

1950

Glen Froyd and M. F. Burgess v. Cedar City Corporation et al : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

GLEN FROYD and M. F.

BURGESS, et al.,

Plaintiffs and Appellants,

vs.

CEDAR CITY CORPORATION,

a body corporate and politic; L.

V. Broadbent, as Mayor, and

J. L. Fakler, Frank Milne, Mar-

ion F. Grames, Gail S. Seeg-

millier and Haldow E. Christen-

sen, as Councilmen of said City,

Defendants and Respondents.

CASE No. 7564

BRIEF OF APPELLANTS

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR IRON COUNTY

HON. WILL H. HOYT, *Judge*

FILED

AUG 18 1950

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sen, as Councilmen of said City,

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CASE No. 7564

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an appeal taken by the plaintiffs from a judgment of "no cause of action" rendered in favor of the defendants by the District Court of Iron County, Utah, Hon. Will L. Hoyt, Judge.

The amended complaint (Rec. 9) and the answer (Rec. 20) set forth the respective contentions of the

parties, and the prayer of the amended complaint (Rec. 17) specifically states the relief sought by the plaintiffs. Briefly stated as to its effect, the action was commenced by resident taxpayers of Cedar City to prevent the defendants, Cedar City Corporation and its mayor and councilmen on behalf of Cedar City Corporation from purchasing a minority stock interest in the Southern Utah Power Company, a public utility; to prevent Cedar City Corporation from becoming a member of the Southwest Utah Power Federation; to prevent the City from proceeding under various contracts and transactions in connection with such purchase and membership; and to restrain the issuance of revenue bonds by the City in furtherance of the consummation of those transactions.

The case was submitted to the trial court upon various exhibits introduced by all parties and upon an agreed statement of fact. No oral testimony was introduced.

We believe the case will be more readily understood if the facts are first fully stated.

For brevity, Cedar City Corporation will be referred to as the "City" and will be treated as the sole defendant, since the mayor and councilmen are joined only in their official capacity; The Southwest Utah Power Federation will be referred to as the "Federation"; the Southern Utah Power Company will be referred to as the "Power Company" and the Rural Electrification Administration will be referred to as the "R. E. A."

FACTS OF THE CASE

The Southern Utah Power Company is a public utility which for many years last past has furnished, and now furnishes, Cedar City and its inhabitants with electrical energy and power for residential, domestic, business and other purposes. The Power Company owns and operates a distribution system within the City consisting of transmission lines, poles, meters and other necessary facilities and properties, and in addition supplies electrical energy to users of power in the Parowan Valley, the Towns of Summit, Enoch and Kanarraville and the Beryl Valley farming district, to users of power in Washington County, including Enterprise, Zions Canyon, Rockville, Hurricane, LaVerkin, Washington, Central, Gunlock, Veyo, Ivins, Santa Clara, Toquerville, Springdale, Pintura, New Harmony and rural communities such as Anderson's Ranch, Leeds and Harrisburg, and their adjacent territories, and to users in Kane County, including Kanab and rural areas. In so doing the Power Company has and does now maintain transmission lines to the points at or near where such users in Iron and Washington Counties are located, and in Kane County has and does now maintain a diesel unit to serve the City of Kanab; and also in so doing said Power Company has directly dealt with and does now deal directly with such users of power; such power users purchasing and using electrical power for household, domestic, business, indus-

trial and irrigation pumping purposes. In like manner the Power Company, under exchange agreements with the Cities of Parowan and St. George, furnishes stand-by or break-down service for these communities, and furnishes "firm" power to the City of Parowan when in the winter months the City of Parowan does not have sufficient water to generate power for its needs through its own municipal hydro-electric plant. (Finding No. 9, Rec. 105).

The interconnected generating system of the Power Company, exclusive of its isolated Kanab plant, consists of a diesel plant within the corporate limits of Cedar City, Utah, and a steam generating plant approximately two miles from Cedar City in Cedar Canyon, and four hydro-electric plants, one being at LaVerkin, Washington County, Utah, and the other three on the Santa Clara Creek in the vicinity of the towns of Veyo and Gunlock in Washington County, Utah. (Finding No. 10, Rec. 106).

The above described generating plants of the Power Company are connected with a high voltage transmission line which forms a loop throughout most of the territory served, the loop beginning at Cedar City, Utah, and running thence west to the Escalante Valley and Enterprise in Washington County, Utah; thence south into Washington County and to the three hydro-electric plants on the Santa Clara Creek; thence to Santa Clara, through St. George, Washington County, and on to Hurricane

and LaVerkin in Washington County, connecting with the hydro-electric plant at LaVerkin; thence running north through Toquerville, Kanarraville and back to Cedar City, Utah, with branch lines running off said main transmission line to serve various customers and towns. (Finding No. 11, Rec. 106).

The steam plant has a maximum capacity of 3,100 kilowatts and a normal operating capacity of 2,850 kilowatts; the diesel plant has a maximum or "peaking" capacity of 4,150 kilowatts and a normal operating capacity of 3,950 kilowatts and the "peaking" capacity of the said steam generating plant and the diesel plant is an aggregate of 7,250 kilowatts, and a normal operating capacity of 6,800 kilowatts; the maximum or "peaking" capacity of the said hydro-electric plants in the aggregate during the winter or high period is 2,400 kilowatts and the normal operating capacity is 2,200 kilowatts, and the maximum or "peaking" capacity of said hydro-electric plants in the aggregate during the summer or low period is 1,400 kilowatts, and the normal capacity is 1,250 kilowatts. Cedar City Corporation the year round uses 32% of the total production of the aggregate developed by said Southern Utah Power Company; none of the figures in this paragraph include the Kanab system. (Finding No. 12, Rec. 106-7).

On February 16, 1950, the trustee of the Washington Gas and Electric Company, which said company owns all

of the issued and outstanding common stock of the Southern Utah Power Company, excepting some directors' qualifying shares, entered into a certain "Sales Agreement" (Ex. "A" of Def. answer, Rec. 27-35) whereunder he agreed to sell and the Federation and the City agreed to buy all of the outstanding common stock of the Power Company in the following proportions:

City	11,305 shares
Federation	51,605 shares

The total purchase price for all of said stock was fixed at \$550,000.00, of which the City's share was fixed at \$98,835.00 and the Federation's share was fixed at \$451,165.00.

The proportion of stock and purchase price is respectively 17.97% and 82.03%.

In addition to the purchase price there is to be considered the outstanding bonds and preferred stock of the Power Company which will require a very large sum to retire, and which the trustee is not required to retire from the purchase price stated. The City's share of the purchase price, including retirement of bonds and other expenses, is \$375,000.00 or a little less.

On September 23, 1949, the Federation and the City entered into a certain agreement denominated by them a "Dissolution Agreement" (Ex. "B" of Def. answer, Rec. 36-40) under which they agreed to dissolve the

Southern Utah Power Company. In such dissolution the City is to receive all distribution lines and facilities within the city limits, and the Federation is to receive all generating and transmission facilities of the Power Company wherever located and particularly including those located in Cedar City, and is to receive all distribution lines and facilities located outside the City limits.

All costs and expenses relating to the dissolution of the Company, including all expenses of retiring the outstanding preferred stock and redeeming the outstanding bonds of the Power Company and discharging the other obligations and liabilities of said Power Company required to be satisfied before dissolution of the Power Company will be allocated 82.03% to the Federation and 17.97% to the City. (Ex. "B" of Def. answer, Rec. 37).

In order to raise the money to buy its 17.97% of the stock of the Power Company, and to retire the preferred stock and outstanding bonds of the Power Company, the City proposes to sell "Electric Revenue Bonds" in the sum of \$375,000.00. (Ex. "D" of Def. answer, Rec. 48-61).

The City has become a member of the Federation and has agreed to pay a membership fee of \$100.00. (Finding No. 7, Rec. 103). The Federation is organized as a non-profit corporation under the laws of the State of Utah. Various pertinent provisions of the Articles

of Incorporation of the Federation (Pl. Exhibit 1, Rec. 139) are given as follows:

ARTICLE III. (Rec. 141).

