

Decision No. 39940

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of CALIFORNIA ELECTRIC  
POWER COMPANY,

Complainant

vs.

MESA ELECTRIC COOPERATIVE, INC.,  
Defendant.

ORIGINAL

Case No. 4855

HENRY W. COIL and D. L. KING, for Complainant.

E. JOHN ERIKSSON and JAMES M. CARL, for Defendant.

ROWELL, Commissioner:

O P I N I O N

California Electric Power Company filed this complaint against Mesa Electric Cooperative, Inc., on October 22, 1946.<sup>(1)</sup> The complaint alleges that Mesa intends to construct an electric system for the purpose of serving electric energy to the public within certain areas of San Bernardino County in the vicinity of the town of Victorville, without having first obtained a certificate of public convenience and necessity from this Commission and in violation of Section 50 of the Public Utilities Act. It was prayed that the Commission issue an Interim Order requiring Mesa to cease and desist from the prosecution of all such construction of electric facilities, and, after hearing on the complaint, it be permanently restrained from proceeding with its project.

On November 22, 1946, Mesa filed its answer. The answer declares that Mesa is a non-profit corporation organized under the laws of California for the

---

(1) These parties will be referred to in this Opinion as California Electric and Mesa, respectively.

sole purpose of supplying electric energy to its members. It denies intention to sell or distribute electric energy to the public, and denies that it is a public utility within the meaning of the Public Utilities Act.

A public hearing was had at San Bernardino, California, on December 13, 1946. Evidence presented at that hearing revealed that Mesa had then actually begun the construction of electric lines. Its plans for the further construction of facilities to be used for the generation and distribution of electricity were described. Inasmuch as Mesa asserts the right to proceed with such plans without authorization by this Commission, the sole issue raised by the pleadings is one of jurisdiction. The question whether public convenience and necessity require the proposed construction of electric facilities is not before us for decision, for Mesa does not seek the grant of such a certificate. When asked during the course of the hearing whether it would seek or accept a certificate to render electric service to the territory here involved in the event the Commission concludes that such authority is a prerequisite to the lawful prosecution of the undertaking, the reply of counsel was to the effect that it would rest its case upon the pleadings and not ask for alternative relief of any kind.

Briefs were subsequently filed and the matter has been submitted for decision upon this single question of law. The Commission is compelled to the conclusion that Mesa is a public utility and that it must be ordered to desist from the further construction of facilities until it obtains a certificate as required by Section 50 of the Public Utilities Act. The basic facts are not in dispute.

Mesa's Articles of Incorporation were filed with the Secretary of State on March 4, 1946. It is evident that those responsible for its organization were hopeful that they might qualify for a loan by the United States through the medium of the Rural Electrification Administration. The federal statute creating that agency permits loans for rural electrification for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and

provides that such loans may be made to "persons, corporations, states, territories, and sub-divisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations organized under the laws of any state or territory."

Article II of Mesa's articles of incorporation as first filed, declares that purposes for which the corporation is formed are

"(a) To generate, manufacture, purchase, acquire and accumulate electric energy for its members, and, on lines purchased from a public utility corporation, to generate, manufacture, purchase, acquire and accumulate electric energy for its members and for non-member consumers, and to transmit, distribute, furnish, sell and dispose of such electric energy to its members and, on lines purchased from a public utility corporation, to transmit, distribute, furnish, sell and dispose of such electric energy to its members and to non-member consumers, and to construct, erect, purchase, lease as lessee and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange and mortgage plants, buildings, works, machinery, supplies, apparatus, equipment and electric transmission and distribution lines or systems necessary, convenient, or useful for carrying out and accomplishing any or all of the foregoing purposes."

On December 6, 1946 the directors executed an instrument to be filed with the Secretary of State in compliance with provisions of Section 362 (b) of the Civil Code for the amendment of its Article II so as to strike out the underscored words of the original article above quoted.

Mesa's Articles of Incorporation further provide that the total number of membership certificates which it shall have authority to issue is 5,000; that each membership certificate shall be of the same kind and shall cost \$5.00; that no person, firm or corporation or body politic may own more than one membership nor be entitled to more than one vote. The amount of capital stock with which the corporation will begin business is \$45,000. There shall be eleven directors.

