

Decision No. 32389

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PUBLIC UTILITIES CALIFORNIA CORPORATION and COOS ELECTRIC COOPERATIVE, INC., for an order authorizing Public Utilities California Corporation to sell its electric and water systems in Del Norte County, California, to Coos Electric Cooperative, Inc.

ORIGINAL

Application No. 25928

Orrick, Dahlquist, Neff, Brown & Herrington,
by Hillyer Brown, for Public Utilities
California Corporation.

J. Arthur Berg, for Coos Electric Cooperative, Inc.

John L. Childs, District Attorney of Del Norte
County, and G. H. Van Harvey, for Board of Super-
visors of Del Norte County, and for Del Norte
Chamber of Commerce, protestants.

BY THE COMMISSION:

O P I N I O N

Applicants request an order authorizing the transfer of public utility electric and water systems in Del Norte County from Public Utilities California Corporation to Coos Electric Cooperative, Inc., pursuant to a proposed contract between the parties.

Public hearings were held by Examiner Fankhauser at Crescent City on March 1 and 2, April 5, 6, and 7, 1944, and at San Francisco on April 17, 1944. Briefs have been filed and the matter is now ready for decision.

Public Utilities California Corporation is a California corporation organized in 1927. It owns and operates a number of public utility electric, water, and telephone systems in various sections of California. The properties here involved are the corporation's public

utility electric and water systems which serve Crescent City and Smith River and surrounding territory in Del Norte County. Such properties were dedicated to public use many years ago and were acquired by the corporation from predecessor utilities.

The proposed purchaser of these utility properties is Coos Electric Cooperative, Inc., a corporation organized in 1939 under the statutes of Oregon relating to non-profit corporations and associations.⁽¹⁾ It owns some 200 miles of electric distribution lines in Oregon, serves a number of communities in that State⁽²⁾, and has about 1,000 members. Such properties have been financed by loans obtained through the Rural Electrification Administration.

The Oregon corporation takes the position that it will not be a public utility subject to regulation in California in operating the utility properties which it proposes to acquire from the California corporation. Protestants to the proposed transfer urge, as one ground of protest, that the Oregon corporation has no right to transact business as a public utility in California, because of section 26 of the Public Utilities Act.⁽³⁾

Most cases calling for a determination of utility status arise from a challenge of the character of existing operations where the owners thereof have not submitted to regulation. The question normally presented is whether the owning or operating entity has acted in such a manner as to have dedicated its property to public use. That question is not involved in this proceeding. Here the purchaser

(1) Oregon Code, 1930, Title XXV, Ch. VIII, Vol. 2, secs. 25-801 et seq; Oregon Compiled Laws, 1940, Vol. 5, p. 509.

(2) Sumner, Fairview, McKinley, Dora, Sitkum, Gravel Ford, Bridge, Remote, Gaylord, Fishtrap (Hall's Creek), and Port Orford.

(3) Section 26 of the Public Utilities Act reads as follows:

"No foreign corporation, other than those which by compliance with the laws of this State are entitled to trans-

proposes to take over utility systems already dedicated to public use and serving the public, and such purchaser intends to continue the existing service.

Utility systems may not be transferred without authorization. And a purchaser of property devoted to a public use takes such property subject to all of its public utility obligations. This is true even though the purchaser be an entity not subject to regulation under the Public Utilities Act, such as a municipality, an irrigation district, or other political subdivision.⁽⁴⁾

In the instant proceeding the prospective purchaser of utility properties is not a political subdivision, but is a private corporation organized under Oregon laws which permit the formation of corporations "for the transaction of any lawful business on the cooperative plan." (See footnote 1, supra.) Thus the question pre-

(3 cont'd.)