"The object or objects and purpose or purposes for which the Federation is formed are:

"Section 1. To generate, manufacture, purchase, acquire and accumulate electric energy for its members and to transmit, distribute, furnish, sell and dispose of such electric energy to its members only 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.

"Section 2. To acquire, own, hold, use, exercise, and to the extent permitted by law, to sell, mortgage, pledge, hypothecate and in any manner dispose of franchises, rights, privileges, licenses, rights of way and easements necessary, useful or appropriate to accomplish any or all of the purposes of the incorporation.

"Section 3. To purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, use, convey, sell, lease as lessor, exchange, or mortgage, pledge or otherwise dispose of any and all real and personal property or any interest therein necessary, useful or appropriate to enable the Federation to accomplish any or all of its purposes.

"Section 4. To borrow money, to make and

issue bonds, notes and other evidences of indebtedness, secured or unsecured, for moneys borrowed or in payment for property acquired, or for any of the other objects or purposes of the Federation; to secure the payment of such bonds, notes or other evidences of indebtedness by mortgage or mortgages, or deed or deeds of trust upon, or by the pledge of or other lien upon, any or all of the property, rights, privileges or permits of the Federation wheresoever situated, acquired or to be acquired."

ARTICLE V. (Rec. 142).

"There shall be a board of five directors of whom a majority shall form a quorum who, except as hereinafter provided with respect to the first board of directors, shall be elected annually by and from the members of the annual meeting of the members on the 1st Monday of March of each year, beginning with the year 1950, * * * *."

ARTICLE IX. (Rec. 144).

"Any persons, firm, association, corporation, or body politic or subdivision thereof may become a member in the corporation by:

"(A) Executing a written application for membership thereon;

"(B) Agreeing to purchase from the Federation electric energy as hereinafter specified;

"(C) Agreeing to comply with and be bound by the articles of incorporation and bylaws of the Federation and any rules and regulations adopted by the board of directors; and

"(D) Paying the membership fee hereinafter

specified; provided, however, that no applicant shall become a member unless and until he or it has been accepted for membership by the board of directors or the members. No member may hold more than one membership in the Federation, and no membership in the Federation shall be transferable."

ARTICLE IX, Section 2. (Rec. 145).

"MEMBERSHIP FEE. The membership fee shall be One Hundred (\$100.00) Dollars. The membership fee paid by or on behalf of an incorporator shall be applied to the membership fee of the organization he represents when it becomes a member."

ARTICLE IX, Section 3. (Rec. 145).

"PURCHASE OF ELECTRIC ENERGY. Unless otherwise specified by written agreement, each member shall terminate any contract which it may have for the purchase of energy from any other supplier when electric energy becomes available from the Federation or as soon thereafter as it may legally do so, and shall purchase from the Federation all electric energy used by the member. *Each member shall pay therefor monthly at rates or on a basis to be determined from time to time in accordance with the bylaws subject to contracts heretofore or hereafter entered into between the member and the Federation. It is expressly understood that amounts paid for electric energy in excess of the cost of service are furnished by members as capital and each member shall be credited with capital so furnished as provided in these bylaws. Each member shall pay to the Federation all such other amounts per month regardless of the amount of*

electric energy consumed, as shall be fixed by the board of directors from time to time. Each member shall also pay all amounts owed by such member to the Federation as and when the same shall become due and payable."

ARTICLE IX, Section 4. (Rec. 145).

"TERMINATION OF MEMBERSHIP: (a) A member may withdraw from membership upon compliance with such equitable terms and conditions as the board of directors may prescribe, provided, however, that no member shall be permitted to withdraw until he has met all his contractual obligations to the Federation. * * * *"

ARTICLE IX, Section 4 (b). Rec. 146.

"* * * * . Termination of membership in any manner shall not release a member or his estate from any debts due the Federation."

As a part of the entire transaction and scheme the City entered into a so-called "wholesale power agreement" (Ex. "C" of Def. answer, Rec. 41) whereunder the City agreed to purchase all its power from the Federation until December 31st, 1984, a period of thirty-five (35) years from the date of the contract, and with a provision, among others, as follows:

"The Board of Directors of the Seller at such intervals as it shall deem appropriate, but in any event not less frequently than once in each calendar year, shall review the rate schedule for electric power and energy furnished hereunder and under

similar agreemnts with other members of the Seller and, if necessary, shall revise such rate schedule so that the rates shall produce revenues which shall be sufficient, but only sufficient, with the revenues of the Seller from all other sources, to meet the cost of the operation and maintenance of the generating plant, transmission system and related facilities of the Seller, the cost of any energy purchased for resale hereunder by the Seller, pay taxes, *make payments on account of principal of and interest on all indebtedness of the Seller*, and to provide for the establishment and maintenance of reasonable reserves. * * * *” (Rec. 46-47).

The Federation presently has no funds excepting the membership fees specified in the Articles of Incorporation of said Federation but it does have an approved loan from the Rural Electrification Administration of the United States Government in the amount of \$3,750,000.00, the proceeds of which are to be used for the purchase of its proportionate share of the common stock of the Southern Utah Power Company and the retirement of bonds and obligations specified in the agreement marked Defendants’ Exhibit “B”, and the making of improvements and building of transmission lines, presently contemplated. This loan bears interest at two per cent per annum, and is retireable over a period of thirty-five years. Repayment of the loan with interest will of necessity be made by the Federation from the sale of power to its members and/or contributions and/or assessments from its members. (Finding No. 18, Rec. 109-110).

In connection with the approved loan of \$3,750,000.00 the Federation has already executed one mortgage note in the sum of \$2,300,000.00 (Def. Ex. "G", Rec. 211-212) and another mortgage note in the sum of \$1,450,000.00 (Def. Ex. "F", Rec. 209-210).

The Federation also has executed a mortgage to secure the payment of said notes, (Def. Ex. "H", Rec. 213-220), which said mortgage specifically provides that it is contemplated that notes additional to the two notes aggregating \$3,750,000.00 shall be executed from time to time, not exceeding \$20,000,000.00; and further that:

"The Mortgagor, 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 of its electric transmission and distribution system and electric generating facilities, if any, *and also to make all payments in respect of principal of and interest on the notes when and as the same shall become due*, and to provide and maintain a reasonable reserve for working capital of the Mortgagor." (Def. Ex. "H", Sect. 15, Rec. 217, reverse side of sheet).

The above mentioned paragraph from the mortgage says "subject to applicable laws and rules and orders of regulatory bodies" but there are no laws applicable and it was held in the case of *Garkane Power Co. v. Public Service Commission*, 100 Pac. (2d) 571, 98 Utah 466, that

an R. E. A. co-operative is not subject to the rules and regulations of the Public Service Commission; consequently there are no state or municipal regulations, limitations or restraints of any kind respecting the rates that may be charged.

“On retirement of the loan, ownership of the assets of the Federation will be held by and vested in the members proportionate to the power usage and payments thereon by said members over such period.” (Finding No. 18, Rec. 110).

The pleadings raise the direct issue as to the legal right and municipal authority of the City to enter into and consummate those transactions. The amended complaint expressly seeks a decree of court declaring the previous dealings and contracts of the said defendants to be illegal and void; declaring that the proposed membership of the defendant City in said Federation to be without lawful authority; declaring the execution of the said or any similar wholesale power purchase agreement to be without lawful authority; and praying that a temporary restraining order and temporary injunction be issued against the defendants and each of them enjoining and restraining them and each of them from continuing further with the proposed transactions as aforesaid and from executing any resolutions, agreements or commitments which shall tend in any way to consummate the said illegal and void acts; that this Court restrain the

issuance of the revenue bonds referred to in Exhibit "D" attached to the Answer, for the consummation of the transaction and/or transactions involved in this action; and that upon the final hearing said injunction be made perpetual; * * * *. (Rec. 17-18).

The trial court rendered a judgment "no cause for action" in favor of the defendants.

The sole question presented for review is whether or not the trial court erred in rendering such a judgment, all of which involves determining the further questions of whether or not the City had a legal right to enter into, and has a legal right to proceed with, the entire scheme of purchasing stock in the Southern Utah Power Company; and whether or not it can enter into the so-called wholesale power contract; become a member of the Federation; and issue its revenue bonds in payment of the stock in the Power Company and incidental expenses.