Mesa's answer to the complaint of California Electric declares that it is a "non-profit corporation organized pursuant to the Cooperative Act (California Civil Code Section 651.1 et seq.)", although it probably intended to make reference to Civil Code Sections 653.1 to 653.16 comprising Title XXV under the heading of "Cooperative Corporations". This is but one of several titles of the Civil Code

relating to non-profit corporations. A corporation organized under Title XXV must contain the word "cooperative". Section 653.1 provides that such a corporation "shall be deemed to be composed of ultimate producers and/or consumers in which each shareholder and/or member has one vote and no more, organized for the purpose of conducting any lawful business primarily for the mutual benefit of its shareholders and/or members who may be natural or legal persons, and the earnings, savings or benefits of which are used for the general welfare of the shareholders, members, or patrons, or are distributed, whether in the form of cash, stock, or evidence of indebtedness or in goods or services 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;" with the further provision that "such corporation may pay out of its net surplus earnings, savings or benefits, not to exceed 5 per centum, interest upon its capital stock. Section 653.5 provides that such 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."

Mesa's By-laws, in conformity with its Articles of Incorporation, provide for the issuance of membership certificates only. Such certificates shall not be issued until the membership fee of \$5.00 has been fully paid. Upon payment of this fee, the member shall be eligible for one electric service connection, but an additional connection fee of \$5.00 shall be paid for each additional service connection. The member shall agree to purchase all electric energy from the corporation at such monthly rates as from time to time will be fixed by the Board of Directors. The Board may expel any member for failure to comply with the By-laws or the rules and regulations adopted, and upon the death, withdrawal or expulsion of a member, his membership certificate shall be surrendered.

The By-laws further provide that no member shall be liable or responsible for any debts or liabilities of the corporation, and that "members shall have no individual or separate interest in the property or assets" of the corpora-

tion except upon its dissolution, in which event each will share in the assets in proportion to his patronage during the seven years next preceding. However, the By-laws further state that, when consistent with the provisions of any mortgage given by the corporation, the Board may annually distribute earnings "among the members in proportion to their patronage" during the year in which received, when in excess of those needed to meet its debt requirements and to maintain specified reserves. There shall be an annual meeting of the members at which they elect the Board of Directors. The Board of Directors is empowered, without obtaining the consent of the members, to mortgage the corporation's property for the purpose of securing any indebtedness incurred to the United States or an agency thereof, but any other conveyance of a substantial portion of property requires the affirmative vote of not less than two-thirds of the members.

On about June 1, 1946, Mesa's Board of Directors completed negotiations with the Rural Electrification Administration for a loan to be used in the construction of an electric system. There were placed in evidence copies of three documents bearing the date of June 1, 1946, and executed soon thereafter. The first is an agreement for a loan in the amount of \$270,000 to finance the construction and operation of an electric system in San Bernardino and Los Angeles Counties, stating that the system will serve approximately 348 customers. The agreement provides that Mesa shall execute notes as advances are made by the government, and also a mortgage conveyance to secure the payment of such notes. It provides in some detail for the approval by the Rural Electrification Administration of all construction plans. Mesa covenants, among other things, that at such times as the Administrator requires, it will make diligent effort to obtain applications for membership of all persons to whom it is proposed to furnish electric energy, and to accept such applications by appropriate corporate action.

A note was concurrently issued in the amount covered by the loan agreement. The note states that it is but one of several notes which will be limited to the aggregate principal amount of \$2,000,000. It provides that the principal,

together with interest at 2%, will be repaid in quarterly annual installments beginning five years after the date thereof, and ending thirty-five years after date.

The mortgage agreement is also in evidence. It conveys all of Mesa's properties to be constructed through such government loans, together with all other property, including all rents, income, revenues and profits derived therefrom. This agreement also sets forth in detail the authority which may be exercised by the Administrator over Mesa's affairs, both during the period of construction and thereafter until all loans are fully repaid. When the above mentioned arrangements were made for a loan in the amount of \$270,000, it was Mesa's intention to construct only an electric distribution system without the installation of electric generating facilities. Thereafter, it decided to procure its own generating facilities, and on October 11, 1946, another loan agreement was made providing for the securing of an additional \$225,000. Thus, the contemplated cost of the total construction program is \$495,000.

