COMMISSION JURISDICTION OVER UTILITY COOPERATIVES

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A group of farmers desire electricity. They propose to form a cooperative, to borrow money and to construct electric distribution lines. They probably will incorporate the cooperative as a stock or non-stock corporation in order to obtain the benefit of limited liability. The cooperative might be formed under a statute specifically enacted to authorize the formation of cooperatives or under a general incorporation statute. Normally, the charter of the cooperative will provide for equality in control by the members or shareholders and for a limited return or no return on capital investment. The cooperative will probably apply to the Federal Government for a loan from the funds made available for rural electrification by recent legislation. Under this legislation 63.5 per cent of the approved loans as of July 14, 1936, amounting in the aggregate to $14,699,412, was made available to a total of sixty-six cooperatives. The electric lines will be constructed under a construction contract entered into between a construction company and the cooperative. A state commission has the power to issue certificates of convenience and necessity, to approve the incurrence of indebtedness, to establish rates and to fix service standards of electric utilities. Is the proposed cooperative subject to commission control of this character?

An impartial examination of the question requires a recognition of the issues which are presented by the conflicting interests. To the
organizers of the cooperative, freedom is the issue—the right to
decide for themselves whether their enterprise is feasible, the right to
borrow irrespective of the extent of their capital investment, and the
right to charge what rates they see fit. This issue of freedom is sup-
plemented by the feeling that commission proceedings entail unnec-
esary expenses and delays. To the existing utilities, equality is the
issue—the right to insist that others who enter their field of activity
should not be given preferential treatment. Supplementing this issue
is the recognition that the cooperative may become a competitor which,
if not subjected to commission jurisdiction, can ignore such territorial
rights as may be incident to a certificate of convenience and necessity.

Caught between the cries of freedom and equality are the com-
misions. An attempt by a commission to decide the question on the
basis of freedom or equality inevitably would intensify one of the
two feelings. More important than the difficulty of choosing between
freedom and equality is the fact that commissions have not been dele-
gated the function of choosing between ideals. Commissions have
certain duties delegated to them by statute. Their decisions must be
based upon the statutory provisions. If, as is true in most jurisdictions,
the legislation of itself does not answer the question, their duty is to
examine the history, the purposes and the judicial interpretation of
the legislation.

The answer to the question requires a study of the legislation which
relates to the creation and power of commissions. In addition it is
necessary to examine the legislation which relates to the formation and
powers of cooperatives. The underlying nature and purpose of com-
misson regulation, however, is to be gleaned from the commission
legislation. It is appropriate, accordingly, to examine, first, the com-
mmission legislation, and second, the cooperative legislation.

I

SCOPE OF COMMISSION LEGISLATION

Commission legislation normally contains an enumeration of the
entities included within its provisions. The following enumeration
in the New York Public Service Commission Law 2 is an example:

"The term 'electrical corporation,' when used in this chapter,
includes every corporation, company, association, joint-stock asso-

2 N. Y. Laws (1910), c. 480, § 2 (13), 47 N. Y. Consol. Laws (McKinney
1917), § 2. The provision has been adopted in many jurisdictions. With it is to
be compared the following provision in the Idaho act, Code Ann. (1932), § 59-104:
The broad scope of such an enumeration is indicative of the legislative intent that the jurisdiction of commissions is not to be denied on account of the type of entity involved. In a recent decision of the Supreme Court of the United States, the State of California was held to be a common carrier notwithstanding its sovereign character.\(^3\) In another decision of the Supreme Court it has been held that "public service corporation" includes not only any corporate entity but also any unincorporated entity operating as a public utility.\(^4\) There would seem to be no basis, therefore, for the construction that cooperatives are not included in the enumeration of entities within the provisions of commission legislation.

It does not follow, however, that all entities enumerated in commission legislation are subject to commission jurisdiction. Thus, for example, the Supreme Court of Vermont in a recent case\(^5\) pointed out that municipalities were entities included within commission legislation but nonetheless held that a municipality was free from commission jurisdiction so long as it served energy only under special contract, and so long as it did not purport to serve the public. It accordingly becomes clear that commission legislation was not intended to result in the regulation of all the entities enumerated therein irrespective of the character of their services.\(^6\) This becomes even clearer.