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

Following are briefly set forth the points upon which the appellants rely for a reversal of the judgment "no cause for action" entered by the trial court:

- I. Cedar City, in purchasing a minority stock interest in the Southern Utah Power Company, and in becoming a minority member of the Southern Utah Power Company, vi-

olates Article VI, Section 31, Constitution of the State of Utah.

- II. Cedar City has exceeded its municipal authority and purposes in entering into the various transactions more specifically enumerated and discussed in the Statement of Facts of this brief.
- III. Cedar City has unlawfully delegated its legislative powers and functions in the many particulars specified later in this brief.
- IV. The financial obligations assumed by Cedar City under the various transactions involved violate Article XIV, Sections 3 and 4, Constitution of the State of Utah.

ARGUMENT

I.

CEDAR CITY, IN PURCHASING A MINORITY STOCK INTEREST IN THE SOUTHERN UTAH POWER COMPANY, AND IN BECOMING A MINORITY MEMBER OF THE SOUTHWEST UTAH POWER FEDERATION, VIOLATES ARTICLE VI, SECTION 31, CONSTITUTION OF THE STATE OF UTAH.

Appellants contend that Cedar City, in purchasing a minority stock interest in the Southern Utah Power Company, and in becoming a member of the Federation, considering the scheme and transactions as a whole, and in view of all the facts and circumstances, violates the terms and provisions of Article VI, Section 31, Constitution of the State of Utah, which we quote as follows:

“(LENDING PUBLIC CREDIT FORBIDDEN).

The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to *lend its credit or subscribe to stock or bonds* in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking.”

The above section can well be divided into two parts: (a) It prohibits a city from lending its credit to any corporate enterprise or undertaking; (b) It prohibits a city from buying stock in any corporate enterprise or undertaking.

We contend that the City is violating that constitutional provision in buying a minority stock interest in the Southern Utah Power Company, and in lending its credit to, and in effect buying the assets of, the Federation.

It will eliminate considerable repetition if the facts and the law relative to the purchase of stock in the Power Company and relative to membership in the Federation are discussed together.

Under the scheme outlined in the Statement of Facts it is quite clear that without the City's purchase of a minority interest of the stock of the Power Company and without the membership of the City in the Federation, the entire scheme will fall. (Def. Ex. “F”, Art. II, Section 9, Rec. 204, reverse side).

Article II, Section 9, of the loan contract between the Federation and the R. E. A. specifically provides that:

“No funds shall be advanced on account of the Loan until the Borrower shall have submitted to the Administrator evidence satisfactory to him that the following contracts have been entered into, all such contracts to be in form and substance satisfactory to and approved by the Administrator, and to be binding on the respective parties thereto at such time as the Government shall have become a party thereto or the Administrator shall have approved all such contracts:

“(a) An agreement (hereinafter called the “Sale Agreement”) between Cedar City, Utah (hereinafter called “Cedar City”), the Borrower and the holder or holders of all of the common stock of Southern Utah Power Company (hereinafter called the “Power Company”), providing for the purchase by Cedar City and the Borrower of all of the common stock of the Power Company;

“(d) An agreement by and between the Borrower and Cedar City, providing for the sale by the Borrower to Cedar City of all the electric energy to be used by Cedar City, for such period and upon such terms and conditions as the Administrator shall approve, in its electric distribution system then in existence or to be constructed.” (Def. Ex. “E”, Art. II, Sect. 9, Rec. 204, reverse side).

ARTICLE II, SECTION 11.

“No funds shall be advanced on account of the Loan until Utah, Arizona, Escalante, Dixie, Gar Kane and Cedar City shall have duly and effectively become members of the Borrower.” (Rec. 205).

In examining the entire transaction and scheme we note that Cedar City in effect guarantees repayment of at least a portion, and if the other members of the Federation "throw up the sponge" or become defunct, then all, of the \$3,750,000.00 loan presently set up, and also any additional sums which may be borrowed in the future. In effect, the City is purchasing assets of the generating and distributing system to be acquired by the Federation proportionate to its power usage and payments, because on retirement of the debt title to the Federation assets vests in the City proportionate to its payments. The City is becoming a minority member of the Federation, thereby joining in a generating and distribution business presently serving two States, and perhaps more in the future.

The so-called wholesale power agreement effectually ties the City to the Federation for thirty-five (35) years (Ex. "C" of Def. answer, Rec. 44) and the mortgage indebtedness must be repaid within that period. (Def. Exs. "F" and "G", Rec. 209-212). The agreement for the purchase of power provides not only that the directors of the Federation shall review the rate schedule at such intervals as it shall deem appropriate and if necessary revise such rate schedule to produce revenues sufficient to meet the cost of operation and maintenance of the generating plant, transmission system and related facilities, the cost of energy purchased for resale, taxes, etc.: in brief, the actual cost of production of electrical

energy, but the board of directors of the Federation shall revise the rate schedule and fix a rate sufficient to

“* * * make payments on account of principal and interest on all indebtedness of the seller, and to provide for the establishment and maintenance of reasonable reserves.” (Ex. “C” of Def. answer, Rec. 47).

The articles of incorporation of the Federation provide:

“Each member shall pay therefor monthly at rates or on a basis to be determined from time to time * * *”. (Pl. Ex. 1, Rec. 145).

The language “It is expressly understood that amounts paid for electric energy in excess of the cost of service are furnished by members as capital and each member shall be credited with capital so furnished as provided in these bylaws” (Pl. Ex. 1, Rec. 145) can have but one meaning, namely, that the amounts paid by the city in excess of actual cost of production and distribution of electrical energy and presently contemplated to be paid is a contribution to the capital of the Federation and shall be so credited, to the end that “on retirement of the loan, ownership of the assets of the Federation will be held by and vested in the members proportionate to the power usage and payments thereon by said members over such period.” (Finding No. 18, Rec. 110).

Nor can the City withdraw from membership ex-

cepting "upon compliance with such equitable terms and conditions as the board of directors may prescribe, provided, however, that no member shall be permitted to withdraw until he has met all his contractual obligations to the Federation" (Pl. Ex. 1, Rec. 145). The contractual obligation of the City with the Federation under the power agreement is to pay a rate sufficient to retire all indebtedness, nor is there a limitation that the indebtedness shall be limited to an R. E. A. mortgage. Not only is withdrawal subject to compliance with such terms as the Federation board of directors may fix, but must be sufficient to retire the present mortgage indebtedness of \$3,750,000.00, which can easily become the full \$20,000,000.00 allowed under the mortgage, and all other indebtedness to anyone else for any purpose.

The entire indebtedness could become payable by Cedar City alone, for if the other members of the Federation become insolvent or withdraw or were dissolved, Cedar City under the Federation articles can be made to fix a rate sufficient to pay the whole thereof. There is no limitation to its original proportion of 17.97% or to 25% or to any other pro-rata portion. If the rate fixed does not produce sufficient to cover all its obligation, we call attention again to that provision in the Federation articles that "each member shall pay to the Federation all such other amounts per month regardless of the amount of electric energy consumed, as shall be fixed by

the board of directors from time to time." (Pl. Ex. 1, Rec. 145). Under that provision the City is unconditionally liable, there is no limitation that repayment must come from revenue from sale of electricity, and recourse may be had to other sources for repayment, including general revenue. In effect, the entire scheme or transaction amounts to a binding agreement by Cedar City to purchase either a portion, or all, of the assets of the Federation which by additional purchases or enlargement of scope of activities the extent of which is now unknown to the City and beyond its control, may cost anything from \$3,750,000.00 up to \$20,000,000.00 and more. It is even conceivable that a new loan might be negotiated in excess of \$20,000,000.00 and what the legal result might be if the City owned assets of a corporation located in Arizona we leave to the imagination for we note that "The Utah-Arizona Rural Electric Association would serve the remainder of Kane County and in addition, the towns of Short Creek and Fredonia, Arizona. (Finding No. 16, sub-division 5)," and the Federation itself might decide to operate in that and other states.

