STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 11-29

Organization of the Clarksville Electric Power Board

QUESTIONS

The Municipal Electric Plant Law of 1935 (the "1935 Law"), Tenn. Code Ann. §§ 7-52-101, et seq., authorizes a city to own and operate an electric plant. The plant is to be managed by a board of public utilities. The board may consist of two or four persons appointed by the chief executive officer of the municipality with the consent of the governing body of the municipality. The chief executive officer must also, with the consent of the governing body, designate a member of the governing body, or, in the chief executive officer's discretion, the city manager, to serve as a third or fifth member of the board. Initial terms of the two or four members are staggered, while the term of the member of the governing body or the city manager is fixed by the chief executive officer. That member's term may not extend beyond his or her term of office or his or her employment as city manager.

Article VI, § 1 of the Clarksville City Charter authorizes the City Council to create a board to operate the City's electric service. The board may have three to seven members elected by the City Council to serve terms of no more than three years. The Electric Power Board that operates the Clarksville Department of Electricity (the "Board") consists of seven members, none of whom is the city manager or member of the city council, who have been appointed to three-year terms.

1. Is the Board legally composed?

2. If the answer to Question 1 is no, is there a specific procedure for bringing the composition and tenure of a public utilities board into compliance with the 1935 Law?

OPINIONS

1. The answer to this question depends on whether the Board was created under the 1935 Law. This is a question of fact that this Office lacks sufficient information to determine. If Clarksville has issued bonds under the 1935 Law, then it was required to create a board under that law. If it did not issue bonds under the 1935 Law, then it could nevertheless have chosen to create the Board under that law. If a city governing body chooses to create a board of public utilities under the 1935 Law, the board's composition must comply with the requirements in the 1935 Law, unless a general or private act specifically overrides the 1935 Law. Thus, if the Board

was created under the 1935 Law, then it must have the membership and terms specified in Tenn. Code Ann. §§ 7-52-107 and 7-52-108. At the same time, Article VI, § 1, of the Clarksville City Charter also authorizes the City Council to create a board to operate the City's electric system. A board created under this provision may have seven members elected by the Council for three-year terms. Further, the City Charter provides that the Council may elect to operate under general laws "in addition to or instead of" its private act charter. If the Council did not issue bonds under the 1935 Law and chose to create the Board under Article VI, § 1 of its charter, and not under the 1935 Law, then the Board is presently legally composed.

2. Neither the 1935 Law nor any other general law provides a specific procedure for bringing the composition and tenure of a public utilities board into compliance with the 1935 Law. Where current board members are appointed under color of law, such as a city ordinance, they are *de facto* officers and may be removed from office only by a court of law through a *quo warranto* proceeding. Tenn. Code Ann. §§ 29-35-101, *et seq.* A *quo warranto* action regarding local public officials is ordinarily brought by the district attorney general. If, as a result of such action, the court removed current board members, the City Council could create a new board in accordance with the 1935 Law and the court's orders. As an alternative to bringing an action, the City Council could adopt an ordinance providing that, as the current terms expire, new board members will be appointed under a plan that will bring the board into compliance with the 1935 Law.

ANALYSIS

1. Composition of Board of Public Utilities under 1935 Law

This request concerns the membership of the Electric Power Board that operates the Clarksville Department of Electricity (the "Board"). The request refers to Op. Tenn. Att'y Gen. 11-14 (February 8, 2011). That opinion concerns the interpretation of several provisions of Tenn. Code Ann. §§ 7-52-101, *et seq*, the Municipal Electric Plant Law of 1935 (the "1935 Law). The opinion does not address whether the Board was formed under and subject to the 1935 Law, or under the City's private act charter. That issue is largely a question of fact that depends on information not available to this Office.