act a public utility business within this State, shall henceforth transact within this State any public utility business, nor shall any foreign corporation which is at present lawfully transacting business within this State henceforth transact within this State any public utility business of a character different from that which it is at present authorized by its charter or articles of incorporation to transact, nor shall any license, permit or franchise to own, control, operate or manage any public utility business or any part or incident thereof be henceforth granted or transferred, directly or indirectly, to any foreign corporation which is not at present lawfully transacting within this State a public utility business of like character, provided, that foreign corporations engaging in commerce with foreign nations or commerce among the several States of this Union may transact within this State such commerce and intrastate commerce of a like character; and, provided, further, that any foreign corporation, which may comply with the laws of this State respecting foreign corporations, and which owns at least ninety per cent of the outstanding capital stock of any other foreign corporation transacting a public utility business in this State, may succeed to the public utility business, franchises and rights of such latter corporation and, thereafter continue and carry on such public utility business."

(4) City of So. Pasadena v. Pasadena L. & W. Co., 152 Cal. 579; Brooks v. Oakdale Irrigation District, 90 Cal. App. 225.

sented is whether such a private corporation, organized to transact business on a cooperative basis, may take over and operate utility systems in California without thereby becoming a public utility subject to regulation by the Commission.

The Constitution of California declares that every "private corporation, and every individual or association of individuals, owning, operating, managing, or controlling" any plant furnishing light, water or power, "either directly or indirectly, to or for the public, * * * is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the Legislature, * * *." (Article XII, section 23.)

The term "corporation," when used in the Public Utilities Act, "includes a corporation, a company, an association and a joint stock association." (Sec. 2(c).)

The term "electrical corporation" includes every corporation or person owning "any electric plant for compensation within this State, except where electricity is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others." (Sec. 2(r).)

The term "water corporation" includes every corporation or person owning "any water system for compensation within this State." (Sec. 2(x).) (5)

The term "public utility," when used in the Public Utilities

(5) Section 1 of the Act for Regulation of Water Companies (Stats. 1913, p. 84, as amended) also provides that any one who sells, leases, rents or delivers water, with certain exceptions not relevant here, is a public utility. Section 2 of that statute exempts from regulation so-called "mutual companies," corporations or associations delivering water to no one except stockholders or members at cost, and organized solely for that purpose. The stockholders or members of a true "mutual," by serving themselves with their own water through their own system, each owning a proportionate interest therein, do not thereby dedicate their private supply and facilities to public use. It has already been noted, however, that questions relating to dedication and status are not involved in this proceeding, as the properties have been dedicated to public use for many years, and the proposed purchaser necessarily will continue existing service.

Act, includes every electrical corporation and every water corporation "where the service is performed for or the commodity delivered to the public or any portion thereof." (Sec. 2(dd).) The "'public or any portion thereof' as herein used means the public generally, or any limited portion of the public * * * for which the service is performed or to which the commodity is delivered, and whenever any * * * electrical corporation, * * * water corporation, * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such * * * electrical corporation, * * * water corporation, * * * is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act." (Sec. 2(ec); emphasis added.)

The Public Utilities Act does not exempt a private corporation from regulation as a public utility merely because such corporation may have been organized on a cooperative basis. Moreover, California law does not prohibit cooperative corporations from engaging in utility business.

Under the Civil Code a "cooperative corporation" is one "composed of ultimate producers and/or consumers * * * organized for the purpose of conducting any lawful business primarily for the mutual benefit of its shareholders and/or members * * * and the earnings, savings or benefits of which are used for the general welfare of the shareholders, members, or patrons or are distributed * * * proportionately and equitably among the persons for which it does business upon the basis of the amount of their transactions and/or participation in production; * * *." (Sec. 653.1; emphasis added.) Five or more persons may form a cooperative "for any lawful purpose" by filing articles of incorporation. (Sec. 653.3.) Furthermore, cooperative corporations "shall have and enjoy all rights, powers, and

privileges granted generally to corporations by the laws of this State, except as may be inconsistent with the provisions of this title." (Sec. 653.5; emphasis added.)