The mortgage from the Federation to the R. E. A., consistent with the purpose and tenor of the power agreement and the articles of incorporation of the Federation provides that:

ARTICLE II, SECTION 15. (Def. Ex. "H", Sect. 15, Rec. 217 reverse side).

“The Mortgagor, subject to applicable laws and rules and orders of regulatory bodies, will charge for electrical 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 of its electric transmission and distribution system and electric generating facilities, if any, and also to make all payment in respect of principal of and interest on the notes when and as the same shall become due, and to provide and maintain a reasonable reserve for working capital of the Mortgagor.”

We previously mentioned that the phrase “subject to applicable laws and rules and orders of regulatory bodies” is meaningless because there are no laws applicable; also, this Court has held that an R. E. A. co-operative is not subject to the rules and regulations of the Public Service Commission. *Garkane Power Co. v. Public Service Commission*, 100 Pac. (2d) 571, 98 Utah 466. Consequently there are no state or municipal relations, limitations or restraints of any kind respecting the rates that may be charged.

It is noted further, that respecting the membership in the Federation, the City is but one of five members, and has but one vote out of five, and in the event there are new members, might eventually have but one vote out of ten, fifteen or more, or no vote at all, since there is no provision that every member shall be represented on the board and the entire board is elected by a majority of

the members. There is no Federation requirement that any member of the City Council or other City official or representative be on the board of directors. The City as a minority member will have no power to restrict or control the membership, the scope of activities, the purchasing of new equipment, the borrowing of additional moneys, salaries and operating expenses, etc. The situation is more flagrant than if the City purchased a minority stock interest in a stock company, because if it were only purchasing such a minority interest in a stock company without liability to stockholders the City could lose only what it had paid for such minority stock interest. Under the present scheme the City can be saddled with a debt of \$20,000,000.00 or more, all to be paid by the citizens of the City and the City will for such money acquire assets in many counties and perhaps several states, unless, of course, there is a foreclosure, the assets of the Federation are entirely lost, and the City is held for a deficiency.

As to the purchase of a minority stock interest in the Southern Utah Power Company, while there is a dissolution agreement, the company will of necessity be a stockholder for whatever length of time may be necessary to dissolve the corporation. It is a matter of judicial knowledge that as a practical matter corporations cannot be dissolved instantaneously. The dissolution agreement and other documents refer to a simultaneous disso-

lution but such a thing is manifestly a legal impossibility. How long it might take to dissolve the corporation is questionable, but it would be a matter of months, at least, and more probably a year or more. We call attention that the time would be considerable and being a minority stockholder the City could not control the situation. Petitions must be filed and notice given; a clearance from the State Tax Commission secured; the permission of the Public Service Commission secured, etc. In that connection we note that the Southern Utah Power Company is a public utility under the jurisdiction of the Public Service Commission. See Sections 76-3-23 and 76-4-1, U. C. A., 1943. Since the Southern Utah Power Company now serves electric users other than the City and members of the Federation, we assume that the Public Service Commission must of necessity investigate and determine that such other users would be afforded adequate service before permitting a dissolution, and this would take considerable time, particularly if any users raised objection. Even assuming that ultimately the Public Service Commission permitted a dissolution, still the conclusion is inescapable that during such period the City would be a minority stockholder of a corporation engaging in business for profit. It is a matter of common knowledge that dissolution of a public utility of the size of the Power Company always takes a longer period of time than is anticipated.

“A purchase of *all of the stock* of a corporation by a municipality or other governmental unit for the purpose of enabling it to acquire the property of the corporation *for public purposes* has been held not to violate a constitutional prohibition against the purchase of stock, particularly where the intention was to dissolve the corporation upon acquiring *all of its stock*.” 152 *A. L. R.* 512 (b).

It will be noted that a city may purchase *all of the stock* of a corporation for the purpose of enabling it to acquire the property of a corporation for public purposes, but we find no case in all the books in these United States holding that a city can purchase a part of the stock, particularly a minority interest. That is prohibited by Article VI, Section 31, Constitution of the State of Utah. Elsewhere in this brief we will discuss and argue that the scope of activities of the Southern Utah Power Company and the Federation are beyond the public purpose.

Respecting both the Power Company transaction and membership in the Federation, we quote from the leading and widely cited case of *Walker v. Cincinnati*, 21 Ohio State 14, which holds:

“The mischief which this section interdicts is a business partnership between a municipality of the state and individuals or private corporations or associations. *It forbids the union of public or private capital or credit in any enterprise whatever.* In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named to participate

in such manner as to incur *pecuniary expense or liability*. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein."

"This section of the Constitution not only prohibits a 'business partnership' which carries the idea of a joint or undivided interest, but it goes further, and prohibits a municipality from being the owner of a property which is owned and controlled in part by a corporation or individual. *The municipality must be the sole owner and comptroller of the property in which it invests its public funds*. A union of public and private funds or credit each in aid of the other is forbidden by the Constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit. The whole ownership and control must be in the public. *Alter v. City of Cincinnati*, 56 Ohio State 47."

The *Walker v. Cincinnati* case is cited as late as 1950 in 64 *C. J. S. Mun. Corp.* Par. 1870 at page 435. We refer the Court particularly to said Par. 1870, subdivision (b), Page 427.

The syllabus of the *Alter v. City of Cincinnati* case holds flatly that:

"A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals and corporations so that when united both together form one property."

The case of *Wyscaver v. Atkinson*, 37 Ohio State 80,

cites and quotes from the Walker v. Cincinnati case, and holds:

“In short. the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town or township with the capital of any other person, whether incorporated or unincorporated, for the purpose of promoting any enterprise whatever.

“From these views it is plain that the statute before us manifests an intent to do that indirectly which, if done directly, would constitute a palpable infraction of the Constitution for which reason it must be declared inoperative and void.

“The purpose and effect of the statute is to unite the means and credit of a township with those of other parties in order to promote a common enterprise, to-wit: The construction of a continuous line of railway, which could not be accomplished without such combination of interest.”

Appellants submit that the above language is directly applicable to the case at bar.

The case of *Cincinnati v. Harth*, 101 Ohio State 344, 128 N. E. 263, is one wherein the city proposed furnishing new rails and ties and constructing a new roadbed for a street railway, the street railway to give the city a lien to secure the repayment. Such a transaction was held unconstitutional as a lending of credit.

The case of *State v. City of Key West (Florida)*, 14 So. (2d) 707, decided in 1943, cites the case of *Alter v.*

Cincinnati, supra, and quotes approvingly from the Walker v. Cincinnati case. We quote at length because it so fully sets forth the law of the case at bar:

“A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that, when united, both together form one property.

“Under Section 6 of Article VIII of the Constitution, a city is prohibited from raising money for, or loaning its credit to or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.

“What was said in that case (referring to the Walker v. Cincinnati case) is applicable here because in this instance the municipality proposes to purchase the common stock and a majority of the preferred stock, leaving the balance of the preferred stock outstanding in the hands of minority stockholders and the proceeds to liquidate the business of the corporation, which, under the terms of the statute, infra, may conceivably be continued in the hands of the director-trustees for a period of three years.

“Any acquisition by a municipality of any stock (less than the entire ownership) in any corporation is ultra vires and void and the municipality is without authority to use stock so acquired for any purpose whatever.

“Under this provision of the constitution, as I see it, the city cannot become a stockholder in the

Key West Electric Company, *even temporarily*, pending the dissolution or liquidation of the company at the instance of the city. And the winding up of the corporation's affairs after dissolution might take considerable time. This provision violates the spirit and intent as well as the constitutional provision. Furthermore it might be observed that the dissolution or liquidation of the company might be prolonged for various reasons, among them being possible opposition and the litigation on the part of minority stockholders."

In the Key West case the court held the acquisition of all of the common and a majority of the preferred stock unconstitutional, yet in the case at bar the City holds only a minority of common stock. In the Key West case the court also noted that the dissolution or liquidation of the corporation might be prolonged where the city held a majority of the stock, and the same argument is being urged by appellants in this case where the City is a minority stockholder, and the dissolution could be prolonged for a greater length of time.

