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

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, Marion F.
Grames, Gail S. Seegmiller and
Haldow E. Christensen, as Coun-
cilmen of said City,
Defendants and Respondents.

Case No. 7564

BRIEF OF RESPONDENTS

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR IRON COUNTY
HON. WILL L. HOYT, Judge

FILED

SEP 14 1950

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Case No. 7564

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The statement of the case as given by the appellants is correct and the respondents, who are Cedar City Corporation and its Mayor and City Council will be referred to as the "City", the Southwest Utah Power Federation, as the "Federation", the Southern Utah Power Company as the "Power Company" and the Rural Electrification

Administration, as the "R. E. A." in order that these abbreviations will be used in the same sense as the appellants.

The respondents agree with the statement of facts as set out by the appellants with one additional fact which should be made clear to the Court. The capital stock of the power company is owned by Washington Gas and Electric Company, a utility corporation now in bandruptcy in the Federal Court in and for the Southern District of New York. Cedar City and the Federation have agreed to purchase from the Court appointed Trustee for this company, the common stock of the power company and as to whether this can be consummated, along with other related questions, are the questions to be decided by this Court.

In order to directly meet and answer the argument presented by the appellants, the four points relied upon by them will be discussed in this brief in the same order except that it is felt that points number 1 and 4 of the appellants' brief involve related legal principles and they will therefore be joined for the purpose of argument. Following are set forth the points relied upon by the respondents:

1. The City, in agreeing to purchase a portion of the common stock of the power company for the purpose of participating in the dissolution and acquisition of its assets and becoming a member of the Federation has not violated the Constitution for the reason that the City is doing nothing in aid of another corporation or individual and for the further reason that no public funds or credit is involved.

2. Cedar City has statutory authority to establish a municipal power system and the method chosen is legal and in the exercise of the legislative discretion of the City.

3. The City has not delegated to anyone its rate making power or power to determine the type and cost of a municipal power system.

4. The plaintiffs can in no way be adversely affected by the consummation of the proposed plan and therefore have no cause to complain.

ARGUMENT

I

CEDAR CITY, IN AGREEING TO PURCHASE A PORTION OF THE COMMON STOCK OF THE POWER COMPANY FOR THE PURPOSE OF PARTICIPATING IN THE DISSOLUTION AND ACQUISITION OF ITS ASSETS AND BECOMING A MEMBER OF THE FEDERATION HAS NOT VIOLATED THE CONSTITUTION FOR THE REASON THAT THE CITY IS DOING NOTHING IN AID OF ANOTHER CORPORATION OR INDIVIDUAL AND FOR THE FURTHER REASON THAT NO PUBLIC FUNDS OR CREDIT IS INVOLVED.

Specifically, the appellants contend that Article VI Section 31 of our Constitution and also Article XIV, Sections 3 and 4 will be violated by the consummation of the power plan proposed by the City. As pointed out in their brief and statement of facts, the city proposes to purchase 11,305 shares of the common stock of the power company, or 17.97% of the stock and the Federation proposes to purchase the remainder or 51,605 shares and amounting to 82.03%. Each of the two purchasers is also having to pay the same proportion of the obligations of the power company so that the total portion of the purchase price to be paid by the city amounts to approximately \$337,000. In order to raise this sum, Cedar City proposes to issue Electric Revenue Bonds in the amount of \$375,000.00. In other words, the first step in the pro-

posed scheme involves the purchase by the city of shares of stock in a corporation.

Article VI, Section 31 of our Constitution would appear at first reading to prohibit this and which we also quote:

“(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.*”

It is obvious as the appellants state, this section can be divided into two parts, (a) It prohibits any city from subscribing stock in aid of any individual, corporate enterprise or undertaking and (b) from lending its public credit in aid of any such individual, corporation or undertaking. The city has no quarrel with the provisions of this section and indeed can see its wisdom, but the city strenuously contends that it has no application to the present case.

A majority of our states have similar constitutional provisions and the reason for them is very clearly stated in 152 A.L.R. 495, as follows:

“Early in the nineteenth century it seems to have been the general practice of states to encourage the building of railroads by permitting the state or subdivisions thereof to purchase stock in railroad corporations, to issue bonds or lend credit in aid of railroads, or to make outright donations to them. However, due to the large number of insolvencies of railroads, caused by fraud or economic conditions, states and subdivisions thereof found themselves

largely indebted and were themselves occasionally insolvent because of large investments in such enterprises. Therefore, a reversal of policy set in”.