A "nonprofit corporation," under the California Civil Code, may be formed "for any lawful purposes such as * * * for rendering services, which do not contemplate the distribution of gains, profits or dividends to the members thereof, and for which individuals lawfully may associate themselves, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. The carrying on of business at a profit incidental to the main purposes of the corporation * * * shall not be deemed forbidden to nonprofit corporations." (Sec. 593; emphasis added.)

Thus, it is clear that California laws permitting the formation of nonprofit cooperative corporations not only fail to prohibit such corporations from engaging in public utility business, but expressly provide that such corporations may be formed for "any lawful purposes." The enabling statutes also recognize that such corporations shall be "subject to laws and regulations" applicable to particular "lines of activity." And the public utility business is a "line of activity" which is subject to certain laws and regulations.

The articles of the Oregon corporation indicate that one of the purposes of the corporation is to furnish electricity and water "to its members," and such articles provide that the corporation "shall render no service to or for the public." However, the powers and purposes which may be set forth in articles of incorporation do not of themselves fix the future status of a corporation as being utility or non-utility in character. Even in cases where the issue is whether there has been a dedication to public use, the test of status is to be found in acts and performance, rather than in statements contained in articles of incorporation or in by-laws. As al-

ready noted, the properties here involved have been dedicated to public use for many years.

Consistent with the fact that a purchaser of utility properties takes such properties subject to all utility obligations, the record herein shows that the Oregon corporation plans to continue service to all members of the public now served by the California corporation, will assume the latter's service and contractual obligations, and proposes to extend service to other members of the public who apply therefor.

The Oregon corporation's articles and by-laws provide that "any person, firm, corporation or body politic" may become a "member" upon paying a five-dollar "membership fee," agreeing to purchase electricity or water, agreeing to comply with the articles, by-laws, and rules, and being "accepted for membership." Payment of the five-dollar membership fee makes a member eligible for one electric and one water service connection. An additional five-dollar fee must be paid for each additional service connection.

Before 1944 the articles provided that no membership certificate should be issued until the membership fee "has been fully paid for in cash," and such payment deposited with the treasurer. In January of 1944, after the present application was filed, the articles were amended to provide that membership certificates should not be issued until the membership fee "has been fully paid and such payment has been noted on the books of the Corporation."

The proposed contract of sale, attached to the application herein, provides that the Oregon corporation shall not only admit to membership all of the California utility's customers who apply, but shall pay the membership fees of such utility customers. ⁽⁶⁾ In 1943

(6) Art. II, sec. 2 of the proposed contract of sale reads as follows:
"Purchaser" (the Oregon corporation) "shall admit to membership all consumers who shall be receiving service from the System on the closing date and who shall make application for membership in Pur-

the Oregon corporation's directors resolved that each customer of the California utility at the time of transfer automatically would become a member in good standing, and relieved of the five-dollar membership fee payment. ⁽⁷⁾

In 1944 the directors resolved that membership fees of utility customers of the California corporation be paid by the Oregon corporation. ⁽⁸⁾

The form of application for membership recites that the Oregon corporation "will pay on behalf of applicant the sum of \$5.00, which will constitute the applicant's membership fee."

Under the purchase agreement the Oregon corporation will as-

(6 cont'd.)

chaser; provided, however, that such consumers shall agree to be bound by and comply with the provisions of the articles of association and the bylaws of Purchaser and by such rules and regulations as may from time to time be adopted by Purchaser. The membership fee of Purchaser with respect to each such consumer shall be paid by Purchaser."

(7) A resolution of October 28, 1943 provided in part as follows:

"NOW, THEREFORE, BE IT RESOLVED by this Cooperative that upon the closing date of the agreement for the purchase of said electric and water systems by the Coos Electric Cooperative from the Public Utilities California Corporation, that each and every user now connected and procuring service of either electricity or water, or either or both of them; and receiving such service on the closing date of said agreement, be and they are hereby declared to automatically become members of this Cooperative in good standing;

"BE IT FURTHER RESOLVED that such members be and they are hereby relieved of the necessity of the payment of the \$5.00 membership fee;

"BE IT FURTHER RESOLVED that it shall not be necessary that each of said users file the application for membership by the closing date, but that applications be made and filed with the Cooperative as rapidly as conveniently possible thereafter."