At the date of hearing of this matter on December 13, 1946, Mesa had not taken corporate action to approve any applications for membership. It appears that of the eleven incorporators and original Board of Directors, ten members remained on the Board at that date, and one had been replaced. As permitted by the By-laws, its mortgage conveyance of June 1, 1946 was executed by its Board of Directors without the approval of the members. Mesa's Secretary testified, however, that it had received between 400 and 500 applications for membership, each accompanied by a fee of \$5.00. He further testified that no corporate action had been taken to establish rules or regulations governing the admission of applicants to membership. Although he expressed the opinion that the Board would not discriminate in the selection of applicants, he insisted that the Board had a right to refuse acceptance for any reason deemed sufficient, giving as an example one who is an alien or not a good citizen. However, the opinion thus expressed by this witness must be reconciled with the loan agreement covenant that it must make dili-

gent effort to obtain and "shall accept" applications for membership. Its By-Laws provide only that an applicant shall agree to "purchase from the Cooperative all electric energy used," at rates to be fixed by the Board. But the Board may restrict his use and may charge him a minimum sum monthly regardless of the amount of energy used.

The extent of Mesa's proposed construction program is indicated by the substantial loans which it has thus secured from the Rural Electrification Administration. As of December 13, 1946, poles were being placed for about eight miles of distribution lines, with a total of 190 miles projected. Some of these facilities were located along a county road running through the community of Phelan, about fifteen miles southwest of Victorville. It intends to extend this line from Phelan northwesterly to serve Smithson Springs, San Bernardino County, and to further extend it into Los Angeles County to serve Wilsonia and Hi Vista. It was stated that all such lines will be constructed in accordance with the standards prescribed by this Commission in its General Order No. 95. Several Diesel electric generating units were said to be available and would be acquired.

Witnesses estimated that about 60% of the entire project, measured both by extent of facilities and the number of customers that may be served, will lie within San Bernardino County, the territory involved in this complaint. An application has been filed with the Board of Supervisors of that county for a franchise permitting the placement of lines along public roads.

California Electric has for many years rendered an extensive electric service in the western sections of both San Bernardino and Riverside Counties. It possesses a certificate from this Commission to serve throughout these areas. Its high voltage transmission lines conveying power from hydro generating plants in Inyo County, and from Boulder Dam, pass through or near the town of Victorville. Prior to 1946, its lower voltage distribution facilities in this area afforded service only to those within Victorville and to the southeast thereof for a distance of approximately 12 miles. During the latter part of that year it completed the construction of a distribution line running westward to Phelan and Smithson

Springs.. It proposes other extensions to serve the communities of Sidewinder Wells and Apple Valley, both situated to the north and east of Victorville.

In large part, therefore, Mesa's proposed facilities in San Bernardino County and those now constructed or projected by California Electric will afford duplicating electric services. The territory is arid and sparsely inhabited. The various distribution lines and laterals to be constructed by California Electric, totalling approximately 89 miles, would make service available to areas within which there are now about 240 potential business and residential customers. If all these elected to receive this utility's service, it would attach but 2.7 customers for each mile of new line constructed. Mesa's witnesses estimated that from 2 to 2.5 customers per mile could be served by all of its proposed facilities. To the extent that duplicate facilities are constructed, the two concerns must compete for even this limited prospective patronage. In the Phelan and Smithson Springs areas, where California Electric has actually begun rendering electric service, it had attached at the date of hearing thirty-five customers and had received and accepted fifty additional applications..

The President of California Electric testified that the described extensions of its facilities in the Victorville area were being made sooner than his company would otherwise have proceeded had it not been for Mesa's declared intention to enter the field. He referred to his company as one engaged primarily in rendering a distinctly rural electric service, pointing out that over its entire system it has an average of but 9 customers per mile of transmission and distribution lines, a far lower density of customer services than that enjoyed by other major electric utilities in this state. He declared his willingness to fulfill every utility obligation to make all reasonable extensions of service, but described the difficulties that have prevailed and still prevail in obtaining materials for new construction. He stated that although eight or ten like construction projects had been completed during the last two years, seventeen or eighteen more are still being deferred because of want of labor and materials.