It might be added that cities have in the past donated building sites for corporations and individuals and made many other monetary inducements to them. This was done by the expenditure of public funds raised primarily from taxation. This practice is so manifestly wrong as to leave no room to doubt the wisdom of such enactments to prohibit it. But the proposed purchase by the city of the capital stock of the power company most certainly does not come within this prohibition according to the general rule of law followed in the states where this question has arisen and particularly as held by two decisions of this Court interpreting Article VI, Section 31 of our Constitution.

In the first place, the purchase of this stock is only preliminary to the main purpose of the purchase — the acquisition of the physical properties of the power company after its dissolution by the City and the Federation. Surely the appellants could have no cause to complain if the city were to purchase the distribution system of the power company, which even the appellants concede it could legally do. But it seems that purchase of capital stock for the purpose of enabling the city to participate in the dissolution of the power company and the division of its assets afterwards is vastly more irregular and in fact is downright unconstitutional. It is obvious that the plan to purchase the stock is only for the purpose of dissolution of the power company because the two purchasers, the City and the Federation had agreed September 23, 1949 as to the dissolution of the power company and the division of its assets between them according to the terms of the Dissolution Agreement (Ex. “B” of Def. Ans., Rec. 36-40) but the actual agreements for the purchase of the stock, (Ex. “A” of Def. Ans. Rec. 27-35) was

not entered into until February 16, 1950. In other words, the City and the Federation had already agreed as to the dissolution and the division of the properties approximately five months before they even agreed to purchase the stock. Therefore, it is obvious that the purchase is only for the purpose of the dissolution of the power company and the acquisition of its assets — the destroying of the corporation so its property can be obtained. The majority rule in this country is that a purchase of corporate stock for the purpose of dissolution does not come within the constitutional provisions similar to our Constitution as above quoted. The following cases so hold:

Brode v. Philadelphia 230 Pa. 434, 79 A. 659.

State Ex Rel Johnson v. Consumers Public Power District, 10 N.W.2nd, 784.

People Ex Rel. Murphy v. Kelly, 76 N. Y. 475.

Cawood v. Coleman 294 Ky. 858, 172 S.W.2nd. 548.

Long v. Mayo, 271 Ky. 192, 111 S.W.2nd. 633.

Wheeler v. Philadelphia, 77 Pa. 338.

McGuire v. Cincinnati, 40 NE.2nd. 435.

Most of the above cases are cited in 152 A.L.R. 512 where an excellent discussion of the question involved is to be found. True, the court in the main case of the annotation, State Ex Rel. Johnson v. Consumers Public Power District, *supra*, which held that the Nebraska Constitution was not violated, used the language of a purchase of *all* of the stock of a corporation but it is obvious that the language was never intended to mean that unless all the stock was purchased, the agreement to purchase only a part was illegal. What the Court did mean was that the purchase of only part of the stock of the corporation, leaving it operating as a going concern with the government agency or subdivision being a stock-

holder was within the prohibition which is as it should be. But if the effect of the purchase is as in this case, to immediately and simultaneously dissolve the corporation and render it defunct, it would make no difference whether the municipality bought only part of the stock or all of it. In other words its co-purchaser is joining with the dissolution. The net result of the purchase would be the same whether the City purchased all of the stock or only part of it. Purchasing only part of the stock and leaving the corporation to operate could very well be "in aid" of the corporation but to purchase all for the purpose of conjointly dissolving it could not in the widest stretch of the imagination be deemed "in aid" of the corporation but the exact opposite.

The reason for the rule that purchasing of stock for the purpose of dissolution not being within the prohibition of our constitution is stated in the case of the State Ex Rel Johnson v. Consumers Public Power District, supra, as follows:

"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 property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature."