(8) A resolution of February 10, 1944 reads in part as follows:

"WHEREAS, the consumers on the lines to be acquired as hereinabove mentioned have been receiving electric and water service for a substantial period of time, requiring no development period before usage of such consumers reaches pay-out levels;

"NOW, THEREFORE, BE IT RESOLVED, that the Cooperative pay the membership fees in the Cooperative of the consumers on the electric and water systems to be acquired and issue membership certificates to said consumers upon receipt of signed applications for membership from such consumers."

sume all service contracts of the California corporation, as well as franchise and permit obligations. ⁽⁹⁾ The proposed deed includes all licenses, franchises, ordinances, authorizations, privileges and permits of the California corporation, issued by the federal or state governments, or any political subdivision, board or commission, authorizing the construction, operation or maintenance of the physical properties, in so far as such franchises, etc., permit of conveyance or assignment. Both the deed and the purchase agreement include all existing contracts relating to electric or water service "to the ultimate consumer." The Oregon corporation will assume liabilities of the California corporation with regard to the refunding of consumer's deposits and refundable contributions for extensions.

The obligation to purchase the properties of the California corporation is conditioned, under the purchase agreement, upon the obtaining by the Oregon corporation of all "orders, franchises, certificates, permits, consents and approvals, to the extent required by law, from all Federal, State and local authorities having jurisdiction in the premises, in connection with the operation by Purchaser of all or any part of the System; * * *."

Not only will existing customers continue to receive utility service from the Oregon corporation, but the latter plans to extend such service to some 300 additional users. When surveys have been

(9) "* * * Purchaser shall * * * assume the following liabilities in so far as they shall have been incurred by Seller in connection with the normal operation of the System: (a) Service Contracts: * * * all obligations to be performed * * * under all contracts relating to electric or water service to the ultimate consumer from, through or by the electric or water lines or facilities included in the System, provided that the rates specified in such contracts shall have been duly filed with and approved by the appropriate regulatory commission * * *; (c) * * * all obligations to be performed * * * under all * * * governmental licenses, franchises, ordinances, privileges and permits, to the extent that such easements, agreements, licenses, franchises, ordinances, privileges and permits are included in the System." (Purchase agreement, Art. I, sec. 4.)

completed, and when feasible, the corporation contemplates possible construction of about 120 additional miles of pole lines.

Under loan contract with the United States of America (through the Administrator of the Rural Electrification Administration), the Oregon corporation has borrowed a substantial sum of money, and has arranged to borrow additional sums. The declared purpose of such arrangement is to finance the construction and operation of an electric system to serve about 2,745 consumers in two Oregon counties, Del Norte County in California, and in counties contiguous thereto in both states, "for the purpose of furnishing electric energy to persons not receiving central station electric service."⁽¹⁰⁾ When required by the Administrator, the Borrower is required to submit evidence that it has obtained "such franchises, authorizations, permits, licenses, certificates of public convenience and necessity, approvals, and orders from public bodies and others," as the Administrator shall deem necessary or advisable. And the Borrower, when so requested by the Administrator, shall transfer and convey to such purchasers "as the Administrator shall designate or approve," all or such portion of the system in California as the Administrator shall designate or approve, "for such consideration and on such terms and conditions as shall be prescribed by the Administrator; * * *."