The same argument is even more cogent respecting the City's minority interest in the Federation, where the remaining members can obligate the City without limit, and extend the scope of activities without even the Public Service Commission to act as a brake.

There are cases holding that a municipality may purchase all of the stock of a corporation, but only when it is all of the stock. The case of *Nebraska v. Consumers*.

etc., 10 N. W. (2d) 784, has this to say:

“This province of our Constitution must be construed with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or by being a partner or a part owner, in a private business, venture or enterprise. Citing *Long v. Mayo*, 111 SW (2d) 633: ‘The purpose of Section 177 of the Constitution in prohibiting the Commonwealth from owning stock in, or from making donations to, a corporation was to prohibit the Commonwealth from entering into private business by becoming associated as a stockholder, or by being a partner or a part owner in a private business venture. It was never intended by that section of the Constitution that the Commonwealth could not acquire property for a public use.’”

The *Nebraska v. Consumers* case, *supra*, held further:

“Section 1, Article XI of our Constitution was never intended to prohibit a purchase by a subdivision of the state of *all the capital stock of a corporation* solely for the purpose of lawfully acquiring the physical assets of such corporation for a public use, constitutionally defined and lawfully authorized by the Legislature.”

If there is a prohibition against the City purchasing a *minority stock interest* in a Power Company operating a public utility and serving the general public, particularly outside the city and county limits—engaging in a business outside the municipal scope of municipal activi-

ties—is it any less reprehensible that it will be for three months, six months, a year or more? Where can this or any court set the line of demarcation? If it is prohibited by the Constitution, it is prohibited—no matter what the period. And the Key West case specifically holds that a city cannot become a stockholder “even temporarily”.

It may be that the defendant will argue that since the Federation encompasses only membership and not a stock interest that the transaction respecting it would not be prohibited by the constitutional provision under discussion, but we submit that the constitutionality of an act is to be determined by its operation and effect, and not by the form it may be made to assume. In the case of membership in the Federation the evils are even greater.

We also respectfully refer the Court to the case of *Colburn v. Chattanooga Western RR. Co.*, 28 S. W. 298, cited also at 152 *A. L. R.* 511.

Pertaining to the City's membership in the Federation we find in addition to the authorities heretofore cited and which hold such transaction unconstitutional, a long line of cases that hold such membership unconstitutional for the additional reason that the City is lending its credit to the corporation.

This line of cases concerns the situation where municipal corporations have joined insurance groups where

a member is liable for losses.

“But whether such Employers Insurance Association be technically a corporation or not, it is clear to us that the whole plan of the Workmen’s Compensation Act is such that the constitutional provision that ‘no power to authorize any * * * city or town * * * to lend its credit or grant public money or thing of value in aid of, or to, any individual association or corporation whatever’ is violated. Becoming a member of such association under our act would necessarily require such city or town to do these very things. In the nature of the subscribers obligation—its agreement to be assessed for the purpose of paying losses—it lends its credit. Indeed, such assessment against the combined membership of the association constitutes an important part of its authorized capital * * * The vice is that liability to assessment is possible, yea, probably.” *City of Tyler v. Texas Employees Association*, 288 S.W. 409.

Payment by the City of the Federation obligations is not only possible but probable—it is required and contemplated.

The comparatively recent case of *Johnson v. School District*, 270 Pac. 764, reviews a number of cases on this point, and holds that where stock in a mutual insurance corporation is non-assessable, that is to say, where there is no liability, it is not unconstitutional, but where there is a contingent liability it is unconstitutional. We urge a thorough reading of this case, but the Supreme Court makes the following flat statement that is worthy of

quoting:

“If the contract of insurance subjects the School District to a contingent liability it is in violation of the constitution and ultra vires.”

The later case of *Burton v. School District*, 38 Pac. (2d) 610, more thoroughly reviews this line of cases and shows that where there is no contingent liability it is not unconstitutional; where there is a limited liability for one year's premium or something similar the courts are divided but where there is no limitation respecting liability there is absolutely no question about the matter.

In the Utah case of *Fjeldsted v. Ogden City*, 83 Utah 278, 28 Pac. (2d) 144, at 150-151 it was held:

“An examination of the cases from other jurisdictions establishes the fact that there are at least two well-settled limitations or exceptions to the ‘special fund doctrine.’ Thus it is well established that an indebtedness or liability is incurred when by the terms of the transaction a municipality is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement contemplated. It also seems well settled, as a second limitation to the doctrine, that a municipality incurs an indebtedness or liability when by the terms of the transaction the municipality may suffer a loss if the special fund is insufficient to pay the obligation incurred.”

In the case at bar it seems readily apparent that the

City has obligated itself to meet the indebtedness of the Federation, both mortgage indebtedness and otherwise, whether out of electric revenue or general funds.

Merely to show the strict attitude of our own Supreme Court, and other than that the case is not in point, we cite the case of *Utah Rapid Transit v. Ogden City*, 89 Utah 546, 58 Pac. (2d) 1, 3.

Under the authorities heretofore cited appellant contends that the payment of the membership fee of \$100.00 violates Article VI, Section 31, Constitution of the State of Utah. Payment of the \$100.00 fee is in lieu of, and has like legal effect as, the purchase of stock in the Federation. Surely it cannot be said that a contribution identical in principal with the purchase of stock in the Federation does not violate that constitutional provision. What cannot be done directly cannot be accomplished by subterfuge or indirection. The mere denomination of such common stock purchase as a "membership fee" does not change the character of the transaction.

For all the reasons stated and under the authorities cited we respectfully submit that Cedar City cannot purchase a minority stock interest in the Southern Utah Power Company; cannot pay a membership fee in the Federation nor become or remain a member thereof.

II.

CEDAR CITY HAS EXCEEDED ITS MUNICIPAL AUTHORITY AND PURPOSES IN ENTERING INTO THE VARIOUS TRANSACTIONS INVOLVED IN THE CASE AT BAR.

Under the authority of the case of *City of Phoenix v. Michael*, Arizona, 148 Pac. (2d) 353, appellants contend that the payment of the \$100.00 membership in the Federation is beyond the municipal power of Cedar City, and in this connection we also call attention to Section 15-8-2, U. C. A., 1943, which provides that a City "may appropriate money for corporate purposes only * * *."

It has been heretofore noted in detail that the Federation proposes to generate and distribute power not only for the use of Cedar City but for other non-profit corporations operating both within and without the State of Utah. The Utah-Arizona Rural Electric Association would serve a part of Kane County, Utah, and in addition, the towns of Short Creek and Fredonia, Arizona. (Finding No. 16 (5), Rec. 108). The Federation has the power to borrow additional money and build or otherwise acquire additional facilities in Arizona or other states.

We believe it will be readily conceded that if the City could not itself engage in generating and distributing electrical power for the express purpose of serving the area contemplated, it cannot affiliate itself as a minority member of a Federation serving such area, indirect-

ly accomplishing the same purpose with the added evil of doing so in union with others. Also, we have previously commented that in the event the other members of the Federation quit, or went defunct, the City might be the sole remaining member, thereby of necessity itself engaging in the identical scope of business activity. The avowed intention to generate and distribute electrical power to the area contemplated is far beyond the municipal powers and permissible scope of municipal activity. The use and purpose for which property is to be devoted determines the power or lack of power of a city to purchase or acquire the same.

Section 15-8-14, U. C. A. 1943, provides as follows:

“Water, Light, Telephone, Street Railways.

“They may construct, maintain and operate waterworks, gas works, electric light works, telephone lines or street railways, or authorize the construction, maintenance and operation of the same by others, or purchase or lease such works from any person or corporation, and they may sell and deliver the surplus product or service of any such works, not required by the city or its inhabitants, to others beyond the limits of the city.”

That section evidences the intention that only a surplus product or service not required by the City may be delivered to others beyond the city limits. A city has the power to establish an electric light plant and transmission lines beyond its boundaries, if necessary, for the purpose of supplying light for itself and inhabitants

(*Muir v. Murray City*, 55 Utah 368, 186 Pac. 433), and can sell surplus power not required by it to others beyond the city limits. But we can find no case in this country holding that a city has the power and municipal authority, by itself or in union with others, to generate and distribute, and/or to purchase facilities for the express and avowed purpose of generating and distributing electrical power in several counties and possibly several states.