He expressed the opinion that this Victorville area project does not merit priority over all others. .

We come now to a consideration of the question whether, on the facts above disclosed, Mesa is legally required to possess a certificate of public convenience and necessity. The facts have been recited in some detail because it is Mesa's contention that by the very nature of its organization and plan of action it is wholly exempt from regulation by this Commission. It does not plead any express statutory exemption from regulation. Therefore, unless some sound legal basis exists for Mesa's claim that the Commission cannot intervene in this pending struggle between two electric service corporations, it is evident that the Commission should take appropriate action to this end, for the conclusion is inescapable that the result of such a conflict cannot be anything but detrimental to the communities immediately affected and to the public generally. .

Mesa is a California corporation, possessing only such powers as are conferred upon it by our laws. No conflict between state and federal authority is here involved. The federal Act creating the Rural Electrification Administration, as well as the agreements made between Mesa and that agency, specifically provide that Mesa must comply with all applicable state laws. As Mesa does not contend that it cannot be subjected to any state control, the single question to consider is whether the Constitution and laws of this state have actually conferred upon this Commission some control over its affairs. .

Article XII of the Constitution, Section 23, declares what undertakings are public utility in character. It provides that "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any \*\*\* line, plant or equipment \*\*\* for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public \*\*\* is hereby declared to be a public utility \*\*\*". Although no legislative act could serve to limit that constitutional definition of a public

utility, the Legislature is empowered to prescribe the extent of this Commission's regulatory authority over the businesses therein named, and to declare other classes of business to be public utility in character.

This broad constitutional definition of those public utilities which the Constitution itself subjects to regulation by this Commission encompasses every private corporation rendering such services to or for the public. As was said in the address to the voters at the time this constitutional provision was placed before them for adoption in 1911, "The amendment proposes to extend the jurisdiction of the railroad commission to every kind of public service except that furnished by municipally owned plants, \*\*\*". *City of Pasadena against Railroad Commission*, 183 California 526. In the enactment of the Public Utilities Act, the Legislature has declared just what control the Commission may exercise over those engaged in rendering electric service. In Section 2(cc) of that Act, the phrase "public or any portion thereof" is said to include one who "performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, \*\*\*".

Mesa takes the position that, although a private corporation undertaking the production, transmission and delivery of light and power, it does not fall within the definition of a utility because it does not intend to serve the public or any portion thereof. It is contended that instead of holding itself out to serve the indefinite public, its service will be limited to a select group of persons. This argument seemingly is premised upon the theory that the selection of particular persons to whom it will offer its service, and the rejection of others, automatically takes it out of the public utility category. It seems to contend further that all so-called "mutual" corporations are exempt from regulation under the California law.

It is unnecessary here to review the court decisions which Mesa cites in support of these propositions. With respect to its assertion that its service is not offered to the public because it will "select" its customers, the Commission

is convinced that none of the cases cited are persuasive. One's mere declaration that he will pick and choose his patrons does not of itself preclude a finding that he is engaging in a public service. Mesa is in fact holding itself out to render electric service to all within a given territory who are selected for membership and who pay the service charges. Should it without good cause refuse service to particular applicants, it would be violating an obligation demanded of all utilities, but this Commission could not well accept the theory that one's mere refusal to be bound by a utility service duty should be taken as evidence that he is not actually rendering a utility service. The court cases and Commission precedents to the contrary are numerous.

In contending that it is a cooperative or mutual corporation free from regulation, Mesa cites a number of California cases dealing with mutual water service companies. It also refers to certain decisions from other states involving the regulation of similar rural electric corporations organized under the laws of those states.