To secure present and future notes to the Government, the Oregon corporation has executed a mortgage which provides that it will comply with all valid laws, ordinances, regulations, and requirements applicable to it or its property." Moreover, the corpora-

(10) Interlineations in other sections of the loan contract refer to the acquisition of existing facilities. For example, in Article III of the contract, relating to "Construction," the words underscored below have been added to section 1:

"SECTION 1. The Borrower shall cause the System to be constructed under contract by a responsible contractor or contractors, except to the extent that the Administrator shall permit the Borrower to construct by force account any portion or portions of the System, or to acquire existing facilities to be included in the System. * * *."

tion, "subject to applicable laws and rules and orders of regulatory bodies, will charge for electric energy and other services furnished by it rates which shall be sufficient to pay and discharge all taxes, maintenance expense, cost of electric energy, and other operating expenses * * *." (Emphasis added.)

Public Utilities California Corporation, through the properties here involved, serves about 750 electric customers and 630 water customers. Some 400 of these customers are within the city limits of Crescent City. To establish credit, this utility requires residence customers who are not property owners to make a deposit of \$5.00 for electric service and \$2.50 for water service, deposits being returnable after a period of one year.

All of these utility customers will continue to receive service from the Oregon corporation. They need only apply for service by signing a membership application, the \$5.00 membership fee having been waived. ⁽¹¹⁾ The president of the Oregon corporation testified in part as follows:

"Q. Is there any stock sold or what is the arrangement with reference to the memberships?

A. There is no stock sold; there is a membership application that each member must sign to become a member of the Co-op.

"Q. And what responsibility is there in connection with that membership? A. There is no financial responsibility whatever. It is merely the same as signing any application for electric service from any private utility.

"Q. In connection with the users in this area if this application be granted is there any membership fee to be charged to members at the time of application? A. Not for those being served at present.

(11) Membership is not restricted to individuals. The Oregon corporation's president testified in part as follows:

"MR. CHILDS: Now, under your articles you state that only -- that you will not serve anyone only members. What are you going to do for street lights here in Crescent City? A. The City can become a member.

"Q. The City can become a member? Public buildings the same? A. Yes."

"Q. And the Board of Directors of the Co-operative have passed a resolution making those applicants automatically members of the association upon signing the application for electric service? A. That is right.

"Q. Now, then, you say there is no financial responsibility whatever, then, that is taken on by any member of the Cooperative? A. The only responsibility is morally, to pay their bill.

"Q. That is for the electric service? A. For the electric service, that is all."(12)

It is clear that if the proposed transfer is consummated, the Oregon corporation will be operating as a public utility in California. Section 26 of the Public Utilities Act provides in part that no "license, permit or franchise to own, control, operate or manage any public utility business or any part or incident thereof be henceforth granted or transferred, directly or indirectly, to any foreign corporation which is not at present lawfully transacting within this State a public utility business of like character; * * *." The Commission may not authorize the transfer of public utility properties to the Oregon corporation, and the application must be denied. Discussion of other issues raised by the parties would serve no useful purpose.

After submission of the proceeding, and after receipt of all briefs, certain "intervenors" filed a "Complaint in Intervention and Answer to Application." That document has not been considered by the

(12) The form of "Application for Membership and for Electric Service" provides that the applicant, "by becoming a member, assumes no personal liability or responsibility for any debts or liabilities of the Cooperative, and it is expressly understood that under the law his private property is exempt from execution for any such debts or liabilities." Such provision is consistent with the corporation's Articles and By-Laws.

The application form also provides that upon acceptance the application shall constitute an agreement, "and the contract for electric service shall continue in force from the date service is made available by the Cooperative to the Applicant" until canceled by 30 days' written notice by either party.

Commission in arriving at its decision in this matter.

O R D E R

Evidence in the above proceeding having been taken at a public hearing, briefs having been filed and the matter submitted, and based upon the record and upon the factual findings contained in the above opinion, IT IS ORDERED that Application No. 25928 be and it is hereby denied.

Dated at San Francisco, California, this 10th day of

October, 1944.

Richard Roche
James F. Ciesler
Francis R. Havens
Francis J. Dore
Frank J. Rueda
Commissioners