Also the case of People ex. Rel. Murphy v. Kelly, supra, where the New York Legislature had passed an act allowing the cities of New York and Brooklyn to jointly buy the Brooklyn Bridge by the buying of the stock of the corporation owning the bridge, held,

"It was not the purpose of the act to make the City of New York a stockholder in the bridge company or to cause it to loan any money or credit to such com-

pany. It was the purpose of the act to extinguish the company and to vest all its property in the two cities for a public purpose. All the money they paid for stock or upon the debts of the company was simply a furtherance of the purpose, to vest the property of the bridge in the two cities and it was not to aid the company or to make the cities stock holders therein. The effect was to be the dissolution of the company and transfer of the property of the company."

It is submitted that this case is directly in point with the case at bar because neither of the purchasers purchased all of the stock but each only a part, but between the two of them, all was purchased and for the purpose of dividing and acquiring the physical property.

As pointed out above, the reason the courts hold that a purchase of corporate stock by a municipality for the purpose of dissolving the corporation and acquiring its assets does not violate constitutional prohibitions such as our own is because there is no "aid" to the corporation. It is not the bare purchase of the stock that is intended to be prevented but the giving of aid to the corporation by the expenditure of public funds.

There is another reason why the proposed purchase of this stock does not violate our constitution and which is one not found in any of the cases cited by the counsel for either the appellants or respondents, which is that public funds or credit are not involved in this case. The very heading of our constitutional provision above quoted "Lending of Public Credit Forbidden" shows clearly that it was intended that the funds or money or credit to be protected was public funds raised from taxation or other lawful means.

In other words, it is to safeguard the public treasury and public funds and to prevent the use of such funds

for such private purposes. As pointed out in 152 A.L.R. 512, *supra* a city could become insolvent or impoverished, its credit ruined and deprived of its ability to serve its citizens by unwise and costly financial ventures in aid of other individuals or corporations.

But the money to be spent by the City for its portion of the power company and consisting of the distribution system in Cedar City, and also for future cost of maintenance and operation would not be the type of funds intended by the constitutional restriction. They are not public funds in any sense of the word but are special funds which in no way affect the tax structure, the finance, credit or solvency of the City. A discussion of the "special fund" doctrine should not be necessary in this case. Needless to say, this court has adopted and affirmed the special fund doctrine in a long line of cases. See *Barnes vs. Lehi City*, 278 Pac. 878, *Fjeldsted vs. Ogden City*, 28 Pac. 2nd. 144, *Utah Power and Light Co. vs. Provo City*, 74 Pac. 2nd, 1191, *Utah Power and Light Co. vs. Ogden City*, 79 Pac. 2nd. 61. Briefly the doctrine as established by the above cited Utah cases and also by a majority of the States of our union is that where the money for the purchase or construction of an income producing utility or property comes from the sale of Revenue bonds, the payment of which and interest thereon, together with all cost of operation, come from the gross revenue received from the operation of the property or utility, the funds involved are not public funds within the meaning of our constitution and particularly Article XIV, sections 3 and 4 which limit the indebtedness of our cities, towns and counties. The right of a city or county to issue and sell such bonds does not even have to be submitted to an election by the people for the reason that a public debt is not being created. Furthermore, the cases of *Utah Power and Light Co. vs. Ogden City*, *supra* and *Utah Power and Light Co. vs. Provo City*, *supra* hold

that the large expenditure to construct electric light systems does not even have to be first noticed for bids from contractors because public funds are not being spent. Surely Article VI, Section 31 of our Constitution in prohibiting the expenditure of funds for stock in corporations or lending credit has reference to public funds from the public treasury raised by taxation or some other legal method. The Provo City case gives an exhaustive treatment of the special fund doctrine and definitely shows that the expenditure of special funds has nothing to do with taxes, credit or financial structure of a city.

Nothing more will be said regarding the special fund doctrine other than to state that so far as known to the writer, no case cited by counsel for the appellants which may have held that the particular spending or lending under consideration was in violation of the constitutional provision similar to ours, was a case where only special funds were involved. In all the cases cited by counsel, the funds were definitely public funds or general credit of the political subdivision and coming from taxes or some other source of general income and were not in the category of special funds as are involved in this case and as defined in the Provo City case.

Therefore, if the funds involved are not the type of funds contemplated by our constitutional provisions above quoted, then the whole prohibition must fall as it has no application.

