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REPORT



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Electric Cooperative Receives Favorable Interpretation of Excess Revenue Statute and Class Action Dismissal

*By Christina M. Schwing, Lawrence J. Hamilton II,
and Laura Beard Renstrom**

Many rural electric cooperatives around the country find themselves defending allegations that they have violated state statutes that require the cooperatives to distribute excess revenues. The authors of this article discuss a federal court's interpretation of an excess revenue statute that could bring an end to many capital credit lawsuits brought by current and former members of rural electric cooperatives challenging the distribution of patronage capital and excess revenues.

A federal court's interpretation of an excess revenue statute could bring an end to many capital credit lawsuits brought by current and former members of rural electric cooperatives challenging the distribution of patronage capital and excess revenues.

Many rural electric cooperatives around the country find themselves defending allegations that they have violated state statutes that require the cooperatives to distribute excess revenues. These statutes typically provide a formula for calculating excess revenues and then provide the methods for distributing those revenues, if indeed, the cooperatives have any. Numerous states, from Montana to Florida, have adopted these statutes fashioned after a model statute promulgated by the Rural Electrification Administration ("REA"), an agency of the federal government established in 1935.

SIMMONS V. WEST FLORIDA ELECTRIC COOPERATIVE ASSOCIATION, INC.

The U.S. District Court for the Northern District of Florida has interpreted Florida Statute Section 425.21—one example of an excess revenue statute—in the case of *Robert Simmons and Jan Simmons v. West Florida Electric Cooperative Association, Inc.*¹ Section 425.21 provides “unless otherwise determined by a

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¹ Case No. 5:15cv321-RH/GRJ.

vote of the members,' excess revenues—determined under a formula set out in the statute—must be 'distributed' to a cooperative's members 'as patronage refunds.'”

Many electric cooperatives have similar bylaw provisions requiring cooperatives to allocate their net margins by crediting members' individual capital credit accounts rather than paying members in cash. These bylaws and the votes adopting them were key to the court's order dismissing the class action lawsuit. The court held that the Florida statute requirement that a cooperative distribute excess revenues “unless otherwise determined by a vote of the members” was satisfied when members voted to adopt bylaws. Specifically, when the members voted on a bylaw provision authorizing the capital-account procedure, this constituted a “vote of the members” that eliminated any requirement to make a cash distribution, even if the statute otherwise would have required such a distribution.

The court rejected the plaintiffs' arguments concerning the timing and type of vote required by the statute. The plaintiffs claimed that “the requirement for a cash distribution may be overridden only by a stand-alone vote of the members—that adopting a bylaw is not enough. And the plaintiffs say there must be a vote each year—that a vote cannot remain in effect indefinitely or until there is a contrary vote.” However, the court pointed out that “nothing in the statute supports these assertions. The best reading of the statute's plain terms is that members may vote to dispense with any requirement to distribute excess revenues. That is what the members did when they adopted the bylaws.”

The court dismissed the plaintiffs' claims and entered a judgment in favor of West Florida Electric Cooperative. This significant victory comes on the heels of a string of favorable rulings for electric cooperatives in the Sunshine State.

RECENT RULINGS

In *Brunson v. Gulf Coast Electric Cooperative, Inc.*,² Florida's Fourteenth Judicial Circuit Court in Gulf County on Oct. 7, 2016, granted in part a motion to dismiss filed by Gulf Coast Electric Cooperative Inc., dismissing the plaintiff's claims for unjust enrichment and violations of Florida's Deceptive and Unfair Trade Practices Act (“FDUTPA”). Several weeks later, on October 26, in *Zittin v. Clay Electric Cooperative, Inc.*,³ Florida's Eighth Judicial Circuit Court in Alachua County granted in part a motion to dismiss, concluding that causes of action accruing prior to four years from the complaint being filed were barred by the statute of limitations.

² Case No. 2015-CA-000063.

³ Case No. 01-2015-CA-004166.

One month later, on November 28, in *Rozes v. Lee County Electric Cooperative, Inc.*,⁴ Florida's Twentieth Judicial Circuit Court in Lee County granted in part a motion to dismiss filed by Lee County Electric Cooperative Inc., dismissing the plaintiff's claims for unjust enrichment and violations of FDUTPA and concluding the plaintiff could not recover any claims arising from the cooperative's alleged failure to distribute excess revenues for years prior to the applicable four- or five-year statute of limitations. This victory follows closely upon the recent decision of the U.S. Court of Appeals for the Eleventh Circuit, in which the authors submitted an amicus brief on behalf of the Florida Electric Cooperatives Association, affirming the dismissal of an Alabama lawsuit on the basis that the allocation of patronage capital satisfied the requirement of the Alabama statute to "distribute" excess revenues.

COOPERATIVES TAKEAWAYS

In light of this recent decision, electric cooperatives operating in states that require distribution of excess revenues—"unless otherwise determined by a vote of the members"—should analyze their bylaws and ensure proper voting of provisions dealing with distribution of net margins.

⁴ Case No. 16-CA-001127.