"The term corporation when used in this act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the limits of incorporated cities, towns or villages."\(^7\)

\(^3\) "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. . . ." United States v. State of California, 297 U. S. 175 at 181, 56 S. Ct. 421 (1936).

\(^4\) "The character of the service, that is, whether it is public or private, and not the character of the ownership, determines ordinarily the scope of the power of regulation. . . ." Van Dyke v. Geary, 244 U. S. 39 at 44, 37 S. Ct. 483 (1917).


\(^6\) Van Dyke v. Geary, 244 U. S. 39, 37 S. Ct. 483 (1917); State Public Utilities Commission v. Noble, 275 Ill. 121, 113 N. E. 910 (1916); and other cases cited infra, notes 29 and 32.
in view of the provision which usually appears in such legislation to the effect that commission jurisdiction is not to extend to a company serving itself or its tenants.\(^7\)

**Limitation of Commission Jurisdiction to Public Utilities**

A very important limitation on commission jurisdiction is its restriction to public utilities. This limitation may result from an express provision in the legislation limiting jurisdiction to companies engaged in service to or for the public use,\(^8\) or it may result from that limitation being read into the legislation. The latter situation is illustrated by the leading case of *State ex rel. M. O. Danciger v. Public Service Commission*,\(^9\) where the Missouri Supreme Court said:

> "While the definitions quoted, supra, express therein no word of public use, or necessity that the sale of electricity be to the public, it is apparent that the words 'for public use' are to be understood and to be read therein. . . ."

The limitation of commission jurisdiction to public utilities has not been a product of "judicial legislation." A complete study of commission legislation leads inevitably to the conclusion that the legislature intended such a limitation to exist. The history of commission regulation and its evolution through the stages of regulation by charter provisions, by municipal ordinances and by private laws, show that the intent was to regulate public service. The very titles of many of the commission acts and the names of the commissions often include the phrase "public service" or its equivalent.\(^10\) The laws call for a "constant detailed supervision and a very high degree of regulation,"\(^11\)

\(^7\) The Pennsylvania Public Service Company Law, for example, excludes activities "by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others." Pa. Laws (1913), p. 1374, art. I, § 1, 66 Pa. Stat. (Purdon 1930), § 1.


\(^10\) This apparently is true in thirty-two jurisdictions.

\(^11\) Justice Brandeis in his dissent in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 S. Ct. 371 (1932), points out that such regulation is applied to businesses commonly referred to as public utilities.
which is appropriate only to such activities as have come to be recognized to need such regulation.

The limitation of return on fair value by rate regulation, the restraint upon competition by the certificate of convenience and necessity, the prevention of over-capitalization by the regulation of security issues, the duty of service to the public without discrimination, and the imposition of safety standards, are underlying purposes of commission regulation which in their entirety are appropriate only to public utilities. Although some of the purposes might be appropriate to companies other than public utilities, it must be kept in mind that commission legislation was not formulated to apply to companies for some purposes but not for other purposes. The nature of the control over a company subject to commission jurisdiction might very well vary with the particular facts pertaining to that company. This, however, would still mean that the company was being subjected to commission jurisdiction for all purposes. The wide scope of these purposes has led to the conclusion that jurisdiction was intended to be limited to public utilities. Courts, in order to buttress this conclusion, have gone so far as to say that a contrary conclusion would raise a serious constitutional question in that a state cannot by legislative fiat convert a private business into a public utility.

Public Use Contrasted With Public Interest

To determine whether the cooperative is a public utility it is unnecessary to enter into a discussion of that unclosed category of businesses deemed to be affected with a public interest. The phrase "affected with a public interest" has played an important role in determining the extent to which a given industry may be regulated. Whether a particular enterprise in that industry is to be subjected to public utility regulation, however, requires an examination of the further question whether the particular enterprise is devoted to the public use. The business of supplying electricity has come to be recog-
nized to be of public interest within the classical meaning of that term, but, as noted in *State ex rel. v. Baker*, "the mere purchase, transmission and sale of electric energy, a commercial product, without more, contains no implication of public service." It becomes important, therefore, to determine what is meant by public use.