We note that presently the City uses only 32% of the capacity of the present facilities of the Power Company. If the scope of activities is enlarged the percentage will be smaller.

We have heretofore shown that the City has obligated itself to pay a portion at least, and perhaps all, of the mortgage and other indebtedness of the Federation, and upon payment of the mortgage indebtedness receive a pro-rata portion or all of the assets. The City could not directly buy a 32% undivided interest in the assets of the Federation, or an undivided interest in any additional facilities which may be added by the Federation at a later date, nor own and/or operate those facilities in undivided interests with others; nor for that matter could it take, operate or control the whole of such assets far in excess of its needs and far beyond its boundaries. Surely it cannot do indirectly through the Federation what it cannot do directly.

Section 15-8-2, U. C. A., 1943, permits a City to appropriate money *for corporate purposes only* and Section 15-8-6 provides that a City may borrow money on the credit of the corporation *for corporate purposes only*.

Parenthetically, it makes interesting speculation as to the legal consequences of a municipality owning and operating generation and distribution facilities beyond the boundaries of the State of Utah, yet when payment of the mortgage indebtedness is made "ownership of the assets of the Federation will be held by and vested in the members proportionate to the power usage and payments thereon by said members over such period." (Finding No. 18, Rec. 109-110).

Plaintiff submits that the acquisition of power facilities through the Federation, the payment of the mortgage indebtedness for the same, and the generation and distribution of electricity far in excess of the City's needs and demands, serving power users outside the limits of Cedar City and Iron County, without restriction as a minority member of and no control over the Federation, is a use and purpose beyond the municipal powers of the City.

We also contend that the City has no authority to contract for the purchase of power for thirty-five (35) years in advance. Sections 15-7-6 and 15-8-20, U. C. A., 1943, would seem controlling. We also cite the cases of *Freeport Water Company v. Freeport*, 45 L. Ed. 679;

Los Angeles v. City Water Co., 177 U. S. 558; and *Tell & Tell v. Los Angeles*, 211 U. S. 265.

If a city council cannot enter into a contract for the lighting of public buildings, streets, alleys and other places beyond a three-year period (Section 15-7-6) or give anyone the privilege of furnishing light for such places in excess of three years (Section 15-8-20), we do not believe a City has the right to contract for lighting, not only of public buildings, streets, alleys and other public places, but for the use of its citizens as well, and for a period of thirty-five (35) years.

We further contend that it is beyond the municipal powers of the City to agree to be liable for and pay an indebtedness of an unknown amount where the determination of that amount is beyond the control of the City, and is placed in the control and power of other members of the Federation to determine, particularly where the indebtedness is incurred for an operation beyond the municipal powers of the City.

Not because it is applicable on the facts but because it exemplifies the attitude of the Utah Supreme Court respecting corporate powers, we cite the case of *Utah Rapid Transit Company v. Ogden City, et al.*, 89 Utah 546, 58 Pac. (2d) 1, at page 3, and we quote a portion thereof as follows:

“The law is well established generally, and in this jurisdiction ‘that a municipal corporation pos-

sesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.* Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.’ 1 Dillon Municipal Corporations (5th Ed.) p. 448, Para. 237. The foregoing doctrine has been approved and followed by this court in the following cases: Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234; American Fork City v. Robinson, 77 Utah 168, 292 P. 249.”

III.

CEDAR CITY HAS UNLAWFULLY DELEGATED ITS LEGISLATIVE POWERS AND FUNCTIONS IN THE MANY PARTICULARS SPECIFIED UNDER THIS SECTION OF THE BRIEF.

The Articles of Incorporation of the Southwest Utah Power Federation empowers the Federation:

To generate electric energy and construct, purchase, lease, exchange or mortgage plants, buildings, works, machinery and transmission and distribution systems

(Article III, Section 1);

To acquire franchises, rights of way and easements
(Article III, Section 2);

To purchase, lease, exchange or mortgage real property (Article III, Section 3);

To borrow money, issue bonds, notes and other evidence of indebtedness secured or unsecured for money borrowed (Article III, Section 4).

Membership in the Federation is evidenced by membership certificate which is in such form and contains such provisions as shall be determined by Board of Directors (Article IX, Section 1).

Unless the Federation agrees otherwise each member shall terminate any contract which it may have for the purchase of electricity from any other supplier and purchase from the Federation all electric energy used by the member and pay for electricity used at rates or on a basis to be determined from time to time in accordance with the by-laws subject to contracts with the Federation. Amounts paid by a member for electric energy in excess of cost of service, are furnished by members as capital and each member is required to pay to the Federation all such other amounts per month regardless of the amount of electric energy consumed, as shall be fixed by the Board of Directors (Article IX, Section 3).

A member must agree to comply with and be bound by the Articles of Incorporation and By-laws of the Federation and any rules and regulations adopted by the Board of Directors (Article IX-C).

No member may withdraw until he has met all contractual obligations to the Federation (Article IX, Section 4).

The affairs of the Federation shall be managed by a board of five directors to be elected annually by and from the members (Article V).

In compliance with the provisions of Article IX, Section 3, of the Articles of Incorporation, which requires that if the City becomes a member it must agree to purchase all of its electricity used by the City and its inhabitants from the Federation, and pay therefor at rates or on a basis to be determined from time to time in accordance with the by-laws subject to contracts, a wholesale power contract was entered into between the Federation and the City, which provided that the City would purchase all of its electric power and energy required for the operation of the City system (Wholesale Contract, paragraph 1) at rates specified in Rate Schedule "A" attached to the Contract (paragraph 4) until December 31, 1984 (paragraph 10). Schedule "A" provides that the Board of Directors of the Federation at such intervals as it shall deem appropriate not less frequently than once

in each calendar year, shall review the rate schedule and revise the rates to produce revenues sufficient to meet the cost of operation and maintenance of the generating plant, transmission system and related facilities of the Federation, together with the cost of purchased energy, taxes, principal and interest on indebtedness and provide for the establishment and maintenance of reasonable reserves. The City agrees to pay the rates as revised (Schedule "A").

Cedar City is a third class city. Its powers are set out in Title 15, U. C. A., 1943. It is authorized to maintain and operate electric light works (15-8-14, U. C. A., 1943). The fixing of rates to be charged the inhabitants for service from its electric distribution system, is a municipal affair. *Logan City vs. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961.

A city which operates its own generating plant, may sell the energy generated therefrom at such prices as it chooses and finance losses from taxes imposed upon the people. *Logan City vs. Public Utilities Commission*, supra.

In the case now under consideration, Cedar City is bound by wholesale contract to purchase all its electricity from the Federation and is faced with two alternatives referred to above. It must make a charge for electricity sold sufficiently high to meet the cost of energy pur-

chased and all other necessary expense in the maintenance and operation of its distribution system, together with principal and interest on bonds authorized under Ordinance No. 100 and create a reserve required by Section 9 of said Ordinance, or finance those losses from taxes imposed on its inhabitants. The determination of the cost of electricity purchased by it is not within the control of the City, but the City is bound to purchase such electric energy. The purchase price is a part of the rate to be charged and a very important factor in making the City's rate for the sale of electricity to the citizens of Cedar City. If the cost of electricity becomes excessive during the term of the contract and until 1984, the City is not at liberty to purchase electricity from other sources or generate electricity. The governing body of the City has bound the City and its inhabitants to purchase all its electricity from the Federation no matter what the cost might be in comparison to the price of other available sources, or the cost to the City to generate its own electricity.

The Federation is at liberty under the Articles of Incorporation to employ such capital as it chooses and require its members, including the City, to furnish the same. It may charge such rates as it may determine from time to time for the sale of its electricity and charges in excess of the cost are considered as capital contributions by the City to the Federation. The City

has granted to the Federation by the Articles of Incorporation and wholesale contract, the right to exercise and perform a municipal and governmental function delegated to the City by the Legislature. The Federation under those agreements will have and exercise a power delegated to it by the City to generate all its electricity and to fix the price at which the City will pay for such electricity and to determine the amount of capital that the City will expend in the development by the Federation of a supply of electric energy to serve customers of the Federation. The only restriction on the Federation is that it must secure the approval of the Administrator of the Rural Electrification Administration (Schedule "A", Wholesale Power Contract).

