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Environmental Law: Final Exam (1973)

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QUESTION 1:

The legislature of the State of X in 1920 created a Corporations and Utilities Commission with jurisdiction over "... all such corporations, partnerships, cooperatives and voluntary associations which, by the nature of their enterprises or activities, affect the public welfare."

Under this statute the Corporations and Utilities Commission shall "... with respect to all entities as fall within its jurisdiction:

- (1) regulate the terms, qualifications and conditions of entry into said enterprises;
- (2) assure fair and reasonable rates and charges for products or services provided by said enterprises;
- (3) prevent discrimination, undue preferences and prejudice or unfair competitive practices;
- (4) review and approve when required by the public interest any merger, pooling agreement, acquisition of control, interlocking relationship or other act which affects the level and extent of competition;
- (5) Assure by all appropriate steps that the products or services provided by said enterprises shall be adequate, free of defect and meet the standards of acceptability as the Commission determines to be usual in the trade;"

The statute provided "grandfather status" for "... all such entities that have been determined by the Commission to have operated for five years preceding enactment of this Act in a manner that conforms to the standards and requirements of this Act."

Initially, the Commission exercised jurisdiction over the electric and gas utilities, the telephone and telegraph companies, intrastate transport companies, banking, insurance, securities and liquor.

In 1969 the State of X amended its constitution by adding the following article II:

Section 1

"Natural Resources, Environmental Values and Historical Sites of the State:

To the end that the people have clean air, pure water, healthy living conditions and the use and enjoyment for recreation of adequate public lands, waters and other natural resources including wildlife, it shall be the policy of the State to conserve, protect, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the State's policy to protect its atmosphere, lands, waters and natural resources from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of this State."

Section 2

Conservation and Development of Natural Resources and Historical Sites:

In the furtherance of such policy, the legislature may undertake the conservation, development or utilization of lands or natural resources of the State, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands and waters from pollution, impairment, or destruction, by agencies of the State or by creation of public authorities..."

Thereafter, the Commission in a Notice of Proposed Rulemaking, cited said

amendment as its basis for assuming jurisdiction over practitioners of veterinarian science and made inter alia, the following finding in its Notice:

"It is a well-known and widely accepted fact, of which we take official notice, that the health of domestic pets as well as animals raised for purposes of producing food stuffs, leather, textiles and other useful commodities, is directly and causally related to the health of the human population and of the wildlife of this State."

There is no association of veterinarians in the State of X and no individual practitioners challenged the Notice of Proposed Rulemaking which was published weekly in the newspaper in each county seat in the State of X for ten weeks prior to adoption of the Rule.

Your client is Adolph Feral who has been a continuously practicing veterinarian in the State of X and in the county seat of Ursus for the past 40 years. He is the patriarch of a family composed of three sons, all of whom are veterinarians, and two daughters, both of whom are married to veterinarians. Each son and son-in-law practices in a different county seat in five contiguous counties. This six county area comprises the western half of the state of X. There are only two other veterinarians in the six county area--a man of 75 who is semi-retired and a new man who has practiced only 3 years prior to adoption of the above-noted rule making.

Your client and each of the sons and sons-in-law publicly display a sign on the front of each of their offices bearing the Feral coat of arms (a black Missouri mule rampant on a field gules) with the superscription "Adolph Feral, Sons" and beneath, the legend "Veterinarians-the Farmers' Friend". The proceeds of the various practices are remitted daily to Adolph who advances a monthly "draw" for living expenses to each family and at years end the surplus remaining after the "draws" is distributed on the basis of a formula known only to Adolph.

In addition to the usual practice of veterinary medicine, the Feral group prescribes, sells and dispenses two substances invented and patented by Adolph--one is known as "Fix-it" which is a general tonic which, according to a widely distributed circular entitled "Feral's Fix-it--the Farmers' Friend", when ingested by all animals including livestock produces "a greatly enhanced healthy tone and augmented resistance to disease and parasites." The other substance, known as "Super-Gro", similarly advertised in a circular entitled "Feral's Super-Gro--the Farmers' Friend", is alleged to "greatly enhance the growth and quality of livestock and other animals ingesting it."

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Jared Feral, the youngest son, had been practicing veterinarian for the past four years. Randall Feral, another son, has been practicing for seven years in the county seat of Bovis County but has published his intention to move his practice to the County Seat of Agnus County where the aforementioned new veterinarian had been practicing for three years.

Thirty days after final adoption of the above-noted rule, the Commission served Adolph and each of his sons and sons-in-law with a Show Cause Order which provides:

"(1) whereas on information and belief Adolph Feral and each of his sons (naming them) and sons-in-law (naming them), hereafter called Respondents, constitute either an informal partnership, or cooperative or voluntary association engaged in the practice of veterinarian science; and

(2) whereas by uncontested and final rule making this commission has extended its lawful jurisdiction over any such entities as practice veterinarian science;

The commission herewith adjures the foregoing respondents to show cause why the following preliminary order of the Commission should not be made final:

ORDER

1 Respondents shall not charge more than \$10 per hour or more than a \$10 minimum per professional consultation if requiring less than one hour.