The mutual water company cases cited by Mesa are inapplicable for two reasons. In the first place they involve corporations which were organized to develop and deliver to each individual member that amount of water to which he was entitled by virtue of his ownership of a private water right, a right which the corporation might administer for his benefit but could not devote to the use of others. That is not the situation here presented. Moreover, such a mutual water company is expressly exempted from regulation by the Water Company Act of 1913. There is no like statutory provision relating to electric companies. Nor is there any statutory authority permitting this Commission to exempt a private electric corporation from regulation merely because it is organized under one or another of our non-profit corporation laws. Citations of authorities from other states, whether they sustain or deny the powers of a state to regulate a rural electric corporation as a public utility, are not determinative of the jurisdiction vested in this Commission.

The fundamental issue here presented was considered by the Commission in the matter of the application of Public Utilities of California Corporation for authority to transfer certain electric and water properties to the Coos Electric Cooperative, Inc.; decision No. 37389, issued October 1, 1944. The Commission then held that Coos Electric Cooperative would be rendering a public utility service if it acquired and operated the properties as proposed, and that a foreign corporation is prohibited by Section 26 of the Public Utilities Act from engaging in such a business in California. But Mesa points out in its brief that it has taken steps to amend its Articles so as to limit its service solely to members served by means of newly constructed electric facilities, whereas the Coos Electric Cooperative had offered to serve those who already were the beneficiaries of a utility service and such persons would automatically be accepted as members of the corporation. We are convinced that this factual distinction does not permit a different conclusion on the question of law here presented.

In conformity with the Commission's decision in the Coos Electric case, and also in many analogous proceedings involving the question of what constitutes service to the public, it must conclude that Mesa will be engaging in a public utility service. Neither the requirement that customers shall become members of the corporation, nor the declared intention to select its members, would justify a contrary conclusion under the circumstances here disclosed. The evidence clearly indicates that anyone who might reasonably be entitled to service from a public utility having facilities ready to serve this territory could just as readily avail himself of Mesa's proposed service, and he would not thereby incur any materially different service obligation, nor acquire any distinctive service right, from that ordinarily applied to a customer and utility relationship. A member's duty to contribute to the defendant corporation is based solely upon the amount of his use of electricity at rates fixed by the corporation, and the member's right to participate in the corporation's earnings through rate reductions or refunds likewise is based solely upon the extent of his patronage. Therefore,

in view of the broad constitutional definition of a public utility to include every private corporation rendering service to the public, this Commission must hold that Mesa's proposed operations fall within the public utility category.

Section 50 of the Public Utilities Act requires that every electric corporation shall obtain from this Commission a certificate of public convenience and necessity before beginning the construction of facilities, except such construction as that section expressly permits. Mesa was privileged to make application to the Commission for a certificate. Not having done so, it undertook the construction of electric lines at its peril. Had it proceeded otherwise, this Commission could have exercised its powers to prevent the construction of any electric lines into Mesa's proposed field of operations until its application could be heard and the issues determined as the public interest demanded. As Mesa did not file such an application, the Commission must issue an order directing it to cease and desist from all further construction or operation of electric facilities until the requirements of Section 50 of the Public Utilities Act are fulfilled.

I recommend the following order.

#### ORDER

The within complaint having been filed by California Electric Power Company against Mesa Electric Cooperative, Inc., a public hearing having been had thereon, and the matter submitted and fully considered, and it being found by the Commission that Mesa Electric Cooperative, Inc., has begun the construction of a line, plant or system for the purpose of supplying electric energy, as a public utility, in the vicinity of Victorville, County of San Bernardino, California,

without first having obtained from the Commission a certificate of public convenience and necessity as required by Section 50 of the Public Utilities Act; and, good cause appearing,

IT IS ORDERED that Mesa Electric Cooperative, Inc., immediately cease and desist from the construction of any electric lines or facilities, and the operation of any electric lines or facilities, for the sale and distribution of electric energy, until it obtains a certificate of public convenience and necessity authorizing such construction and operation.

~~The effective date of this order shall be the twentieth day after the date hereon.~~

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Public Utilities Commission of the State of California.

Dated at San Francisco, California, this 4th day of February, 1947.

Harold P. Huls

Justice J. Casper

Justice Powell

A. E. [Signature]

Commissioners.