The expression "public use" is encountered in various fields of the law. The question whether a state may enter a certain sphere of activity is often stated to depend upon whether the resulting expenditure of funds will be for the "public use." The "public use" which makes spending constitutional, however, is not the same public use which makes an enterprise a public utility. Banking may be a "public use" of state funds, but banks are not considered public utilities. "Public use" is also involved in the normal rule that property cannot be taken by eminent domain except for "public use." A close relationship between the use of the term in the field of eminent domain and public utilities is to be expected in view of the fact that the power of eminent domain has been so often exercised by public utilities. It does not follow, however, that the terms are always used in the same sense. Although the assertion of the power of eminent domain may normally necessitate the use of facilities by the public, the legislature may grant the power of eminent domain for the public welfare as contrasted to the public use. This is recognized in the recent New

Commissions as to what constitutes a public use in those businesses admitting of both a public or private calling have been almost unanimously contra to the decisions of the courts." But cf. the viewpoint of the Wisconsin Public Service Commission, *In re Application of Wisconsin Power and Light Co., C C H Public Utilities and Carriers Service* (Wis. 1936), p. 2372.


York Housing case, and in a recent decision of the Supreme Court in which reference is made to a company not a public utility which possessed the power of eminent domain. The varying use of the term “public use” makes it necessary, therefore, that its meaning for the question here involved be determined from its use in connection with public utilities.

The term “public utility,” together with its connotations “affected with a public interest” and “devoted to the public use,” has been described by the late Justice Holmes as “a fiction intended to beautify what is disagreeable to the sufferers.” It, of course, is clear that “public utility” may be used with varying meanings under different circumstances. Legal incidents normally attached to the term may not be appropriate if a contrary intent can be gleaned from the manner in which it is used. Thus, in a case involving the use of the term “public utility” in a statute providing for a tax exemption it was stated:

“...Their contention that the statute, in using the word ‘public utility’ uses it in the sense of properties devoted and dedicated to the public use is, we think, clearly untenable. ... The language there used, the language of the statute, was intended to have, it must be given, a physical, not a legalistic, meaning. ...”

Under normal circumstances, however, the term is used in its legal sense and hence must be given that meaning. Confusion often results from an attempt to give a literal meaning to concepts. A taxicab driver may have “devoted” his taxicab “to the public use,” but this does not mean that the public can climb into his cab while he is carrying a

22 New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936).
passenger. Underlying any concept are factual situations which must not be ignored. It is important, therefore, to examine the factual situations which have been held to constitute public service as contrasted with those which have been held not to constitute public service.

Relationship of Incidental and Cooperative Service to Public Use

A usual situation in which the question has arisen as to whether a certain endeavor is conducted for the public use is that which results where a company, engaged in an activity for its own purposes, uses its surplus facilities for other persons. Courts have held that such activities may or may not constitute public use within the meaning of commission legislation. The absence of commission jurisdiction in these situations is not based upon the fact that the activity is collateral or incidental to the main purpose of the company. It results rather from the factual conclusion that the company purports to serve only a limited portion of the public.

The furnishing of service by cooperatives is another situation in which the question has arisen as to what constitutes public service. Under such circumstances it is held that the offering of service to members does not constitute public service within the meaning of commission legislation. In the list of cases cited in the footnote appear


28 Wingrove v. Public Service Comm., 74 W. Va. 190, 81 S. E. 734 (1914).


31 See cases cited supra, note 29.

decisions of the highest courts of California, Illinois, Mississippi, Missouri, Nebraska and Wisconsin which are directly in point. In the Ohio and Pennsylvania cases, the same rule is stated in decisions relating to service offered to members of a cooperative by third persons rather than by the cooperative. The Kansas case is especially interesting in that the cooperative originally served only members, but subsequently offered to serve and did serve the public in addition to its members. The court pointed out that originally the cooperative was not subject to commission jurisdiction, but held that when it began to offer service to the public it became subject to commission jurisdiction. In accord with the holding of the Kansas case are decisions in Illinois, Maine, Minnesota, Washington and Wisconsin. The two lines of cases manifestly do not represent conflicting viewpoints, but rather represent the application of the distinction made between service offered to the public and service offered only to members.

If a cooperative serves non-members it does not necessarily follow that it is serving the public. The situation in this respect is rather analogous to that which exists when a company serves other persons in addition to serving itself. In such a situation there is presented the factual question of whether or not under all the circumstances the service is to a limited portion of the public. Thus, if service is offered to a limited number of non-members only under special circumstances, the cooperative will be held free from commission jurisdiction.