To permit the Federation that right and power is far more reprehensible than that such right and power be vested in the Public Service Commission, and yet this Supreme Court respecting the vesting of such right in the Public Service Commission said:

"It is for them, through their chosen officers and boards, to determine, not only the character of the plant to be owned and operated, but also the rates and charges to be made and whether the interest on and principal of bonds shall be met by taxation or by charges from operation or partly from the one and partly from the other. If officers, boards, or agents chosen and selected by them do not comply with their demands or requests, or fix an unfair or an unreasonably low or high or a discriminatory rate or charge, others can be chosen

or selected to establish a proper and fair rate or charge or consumers may appeal to the courts to correct any such abuses. To take such power from taxpayers and citizens of a town or city and confer it elsewhere is, as we think, an unauthorized interference with the performance of mere corporate and municipal affairs forbidden by the Constitution." *Logan City v. Public Utilities Commission*, 271 Pac. 961, 971.

The Federation is proposing to borrow money from the Rural Electrification Administration (Wholesale Agreement, Section 10, sub-section (C)), which money will be loaned for the purpose of furnishing electric service to persons in rural areas who are not receiving central station service (Title 7, U. S. C. A., Section 904). Service to sparsely settled areas is more costly than service to thickly populated areas, requiring more transmission and distribution facilities per customer. As the Federation in compliance with the Federal Law, extends its service to more and more rural areas, costs of electricity will increase and the City will have no alternative but to help finance the development of such rural areas as the Federation chooses to serve. The added costs of electricity to the City will be reflected in the rates charged by the City to its inhabitants.

The power and duty of the City to determine whether it will purchase electricity and if so from what source, and whether it will generate electricity, and the power to determine whether it will make contributions to capital

of the Federation and if so the amounts of such capital it will contribute, has all been bargained away and delegated to the Federation. The duty to fix reasonable rates for electric energy sold by the City will depend upon the money paid to the Federation for service purchased and capital contributed, the amount of which will all be determined by the Federation. The management policies of the Federation cannot be controlled by the City. The principal is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents, cannot be delegated to others. Rev. Vol 1, *McQuillin Municipal Corporations, Second Edition*, Section 393. Were this not the law the officers of the City could by agreement compel the inhabitants of the City to pay any price for electricity and any sum as capital contributions that may be determined to be necessary by the Federation and thereby help to finance the Federation in furnishing power at a reasonable rate to rural areas outside of the limits of the City. This condition would continue until 1984, during which time the populated area of Cedar City would be financing the development of the sparsely settled areas served by the Federation.

“* * * Contracts and ordinances relating to any municipal function which embarrass in any way the power of regulation of public affairs are ultra vires; for the municipal corporation cannot in any manner divest itself of its power to control and regulate at all times everything within the domain

of its jurisdiction. The adjudications present numerous instances of ordinances and contracts in derogation of the police powers which are uniformly declared void under this principle. Such powers belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex esto*, and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. 'The discretion can no more be bargained away than the power itself.' Therefore, when the city, within its charter powers, grants franchises for the use of its streets, wharves, parks, and other places for public purposes, the right of control and regulation on the part of the municipal authorities must be reserved so that it may be exercised at any time for the public good." Rev. Vol. 1, *McQuillin Municipal Corporations, Second Edition*, page 1097.

All the officers of Cedar City elected and appointed until 1984, will be prevented from exercising powers granted by the Legislature to the City. Under the arrangement an officer of the City Council might become an officer of the Federation—possibly a member of its board of five directors. Such officer would have no power except as a director of the Board of Directors of the Federation. The City could not delegate to that officer its legislative functions and powers. *Walton v. Tracy Loan & Trust Company*, 97 Utah 249, 92 Pac. (2d) 724, 727. Nor could the City delegate such powers and functions to the Federation. *City of Centralia v. Illinois*

Power & Light (7th C. C. A.), 89 F. (2d) 985; *Arkansas-Missouri Power Company vs. City of Kennett* (8th C. C. A.), 78 F. (2d), 911, 922.

“The building of an electric light plant obviously requires the exercise of judgment and discretion. Into the actual construction of such a plant, two things enter—labor and material. The selection of the labor and material to be used in erecting the plant requires the use of judgment. The duty to exercise that judgment is imposed upon the council of the city. We think that it may not contract that duty away or share it with others. * * *”

Legislative and municipal powers of a city must be exercised by the governing body of the city. 15-8-1, U. C. A., 1943. *Wadsworth v. Santaquin*, 83 Utah 321, 28 Pac. (2d) 161, 171; *City of Eureka v. Wilson*, 15 Utah 67, 48 Pac. 150, 151.

The fixing of rates for electricity to be purchased by the City is vested in the Federation under the Wholesale Power Contract which gives the Federation the exclusive right in this regard and as pointed out above the Board of Directors of the Federation fixes the rates the City must pay and the City has no alternative but to buy electricity at the rate fixed throughout the term of the contract. The fixing of rates is a governmental function and the right granted to the City to determine what it will pay for electricity cannot be surrendered directly or indirectly. *Brummitt v. Ogden Water Works Com-*

pany, 33 Utah 289, 93 Pac. 828, 833; *City of St. George v. P. U. C.*, 62 Utah 453, 220 Pac. 720, 722; *Fjeldsted v. Ogden*, 83 Utah 278, 28 Pac. (2d) 144, 154.

When a city generates its own electricity it determines the scope of activity although the cost of production may vary, but under the present setup with the Federation the matter of cost of production of electric energy is affected by the scope of activity not now known, and which scope of activity, additional members, salaries of officers, additional borrowing of money, and many other items, will be determined not by the City but by the Board of Directors of the Federation. If the municipality has power to purchase and distribute power, or to generate and distribute power, it alone has the right to fix the rates and control the various elements or factors that go into the matter of cost, and these cannot be delegated.

We submit that Cedar City has delegated to the Southwest Power Federation its power and duty to determine the cheapest source of power, to regulate, fix and maintain reasonable rates for the sale of power, to determine whether and what capital will be employed in the development of electric generating facilities, and to determine the rates the City will pay for electricity purchased from the Federation.

“A municipal council cannot delegate to one of its own committees or to any other municipal officer the power to decide upon legislative matters properly resting in the judgment and discretion of

the council, or, as held by some authorities, to one member of such governing body. * * * The members of the council are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties; and the public is entitled to the judgment and discretion in all matters where such elements enter into transactions in behalf of the municipality of each member of the body upon which authority to act is conferred." 37 *Amer. Juris.* 667, Para. 53.

On the basis of all of the legal authorities hereinbefore cited we further submit that:

(a) The City has delegated to the Federation the power to require the inhabitants of the City to furnish capital to provide generating facilities useful in serving the rural areas not within the corporate limits of the City.

(b) The City has delegated to the Federation the power to determine what the City's obligations to the Federation, and through the Federation to others, shall be, since we have previously noted that the Federation's Articles of Incorporation provide that:

"Each member shall pay to the Federation all such other amounts per month regardless of the amount of electric energy consumed, as shall be fixed by the Board of Directors from time to time."

And respecting the payment of Federation obligations we note that:

"The City authorities have no discretion to

give away the public funds, or pay other people's bills." *City of Nampa v. Kibler* (Idaho) 113 Pac. (2d) 411, 414.

(c) The City has delegated to the Federation the power to determine the scope of the City's activities for the reason that the Federation has the right to enlarge the scope of activities beyond the present activities and facilities of the Power Company, and it is contemplated that such shall be done for the loan limit fixed by the R. E. A. mortgage is \$20,000,000.00 although notes have been executed only for \$3,750,000.00 and the articles of the Federation expressly permit such enlargement.

It seems inconceivable that a City can delegate to the Federation the right to commit the City to pay a portion, or perhaps all, of an indebtedness incurred for the future construction of generating and distribution facilities, with no power reserved to the City to limit the scope of activities, facilities, indebtedness, or membership.