In fact it might be pointed out that the expenditure of the funds involved could in no way adversely affect the city's credit. The only conceivable way it could have anything to do with the financial structure of the city would be for the better. Of course the success of the proposed venture is not assured but surely the City expects to make some profit from such an operation which would

definitely improve the City's financial condition or enable the City to lower its tax rate because of the added money.

As above pointed out, Article VI, Section 31 of our Constitution prohibits the lending of credit of the City as well as purchasing stock in a corporation and appellants claim that the credit of Cedar City is being lent to the Federation and here we have a slightly different proposition, but in any event there is no lending of credit by the City. In the first place no public credit of the City is involved or in any way jeopardized for the reason that only special funds are involved and the argument above presented regarding the use of such funds for the purchase of the capital stock would be applicable to the lending of credit.

True, the Federation has four other members besides the City covering all of the Southern counties of the State and to a minor degree in northern Arizona. The generating plants and transmission lines of the Federation will be scattered and Cedar City is only the hub, so to speak. Under the proposed plan, Cedar City would own its distribution system outright, and the Federation would have no claim to or lien upon it in any way. Likewise the holders of the Electric Revenue Bonds, when they are issued, would have no claim upon the distribution system. The City, however, would own no generating facilities. It has heretofore decided it would be better to buy its needs in power from a non-profit co-operative, thus escaping the costs and hazards incident to generation. To do this the City has become a member of the Federation and has signed a contract (Ex. "C" of Def. Ans. Rec. 44) to purchase all power for a period of 35 years at a price of cost to produce the power. Since the Federation is a non-profit co-operative, it can make no profit but exists and operates solely for the benefit of its

members. True, the Federation has no money, but does have an approved loan from the R.E.A. for \$3,750,000.00 with which to purchase its portion of the system of the power company and to make certain improvements and extensions to the system. The Federation and only the Federation has executed notes and mortgages on this loan and at no place is the city obligated to pay any part of it. The only obligation which the City has is to purchase all of its power from the Federation. The money received from the City will of course be used by the Federation to pay its operating expenses and also to pay off the R. E. A. loan and interest. Surely because the City will be paying money to the Federation for kilowatts of power, which money will then in turn be paid to the R.E.A. on the loan cannot be termed an obligation of the City to pay off the loan. To repeat, the only sums which the City would be obligated to pay would be for power delivered according to the terms of the wholesale power contract, (Ex. "C" of Def. Ans. Rec. 44). If this were determined to be a lending of credit or the assumption of a debt unlawfully, then every contract which a city or other governmental subdivision makes involving the payment to another for service or materials rendered or delivered to the City is likewise illegal because the money so paid would be used by the payee to either pay off its own obligations or would go to expenses or profit.

The assertion that the City *might be* obligated to pay off the entire loan of \$3,750,000.00 or perhaps even \$20,000,000. if the other members of the Federation or the Federation itself went defunct, is truly remarkable. This would appear to be a case of painting the worst possible picture, including matters so remote as to be beyond the realm of possibility and then passing it off as a true likeness of the business transaction. This is impossible because the only payment for which the City is obligated

is for the power consumed by its citizens and at a price of cost to produce. Surely under the wholesale power contract the appellants cannot seriously contend that the City would be required to purchase more power than it could use, and this always at cost. If this is not enough along with the purchase of power from the Federation by its other members to pay off the loan from the R.E.A. it may not be paid but even then the City could not be jeopardized because its power system would be owned by it outright and the Federation could have no recourse to it.

It is interesting to note that appellants have cited cases decided by many courts throughout the land in which the question of lending of public credit was involved and particularly Constitutional or statutory provisions similar to Article VI, Section 31 of our constitution. These courts have construed and interpreted these different provisions, but no reference is made to the cases decided by this Court which interpret our own provision. This section has come before this Court twice before, in the case of *Bailey vs. Van Dyke*, 240 Pac. 454 and *Lehi City vs. Meiling*, 48 Pac. (2nd) 530. In both of these cases, the court held that the public spending or credit involved was not "in aid of" another corporation or individual but was for a public purpose and benefit and therefore, not within the prohibition.