2 Respondents shall cease and desist from selling or otherwise providing to any person the substance known as "Fix-it" until such time as respondents demonstrate to the satisfaction of this commission that said substance possesses therapeutic properties.

3. Respondents shall make available at cost plus 10 percentum to other veterinarian practitioners in the State of X for use in their practice the food additive known as "Super-gro".

4. The above named Jared Feral, having practiced fewer than five years next preceding enactment of this regulation, shall cease and desist from holding out and further practicing veterinarian science until such time as he has obtained a certificate of public convenience and necessity from this Commission.

5. The above named Randall Feral, on information and belief, intends to move his practice from the County of Bovis to the County of Agnus. Said respondent is herewith enjoined from doing so until this commission, after notice and hearing, determines that no adverse competitive consequences will thereby result.

6. Respondents are herewith directed within 30 days after this order is final to submit in writing to this Commission the details of their contract, whether it now be oral or written, by which they hold out to the public to practice as an association with a common sign, trade or service mark and dispense common proprietary products.

7. Respondents are further directed to file with this Commission an application seeking approval for said association and assume the burden of proof that said association is not anti-competitive or against the public interest. Until such time as the Commission acts on said application, respondents are ordered to cease and desist from further holding out as an association.

8. Respondents are herewith directed to disclose their joint and several earnings, the nature of the pooling and apportionment agreement as to said revenues and to file with this Commission an application for approval of said agreement. Pending action by this Commission on said application, respondents are directed to place said earnings in an escrow account in a state bank of their choice."

Advise your client of his rights and recommend the course of action he should pursue.

QUESTION II:

The X Corporation is a natural gas wholesaler that sells directly to consumers in the State of Watt and obtains all of its gas under a bulk rate tariff approved by the Federal Power Commission from the Y Corporation which operates a natural gas field in the State of Ampere. Plaintiffs are directors and minority shareholders of the X Corporation. Defendants are also directors of the X Corporation and in addition are directors, and officers of the Y Corporation. Defendants are also directors and shareholders of the Z Corporation which is also located in the State of Ampere and is the sole bulk producer of electric power in the two state region.

Plaintiff filed a suit in the Federal District Court alleging:

1. That defendants are guilty of a breach of fiduciary duty to the X Corporation and its shareholders in that defendants by fraud, coercion and collusion obtained a contract between the X and Y Corporations whereby the rate for natural gas was doubled, which contract thereby produced unjust enrichment to said defendants. Plaintiffs allege that said contract had been filed with the Federal Power Commission, that no protest being received, it automatically took effect, and for the past nine months defendants and the Y Corporation have been unjustly enriched. Plaintiff seeks damages in the amount that the current contract exceeds the prior contract and declaratory relief enjoining further charges under the contract. Plaintiff alleges that the Federal Power Commission has power only to fix rates prospectively and lacks power to award reparations.

2. Plaintiff alleges it is the sole bulk wholesaler dealing with the Y Corporation and is entirely dependent upon it for its supply of natural gas.

3. Plaintiff alleges that defendants by their position in the Y Corporation and as directors and shareholders of the Z Corporation are in clear violation of

the Sherman Act in that said interlocking relationship creates a de facto monopoly over all public power in the two state region and such monopoly is in restraint of trade. Plaintiff further alleges that by virtue of Defendants' multiple interlocking directorates they can impose upon the X Corporation the alternative of payment of the higher rate for natural gas (in which event the X Corporation is placed at a competitive pricing disadvantage vis-a-vis the Z Corporation) or nonpayment of the higher rate (in which event the X Corporation loses all of its market through inability to supply natural gas). Plaintiff seeks treble damages and asks the court to enjoin the continuation of this interlocking relationship between Defendants and the Z Corporation.

4. Plaintiff alleges that Defendants, improperly acting on behalf of the X Corporation and exploiting their apparent authority as directors of said Corporation, approved various expenditures of the Corporate funds of the X Corporation, viz.

(a.) donations to various Chambers of Commerce and pet charities in the State of Ampere;

(b.) expended funds to lobby legislation in both the States of Watt and Ampere;

(c.) expended sums to advertise various appliances including electrical appliances in the States of Watt and Ampere.

Plaintiff further alleges Defendants expended these sums improperly in that said expenditures either did not redound to the benefit of the X Corporation or that Defendants knew or should have known that said expenditures were not recoverable by the X Corporation in rate proceedings before the Public Utility Commission in the State of Watt. Plaintiff seeks damages in the amount of the alleged improper expenditures.

Defendant filed a general denial and a motion to dismiss on the grounds that the Court lacked jurisdiction to hear the complaint.

You are the Federal District Judge and it is your duty to rule upon the complaint and the motion to dismiss stating the basis of your decision in each instance.