Under the 1935 Law, every municipality is authorized to acquire and operate an electric plant. Tenn. Code Ann. § 7-52-103. Tenn. Code Ann. § 7-52-107 provides:

> (a) Any municipality, except those that employ a city-manager or that have a population of less than two thousand (2,000), issuing bonds under the provisions of this part for the acquisition of an electric plant shall, and any municipality now or hereafter owning or operating an electric plant under this part or any other law may, appoint a board of public utilities, referred to as the "board" in this part.
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> (b) The board shall be created in the following manner: at the time the governing body of a municipality issuing bonds under this part determines that a majority of the qualified voters voting on the election resolution have assented to the bond issue for the acquisition of an electric plant, the chief executive officer of the municipality shall, or if no such bonds are issued, or if the municipality employs a

> city-manager or has a population of less than two thousand (2,000), then at any time *the chief executive officer may, with the consent of the governing body of the municipality, appoint two (2) or four (4) persons from among the property holders of such municipality who are residents of the municipality and have resided therein for not less than one (1) year next preceding the date of appointment to such board. The board of a municipal electric system may consist of two (2) or four (4) persons who have been for not less than one (1) year preceding the appointment both a customer of the municipal electric system and a resident of the county wherein such municipality is located.* No regular compensated officer or employee of a municipality shall be eligible for such appointment until at least one (1) year after the expiration of the term of such person's public office.

(emphasis added). Thus, a municipality that employs a city manager or has a population of less than two thousand is not required to appoint a board under the 1935 Law, even if it issues bonds under it. A municipality that issues bonds under the 1935 Law and does not employ a city manager or have a population of less than two thousand must create a board of public utilities under the 1935 Law. Any other municipality that has not issued bonds under the 1935 Law may choose to create a board under it. Tenn. Code Ann. § 7-52-108 provides:

> (a) The original appointees, if two (2) are appointed, shall serve two (2) and four (4) years respectively, or if four (4) are appointed, shall serve for one (1), two (2), three (3) and four (4) years respectively, from July 1 next succeeding the date of appointment, as the chief executive officer shall designate.
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> (b) Successors to retiring members so appointed shall be appointed for a term of four (4) years in the same manner, prior to the expiration of the term of office of the retiring member.
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> (c) In addition to the members so appointed, such chief executive officer shall also, with the consent of the governing body of the municipality, designate a member of such governing body, or, in the chief executive officer's discretion, the city manager, to serve as a third or fifth member of the board, as the case may be. The term of such member shall be for such time as the appointing officer may fix, but in no event to extend beyond the member's term of office in such governing body or the member's employment as city manager, as the case may be. Appointments to complete unexpired terms of office shall be made in the same manner as original appointments.

Tenn. Code Ann. § 7-52-133 provides:

> The powers conferred by this part shall be in addition and supplemental to the powers conferred by any other law. Bonds may be issued under this part for the acquisition or improvement of an electric plant, notwithstanding that any other law may provide for the issuance of bonds for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Tenn. Code Ann. § 7-52-134(b) provides:

> This part is remedial in nature and the powers hereby granted shall be liberally construed to effectuate the purpose of this part, and, to this end, every municipality shall have power to do all things necessary or convenient to carry out the purposes of this part in addition to the powers expressly conferred in this part.

The first question is whether the Board may be comprised of seven members, none of whom is the city manager or member of a city governing body, elected by the Council to three-year terms.

The answer to this question depends on whether the City Council created the Board under the 1935 Law. As this Office discussed in the February 8 opinion, the 1935 Law generally governs the relationship between the city council and a board of public utilities created under the 1935 Law, unless a general or private act specifically overrides it. Op. Tenn. Att'y Gen. 11-14 (February 8, 2011). The same principle applies to the composition of a board of public utilities created under the 1935 Law. If a city council chooses to create such a board of public utilities, that board's composition must comply with the requirements in the 1935 Law, absent a general or private act that specifically overrides it. *See*, *e.g.*, *Johnson City v. Allison,* 50 Tenn. App. 532, 362 S.W.2d 813 (Tenn. Ct. App. 1962), *p.t.a. denied* (1962) (upholding private act requiring additional members of Johnson City Power Board, which was operating under the 1935 Law, to represent the county and the other cities it was serving); *Bowman v. Pemberton,* No. 03A01-9104CH125, 1991 WL 169186 (Tenn. Ct. App. Sept. 5, 1991) (private act changing composition of Rockwood Public Utility Board "[n]otwithstanding any provision of the law to the contrary"). If Clarksville issued bonds under the 1935 Law, then it was required to create a board under that law. If it did not issue bonds under the 1935 Law, then it could have chosen to create the Board under that law. If, for either reason, the Board was created under the 1935 Law, then it must have two or four members and an additional member who must be a member of the City Council or the city manager. The two or four members must be appointed to staggered four-year terms.