In the *Bailey* case, the County Commissioners of Weber County had entered into an agreement with the Utah State Agricultural College and the U. S. Department of Agriculture whereby Weber County would pay a portion of the salary and expenses of the Weber County Agricultural Agent who was to be in Weber County in the program of the College and the Dept. of Agriculture. It was claimed that this was a lending of public credit. This court held, however, that so long as the contract and

payment was for a public benefit and for the benefit of the citizens of Weber County, that the Constitution was not violated even if such an arrangement may have benefited the other contracting parties. This would appear to be a case of a more direct benefit and aid to the other parties than the indirect benefit possibly involved in this case.

In the Meiling case, where the Metropolitan Water District Act of 1935 was attacked, this court held to the same public purpose doctrine. Under the act and being Chapter 10, Title 100, U.C.A. 1943, a group of small communities could form a water district for the purpose of acquiring, developing and constructing water and water sources for the joint use and benefit of all, and generally doing what one individual city probably could not do alone. The powers of the District as given by the act were claimed to violate the Constitution on several grounds, but in particular Section 18 of the Act, subdivision (G) which allowed the District of which individual cities would be the members, "to borrow money and incur indebtedness and to issue bonds or other evidence of such indebtedness "and also sub-section (K) which allowed the District to "join with one or more other corporations, public or private, for the purpose of carrying out any of its powers and for that purpose to contract with such other corporation or corporations for the purpose of financing such acquisition, construction, operation and therein obligate itself severally or jointly with such other corporation, or corporations; also to secure, guarantee or become surety for the payment of any indebtedness, or the performance of any contract or other obligation that may be, or shall have been incurred or entered into by any corporation in which the district shall have acquired shares of stock by subscription or otherwise " This Court held that the Constitutional provision above quoted was not violated and said:

“The purpose for which the broad powers are granted the district are for the acquiring, developing and use of water for public benefit, and particularly for municipal and domestic uses by the inhabitants of the cities and towns which may organize a separate district or join with the inhabitants of other cities and towns in the organization of a single large district. The section must be read and construed with reference to the purpose of the act.”

Therefore, it would appear that we do not have to look beyond the decisions of our own Court to find what the Constitutional provision relied upon by appellants means, and these cases, along with the other cases above cited should prove that Article VI, Section 31 is not violated in any way.

The appellants also contend that Section 3, Article IX of the Articles of Incorporation of the Federation commits the City to pay future and contingent sums and this obligating the City to lend its credit and likewise this is without merit. Admittedly, the wording of Section 3 is at best unfortunate but it could not be interpreted as meaning anything more than the fact that the City will be obligated to pay for its power purchased at a rate any different than as set forth in the wholesale power contract. That contract determines what Cedar City will pay and the rate for the power, which is always subject to adjustment and change in order to reflect the cost only, which may vary. When Section 3, Article IX provides that the City will pay for power at rates or on a basis to be determined from time to time in accordance with the bylaws (Articles), *subject to contracts heretofore or hereafter entered into between the City and Federation* then it is clear that the contract determines the rate to be paid. Furthermore, no other sums are to be paid as an obligation by the City other than for power.

Probably of least merit of any contentions made by the appellants is that covered by point No. 4 wherein it is claimed "The obligations assumed by Cedar City are unconstitutional, violating Article XIV, Sections 3 and 4 of our constitution". There it is claimed that the above sections which have to do with the creation of public debt and limiting indebtedness apply to this case.

Attention should be called again to the type of financing and the funds involved in this case. The money which the city intends to use to purchase its portion of the power system would come from the Electric Revenue Bonds. All of the money which the City expects to pay to the holders of these bonds, all costs of operation of the utility, including payment for power purchased from the Federation, must come from the gross revenues received from the operation of the utility. This is provided for in Ordinance No. 100 (Ex. "D" of Def. Ans. Rec. 48-61) and the City could pay no other monies. It would be bound by the ordinance which was submitted to the electorate of Cedar City under our Initiative procedure and approved by a majority of a large vote. This ordinance definitely commits the City to pay all expenses of purchasing the system and future operation and maintenance from the special fund created from the operation. No general funds or credits are in any way involved in this case. Sections 3 and 4, Article XIV of our constitution quoted and relied upon by the appellants clearly have no application to this case. This court has held numerous times that the above sections of our constitution have no application to such special funds. Some of these cases are *Barnes v. Lehi City*, *Utah Power and Light Co. v. Ogden City*, and *Utah Power and Light Co. v. Provo City*, *supra*. Therefore, this matter can be dismissed as being entirely without merit.