(d) The City has unlawfully delegated its authority in permitting any one or more, but not all, of the city council to act for it in the affairs of the Federation as a director or directors.

(e) The City has unlawfully delegated to the Federation the right to determine the type of franchise which the City shall grant to the Federation, and in this connection we note that in the dissolution agreement it is

expressly provided that:

“The City shall grant to the Cooperative, prior to the closing date, as defined in the Sale Agreement, an exclusive franchise, *in form and substance satisfactory to the Purchaser*, for the maintenance and operation of such plant, lines and facilities, for as long a period as shall be permitted by law, together with an exemption of such plant, plant site, and transmission lines, and equipment and facilities connected thereto, or used in connection therewith, from any taxation by the City, to the extent permitted by law.”

We call attention also to the fact that the City has no authority to grant an exclusive franchise to the Federation.

(f) The City has unlawfully delegated its municipal authority by designating a proxy to participate in all meetings of the stockholders of the Southern Utah Power Company and in this connection we note that under Section 1 of the dissolution agreement it is specifically provided that the City shall “as promptly as possible after the execution of this agreement, through its council or board of directors, designate a proxy or representative to participate in all meetings of the stockholders of the company, *with full power to vote such purchasers' stock in the Company*, and to take all other action which may be necessary, desirable or appropriate to accomplish the purposes of this agreement.”

(g) The City has unlawfully delegated to the Feder-

ation indirectly the right to compel the City to levy taxes because if the rate is not sufficient for all requirements the City would of necessity be compelled to levy taxes to cover the deficit, and we repeat—the Federation has the power to incur indebtedness without the consent of the City.

For all of these reasons and in all of the above mentioned respects we submit that there has been an unlawful delegation of the City's legislative powers and functions; that the City does not have the right or power to become a member of the Southwest Utah Power Federation and agree to comply with its Articles of Incorporation, or to enter into the wholesale power contract, or to proceed with the stock purchase in the Southern Utah Power Company.

IV.

THE OBLIGATIONS ASSUMED BY CEDAR CITY ARE UNCONSTITUTIONAL, VIOLATING ARTICLE XIV, SECTIONS 3 AND 4.

We have already noted that under the wholesale power agreement the City has pledged itself to pay sufficient to retire the indebtedness including interest of the Federation, and under the mortgage from the Federation to the R. E. A. the Federation has agreed to fix a rate sufficient to retire that indebtedness, including interest.

The articles of incorporation of the Federation provide as follows:

“Each member shall pay to the Federation all such other amounts per month regardless of the amount of electric energy consumed, as shall be fixed by the board of directors from time to time. Each member shall also pay all amounts owed by such member to the Federation as and when the same shall become due and payable.”

The language is clear. The City has guaranteed to pay all mortgage and other indebtedness of the Federation and all expenses of every kind, in an unknown amount and utterly beyond the control of the City.

We cite Article XIV, Section 3, as follows:

“(Debts of counties, cities, etc., not to exceed revenue. Exception.)

“No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting shall have voted in favor of incurring such debt.”

It is true the City held an election to authorize it to issue special revenue bonds in the sum of \$375,000.00 for the purchase price of its portion of the Power Company. The City held no election for the purpose of authorizing

it to incur an indebtedness in the sum of \$3,750,000.00, or \$20,000,000.00, or any other part of the mortgage or other indebtedness of the Federation, and such sum or sums is fantastically disproportionate to the revenues of Cedar City.

It should not necessitate strenuous argument to convince this Court that an indebtedness of unknown quantity, particularly where the extent thereof is beyond the control of the City, is an indebtedness in excess of taxes for the current year and in excess of any legal bonded indebtedness the people could vote at an election called for that purpose.

The case of *School District No. 8, Twin Falls County v. Twin Falls County Mutual Fire Insurance Co.* (Idaho), 164 Pac. 1174, holds:

“By the terms of section 3 of article 8 of the Constitution a school district is prohibited from incurring any indebtedness or any liability in any manner or for any purpose exceeding in any year the income or revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. The language of this section is very broad and prohibits the incurring of any indebtedness or any liability in any manner or for any purpose contrary to its provisions. It may be that a postponed contingent liability is not an indebtedness within the meaning of the section of the Constitution until the contingency has occurred, but it is a liability which may become an indebtedness upon the happening of the contingency. Liabilities

which are assumed by virtue of membership in a county mutual fire insurance company *are not within the control of the member or limited in amount, and the contingency may occur at any time.* The assumption of such liability by a school district is contrary to the provisions of section 3 of article 8 of the Constitution.”

The obligations assumed in the Federation are not limited to payment from the sale of electricity by the City to the inhabitants thereof.

In addition, we call attention that under Article XIV, Section 4, Constitution of the State of Utah, no bonded indebtedness “shall be incurred for other than strictly county, city, town or school district purposes,” and when the bonded indebtedness is in excess of four percent of the value of the taxable property for water, artificial lights or sewers, only when “such water, lights and sewers shall be owned and controlled by the municipality.”

In the case at bar the indebtedness is not for a municipal purpose, as we have previously shown in this brief; the liability is not within the control of the City or limited in amount; and the Federation is neither owned nor controlled by the City as required by Article XIV, Section 4.

“The purpose of the constitutional prohibition is to serve as a limit to taxation and as a protection to taxpayers; to effectually protect persons residing in municipalities from the abuse of their

credit, and the consequent oppression of burthensome, if not ruinous, taxation." *McQuillin Municipal Corporations (First Ed.)* Volume 5, Page 4682, Par. 2205.

Seldom have we seen a more direct example of the evils which Article XIV, Sections 3 and 4, are designed to prevent.

"Arguments of convenience, of policy, or of present necessity, should not be allowed, by loose construction, to weaken the force or limit the extent of debt limit provisions. Attempts to evade these debt limit provisions by indirect methods * * have invariably been unsuccessful." *McQuillin on Municipal Corporations (First Ed.)* Par. 2234, Volume 5, Page 4736.

CONCLUSION

The appellants concede that whether the City is wise or unwise in entering into such transactions is not before the Court, and we have confined ourselves strictly to the legal points involved.

That it is unwise for the City to bind itself to purchase electrical energy exclusively from the Federation for thirty-five years and at a rate beyond its control; that it is unwise to engage in generating and distributing electrical energy far beyond its own needs, serving other members of the Federation who in turn serve users beyond the boundaries of the City, the County and the

State; that it is unwise to hold membership in a Federation which can enlarge its scope of activities and thereby increase the financial obligations of the City; that it is utter folly for the City to guarantee without limit not only present specified obligations but all future obligations as well, where such obligations are now and can become fantastic in relation to the ability of the City to pay and the value of the electrical energy the City may need or receive; that it is unwise for the City to associate itself as a member of a Federation from which it cannot withdraw excepting on terms and conditions and payments set by the Federation and without control of the City; that it is unwise to indirectly delegate to the Federation the taxing powers of the City; that it is unwise to place the City's business affairs and management so completely in the uncontrolled power of future and unknown directors of the Federation—all these are not matters for determination by this Court if otherwise constitutional and within the municipal powers—but we submit that these factors are pertinent to demonstrate the evils that the framers of the Constitution and legislature of this State intended to prevent. There are and should be checks upon a City's partnerships with and stockholdings in private enterprises, and business associations with corporations and individuals; upon municipal authorities and activities; upon the delegation to others of municipal legislative powers and functions, and upon debts and financial obligations assumed by a muni-

cipality. We believe that the tax structure and the solvency and financial involvements of a city under this and similar schemes may well be kept in mind. If this scheme can be upheld we see no check on how far a city may go to accomplish indirectly what the Constitution and the statutes of this State prohibit a municipality from doing directly. It was to prevent these evils of unrestrained municipal government that prompted the framers of the Constitution to enact the constitutional provisions cited in this brief and prompted the legislature to withhold certain powers from a municipality.

Appellants submit that the entire scheme, considered as a whole, should be declared illegal, unconstitutional and void.

Respectfully submitted,

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