In this case, however, the Clarksville City Charter also authorizes the City Council to form a supervisory board to operate the city's electric plant. Article VI, § 1 of the Charter provides:

> The city council may elect or create supervisory boards of not less than three (3) nor more than seven (7) members to be appointed or elected by such council. No member of such board shall be appointed or elected for a longer period than three (3) years. The members of the first board may be appointed or elected to serve for different periods so that the terms of office of its members shall not all expire the same year. To such extent and in such manner as the city council shall by ordinance determine, these boards shall have general supervision, management and control of the construction, maintenance and operation of such plants, systems, lines and additions, extension and improvements thereto, and the purchase, sale and resale of electric power, gas, water and furnishing sewerage disposal services, and the operation of recreational facilities.

If the Council created the Board under this provision, then the Board is legally composed.

Clarksville city ordinances governing the Board refer to the 1935 Act. Clarksville City Ordinance § 13-108.c. (superintendent's power to acquire and dispose of property subject to Tenn. Code Ann. § 7-52-132). But the ordinance does not clearly state the authority under which the City Council acted when it created the Board. The request for the February 8 opinion included an opinion from an independent attorney addressed to the Chairman of the Board that assumes the Board was created under the 1935 Act. That opinion does not discuss the basis for this assumption.

Because the answer to Question 1 depends on facts pertaining to the manner and authority under which the Board was created, and because those facts are not known to this Office, we cannot authoritatively answer. Because the composition of the present Board is consistent with the City Charter, one might assume that the Board was created under that Charter. But we do not know that as a matter of fact. Further, we do not know whether bonds have subsequently been issued under the 1935 Act that would require the Board to be reconstituted under that Act.

2. Bringing Composition of Board into Compliance with the 1935 Law

The second question is whether, assuming the answer to Question 1 is in the negative and that the 1935 Law governs and does not permit a seven-member board, there is a specific procedure for bringing the composition and tenure of the board into compliance with the 1935 Law. Neither the 1935 Law nor any other general law provides such a procedure. As the request indicates, the current Board was appointed in accordance with city ordinances. Even if the Board is not presently legally composed, the current Board members are *de facto* officers. The Tennessee Supreme Court recently applied the equitable doctrine of *de facto* officers in *Jordan v. Knox County*, 213 S.W.3d 751, 774-79 (Tenn. 2007). In that case, the Court found that the Knox County Charter, in effect since 1990, was invalid. But the Court concluded that the charter had formed a *de facto* government and that its officers were *de facto* officers. Under the doctrine of *de facto* officers, a public officer who has taken office under color of a known election or appointment holds office until his or her title has been legally determined to be invalid because the officer was not eligible for the office, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in the exercise of the appointing power. Generally, the acts of *de facto* officers are valid as to third persons and the public. *State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995); *Bankston v. State*, 908 S.W.2d 194, 196 (Tenn. 1995); *Country Clubs, Inc. v. City of Knoxville*, 217 Tenn. 104, 113, 395 S.W.2d 789 (Tenn. 1965) (the law validates the acts of "*de facto*" officers as to the public and third persons on the ground, that while they are not officers *de jure*, they are in fact officers whose acts, public policy requires, should be considered valid).

Current members of the Board, therefore, absent their voluntary resignation, could only be removed from office by a court of law. Under Tennessee law, a public officer's title to office may be tried under the *quo warranto* statutes, Tenn. Code Ann. §§ 29-35-101, *et seq.* A *quo warranto* action regarding local public officials is ordinarily brought by the district attorney general. *Snow v. Pearman,* 222 Tenn. 458, 436 S.W.2d 861 (1968). If, as a result of such action, the court removed current Board members, the mayor, upon confirmation by the City Council,

could appoint a new board in accordance with the 1935 Law and the court's orders. As an alternative to bringing an action, the City Council could adopt an ordinance providing that, as the current terms expire, new Board members will be appointed under a plan that will bring the Board into compliance with the 1935 Law.

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