II

CEDAR CITY HAS STATUTORY AUTHORITY TO ESTABLISH A MUNICIPAL POWER SYSTEM AND THE METHOD CHOSEN IS LEGAL AND IN THE EXERCISE OF THE LEGISLATIVE DISCRETION OF THE CITY.

The appellants concede that a city in Utah has statutory authority to build, purchase and own a municipal power system, and Section 15-8-14, U.C.A. 1943 confers this right. A great majority of the cities in Utah have elected to have their own municipal power system. The generating plants for some of the municipal systems are of necessity outside the city limits and of course the appellants do not argue that a city may not go outside its corporate limits for the purpose of generating power and transmitting it to the city. Furthermore, it is also probably a matter of common knowledge that some of our municipalities do not generate all or any part of their power but they purchase it from some generating company at a wholesale rate and then distribute and sell it retail to its citizens. As to which method is chosen is a matter for the legislative discretion of each individual city. Cedar City has determined to handle only the distribution of electric power and relieve itself of the increasing costs of generation. Over a period of years the city will acquire an interest in the generating and transmission system of the Federation by paying into the Federation money for its power. Appellants appear to be greatly alarmed that the City would in this way acquire an interest in generating facilities which may be scattered and outside Cedar City. If the City could go outside the city limits to buy or build generating facilities, there should be no harm in acquiring an interest in those of the Federation with the money being spent for

power. In other words, the City would be getting double value for its money spent for power. This would appear to be only good business and a matter for Cedar City to legislatively determine instead of a legal problem for decision.

Appellants rely upon the case of *City of Phoenix v. Michael*, Arizona, 148 Pac. (2d) 353 as authority for support of their argument that the action of the City in respect to purchasing an interest in a generating facility outside the corporate limits in connection with the Federation is beyond the City's authority. That case had to do with the expenditure by the City of Phoenix from its public funds of a sum of money to a League of cities in Arizona organized for the purpose of training municipal officers and also for lobbying in the State Legislature. It was held that the City had no business spending its money to do these two things and which holding would appear only reasonable and therefore the expenditure was illegal. But that case did not involve the expenditure of only special funds for a power system which cities in Utah may legally buy and own.

Appellants also seem to feel that Sections 15-7-6 and 15-8-20 U. C. A. 1943 which deal with a city's power to contract for lighting of its city streets and public buildings and places is controlling upon the question of signing a contract with the Federation to supply the city with power for 35 years. Those two sections limit the length of a contract of street lighting and lighting for public buildings to three years, but surely appellants do not seriously contend that these sections are in any way applicable. It is clear that they only apply to contracts for public lighting and they have nothing to do with contracts for the purchase of power or franchises, for that matter. Utah has no statutory or constitutional

restriction or limitation upon the length of time a city may grant a franchise or contract for services such as contemplated in this case. This is confirmed by the case of *Brummitt v. Ogden Water Works Co.* 93 Pac. 828. If the cities of Utah were limited to three years in the franchises they give or contracts for the purpose of power or water, then practically every such franchise held by any company with a city in Utah is likewise invalid as it is probably common knowledge that they normally run many times three years.

III

CEDAR CITY HAS NOT DELEGATED TO ANY-ONE ITS RATE MAKING POWER OR THE POWER TO DETERMINE THE TYPE AND COST OF A MUNICIPAL POWER SYSTEM.

At the outset it is admitted that the power to make rates for electric service or for that matter any utility which a city may legally own is a power which cannot be delegated by the City. Appellants contend that by being a member of the Federation and agreeing to buy power from the Federation at a wholesale rate subject to change so as to only reflect the cost at all times, is in effect a delegation of rate making power. Merely because the Federation would set the wholesale rate, which of course would go to the ultimate retail rate in Cedar City would not be delegating to the Federation the power to fix rates, however. If such were the case, every city which buys power or anything else for resale in the community by the City would be allowing the seller of the electricity or other commodity to determine rates. Of course the price a wholesaler charges a retailer indirectly determines what the retailer will sell the commodity for. This is an inescapable fact of our economic

system. As previously stated, many cities in Utah own their distribution system and purchase their power from some private company. The rate is set by contract and of course that rate determines to a degree what the City will sell it for. But this has never been considered as granting to the power company the right to fix rates. The city would still fix that rate at any level it could otherwise legally do, considering all costs of operation.

