circumstances, it is our opinion that the property of rural power districts must be considered exempt from taxation under Article VIII, Section 2, as is the property of public power and irrigation districts.

In light of our conclusion as to the exemption from taxation of the property of rural power districts, it is necessary to consider your second question regarding whether such entities, if exempt from property tax liability, must nevertheless pay the gross revenue tax imposed on public power and irrigation districts under Neb.Rev.Stat. §70-651.03 (Reissue 1986). Section 70-651.03 provides:

Beginning in 1960, every public corporation and political subdivision of the state, which is organized primarily to provide electricity or irrigation and electricity, and which sells electricity at retail within incorporated cities or villages, shall on or before April 1, of each year, pay to the county treasurer of the county in which any such incorporated city or village may be located, a sum equivalent to five per cent of the gross revenue derived by it during the preceding calendar year from retail sales of electricity within such incorporated city or village, less an amount equivalent to the amount paid by such public corporation in lieu of taxes in the 1957 calendar year with respect to its properties in such city or village. (Emphasis added).

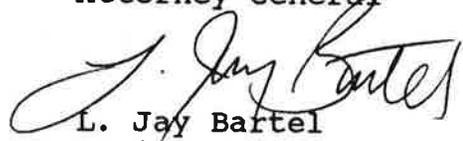
In our view, the plain language of §70-651.03 precludes the imposition of the gross revenue tax provided for thereunder upon rural power districts. The statute specifically requires such payments only from entities which sell electricity at retail "within incorporated cities or villages." As it is our understanding that the statutes providing for the creation of rural power districts authorize such entities to be established

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for the purpose of providing electrical energy in rural areas, it appears the gross revenue tax imposed under §70-651.03 is simply inapplicable to the activities of rural power districts under current statutory provisions.

Very truly yours,

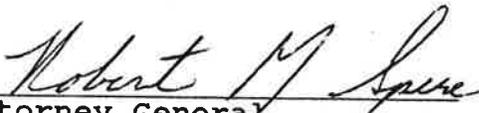
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APPROVED:

  
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