Any city which owns a municipal power system and generates its power has to buy diesel fuel or coal, unless a hydro-electric system is in use, and the price paid for the fuel oil or coal to a certain extent determines the price of electricity. It would seem that additional argument is not needed to show that there is no delegation of rate making power by Cedar City in this case but attention should be called to two Utah cases which have ruled on this point, *Brummitt v. Ogden Water Works Co.* supra and *Lehi City v. Meiling*, supra.

Appellants have cited the *Brummitt* case to support their argument that there has been a delegation of power and that such is unlawful. This is indeed odd, because the ruling of the *Brummitt* case definitely establishes that there is no delegation of power in the case at bar about which the appellants can complain. There it was claimed there was an unlawful delegation of water rate making power. The court held that the City of Ogden had tried to illegally delegate its power to fix rates but held further that since this was unlawful, the company to which the delegation was attempted got nothing and the City lost nothing and therefore the plaintiff had suffered no loss about which it could complain. Likewise, if there is any attempted delegation of power in any of the particulars set out in appellant's brief, such is not legal admittedly but likewise the appellants have no cause to complain.

In the Meiling case it was likewise contended that the Metropolitan Water District Act of 1935 allowed a city to delegate to the water district power over city finances and property and to interfere with city affairs, but the court held that such was not the case and stated:

“Nor does the act provide for interference with any municipal improvement, money, property or effects. The power of control vested in the Board of Directors is over the property, improvements, money and effects of the district and not that of any of the cities and towns whose territorial boundaries may be coincidental with that of the district or included therein.”

As an answer to the charge that the City has delegated to the Federation the right to compel the city to levy taxes in order to defray its expenses in the operation or to pay off the R.E.A. loan, we only need to look at Ordinance 100 which was adopted by Cedar City and the voters of the city which definitely limits any expenditure which the City could conceivably make to the gross revenues received from the operation of the utility. Unless the ordinance is valid so as to enable the City to raise its portion of the purchase price, then the proposed transaction could not be consummated because the City would have no money, and if it is valid, and it is not under attack, it becomes an integral part of the entire transaction. To repeat, the only money Cedar City could spend is revenue from the operation of the power system and the ordinance expressly binds the City and this can be relied upon by the appellants and every other resident of Cedar City as a protection to them against the evils which appellants say will result.

IV

THE APPELLANTS CAN IN NO WAY BE ADVERSELY AFFECTED BY THE CONSUMMATION OF THE PROPOSED PLAN AND THEREFORE HAVE NO CAUSE TO COMPLAIN.

As pointed out in this brief, the funds here involved are special funds and not general or public funds, the expenditure of which is stringently regulated by our statutes and constitution. None of the prohibitions relating to the incurring of debts, advertising for bids for construction or pledging the credit of the city to pay off obligations of others have any application to this case. The appellants cannot and have not shown wherein the consummation of the plan will take away any city funds, deprive the city of its ability to perform its functions or raise taxes in any way. They cannot show where it will affect any person in Cedar City adversely from a financial standpoint. For this reason most if not all of the objections raised by appellants are disposed of. The City contends that all elements of this over-all plan are legal and within the power of the City but in any event, because of the expenditure of special funds only, they would have no cause to complain.

It seems that the appellants' main concern here is not necessarily with the legality or illegality of the acts of the City, but rather with the particular method adopted by the City to achieve the result. The appellants are objecting to the length of time granted in the wholesale power contract—35 years; they are objecting to the fact that Cedar City, for 35 years is giving up its right to generate its own power. They are objecting to the fact that the City has tied itself to buy power from the Federation which serves rural areas when Cedar City might be able to take care of its own needs at a cheaper rate. They object to the fact that Cedar City will be a minority

owner in the Federation and in many other particulars. It is submitted by the City that the different acts and contracts of the City are legal and are only the method chosen to acquire and operate its own power system. The City has decided that the method adopted was the best one in the long run. It has therefore exercised its discretion in a legislative capacity and this Court is not concerned with the wisdom or folly of the plan. As pointed out in the case of *Brummitt v. Ogden Water Works Co.*, supra and also by Mr. Justice Elias Hansen in the case of *Utah Power and Light Co. vs. Provo City*, supra, these are legislative, discretionary matters with which the court is not concerned. It may appear that the City could have driven a harder bargain or that the agreements appear to favor the Federation, but this is not enough to make them illegal. On all these matters, the appellants cannot be heard to complain.

Attention should be called to the *Brummitt* case and the *Lehi City v. Meiling* case where the court held among other things that the plaintiffs could not be adversely affected by the consummation of the scheme proposed. The Court, in the *Meiling* case observed that the cities involved had not been called upon to do any of the things it was claimed were illegal and beyond the cities' power and stated that if, at some future date any city was called upon to lend its credit or obligate itself for any unknown obligation that such may be illegal and if any plaintiff was to be aggrieved by the action, he could then enjoin the City. The question is, can the plaintiffs and appellants, in advance, champion the rights of others as was refused in the *Brummitt* case, when they have suffered no loss? As in the *Meiling* case, Cedar City has not been asked to do any of the things appellants claim can be asked and which are illegal. The proposed plan is as yet only on paper and has not been

consummated. If at any future date, Cedar City might be required to perform in any of the particulars which appellants claim are illegal then the appellants could seek to enjoin the City.

CONCLUSIONS

The appellants have the burden of pointing out wherein the power plan contemplated by the City, or some material part, is illegal and beyond the powers of the City and not merely the exercise of the legislative discretion of the City.

The major objective of the City is to acquire and operate the electrical distribution system of Southern Utah Power Company within the corporate limits of the City. In order to buy this portion of the company, whose parents Company is in Bankruptcy, it has become necessary to purchase shares of common stock so as to participate in the dissolution of the company and the acquisition of the property it wants. Surely this is not such a purchase of corporate stock as to be unconstitutional.

After the acquisition of the distribution system, the City, instead of generating its power, which the appellants seems to feel it should do, intends to purchase all of it from the Federation, a non-profit corporation of the State of Utah and made up of other southern Utah users. This company can make no profit but exists only for its members. The appellants claim that by so becoming a member, the City is allowing the Federation to make assessments on the City for the payment of the loan of the Federation. But the Federation has contracted, by a special contract, with the City which governs any payments to be made by the City and it is submitted that this contract, not the Articles of Incorporation of the Federation, which provide for alternate methods of

paying for electricity, determines what the City will pay. Admittedly the sums paid to the Federation for electricity will be used to pay off the indebtedness of the Federation incurred to purchase its properties but if this is such a lending of credit to the Federation as to come within our constitutional prohibition herein relied upon, then it would be difficult indeed for any city to operate and not violate it.

Further, all of the money to be spent by the City will come from a special fund having nothing to do with the city's credit, finances or solvency or tax structure. The ordinance adopted by the City in of itself answers most if not all of the questions raised by appellants as all of them are either financial restrictions directly or have their roots in the protection and safeguard of the City's credit and indirectly the taxpayer. But if we are not concerned with finances, credit of the city, or public funds as intended by these constitutional and statutory restrictions, then they most certainly are not applicable. The appellants have not shown and cannot show where they will be adversely affected in any way by the consummation of the plan proposed because none of the funds to be spent will affect them.

Lastly, the plan proposed has never been put into operation. If at any future time, the Federation attempts to claim the right to in any way force the City to lend its credit, any citizen of Cedar City could then enjoin it. If the City has attempted to lend its credit, which the Respondents deny, then such is illegal and the City could not be forced to perform and therefore, we have a situation where the City or its citizens have given up nothing and the Federation has gained nothing.

The appellants must go further than merely point out remote possibilities. This is a large transaction involving a considerable area and a great number of

people. It has been necessary to enter into a number of contracts and associations in order to achieve the desired result. If any parts of the plan appear to be unfavorable to the City, they are of no concern to this Court if within the power of the City or if the appellants will not be adversely affected thereby. All of these parts to this plan must be considered together as all are part of the integrated plan and when the over-all picture is seen and not merely isolated parts, its legality should not be open to question.

Respectfully submitted,

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