Significance of Factors Pertaining to Utility Cooperatives

Although the cases are clear to the effect that cooperatives serving their members are not serving the public, they are not so clear as to the reasons why such services do not constitute public service. Before an analysis of that term as applied to cooperative service is attempted, it might be helpful to eliminate the following factors which have been held immaterial in cases in which the court had to determine whether cooperatives were public utilities subject to commission jurisdiction:


34 Hinds County Water Co. v. Scanlon, 159 Miss. 757, 132 So. 567 (1931).
(1) lack of profit; (2) extent of the powers granted the cooperative; (3) use of highways; (4) use of facilities of public utilities; (5) existence of a monopoly; and (6) number of members of the cooperative.

(1) Lack of profit does not mean that an enterprise is not a public utility. Legislation in a few jurisdictions, however, has expressly excluded non-profit organizations from commission jurisdiction. In addition some courts have construed expressions such as "for hire," "for compensation" or "for profit" in commission legislation as intended to exclude commission jurisdiction over non-profit enterprises. Such a construction raises the very interesting question whether a cooperative is to be deemed a non-profit enterprise. Non-profit commission exemptions like non-profit tax exemptions or non-profit incorporation laws have a background and a reason all their own. Accordingly, it would not be surprising to find that an enterprise deemed to be non-profit in one situation might be deemed to be a profit enterprise in another situation. In commission legislation it would seem that the term "for profit" and what appear to be its equivalents "for hire" and "for compensation" refer to the nature of the service rather than to the nature of the enterprise. It would appear, therefore, that

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36 Idaho Code Ann. (1932), § 59-104; Ill. Laws (1921), p. 702, Ill. Rev. Stat. (Cahill-Moore 1935), c. 111a, § 25; Ohio Gen. Code (Page 1926), § 614.22. The situation in Illinois is interesting. After four cases involving jurisdiction over cooperative telephone companies, the legislature expressly excluded mutual telephone companies. In the first and third cases [State Public Utilities Comm. v. Noble Mut. Tel. Co., 268 Ill. 411, 109 N. E. 298 (1915); State Public Utilities Comm. v. Noble, 275 Ill. 121, 113 N. E. 910 (1916)], the cooperative was held subject to commission jurisdiction because it served the public or was under a duty to serve the public because of a franchise. In the second and fourth cases [State Public Utilities Comm. v. Bethany Mut. Tel. Assn., 270 Ill. 183, 110 N. E. 334 (1915); State Public Utilities Comm. v. Okaw Valley Telephone Assn., 282 Ill. 336, 118 N. E. 760 (1918)], the cooperative was held to be free from commission jurisdiction because it was authorized to serve members only.

these expressions were meant to refer to service paid for, even though at cost, as contrasted to gratuitous service. A contrary viewpoint, however, has been expressed in some cases in which the freedom from commission jurisdiction also was, or could have been, based on the fact that the cooperative served only members. 89

(2) The extent of the powers of a cooperative does not determine whether it is a public utility. The test is not what a corporation can do, but what it does do. 40 With apparently the sole exception of Illinois, 41 the courts take the position that the utility status of a cooperative does not depend upon its charter powers. Thus a cooperative organized under a cooperative statute or under an ordinary incorporation statute may be a public utility 42 and, conversely, another enterprise, even though organized under a statute for the formation of public utilities, may not be a public utility. 43

(3) The use of highways does not convert a cooperative into a public utility. 44 The matter is stated tersely and effectively by the Illinois court: 45

"If poles or wires should be placed on streets and highways it would no more tend to prove that the use is public than the fact of farmers driving upon public highways with their own products would tend to prove they are common carriers. . . ."

The grant of a franchise to use highways may be conditioned upon

39 Supra, note 37.
40 Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 36 S. Ct. 583 (1916); United States v. State of California, 297 U. S. 175, 56 S. Ct. 421 (1936). It should be noted, however, that in jurisdictions like Pennsylvania where charters of public utilities must be approved by the Commission [Pa. Laws (1913), p. 1374, 66 Pa. Stat. (Purdon 1930), § 181], it would be necessary under such circumstances to rely on the terms of the articles of incorporation in order to determine whether the corporation was a public utility.
the giving of service to the public. The acceptance of the franchise, with the resulting duty of public service, would make the grantee a public utility. Likewise, safety in the use of highways may be a reason for the legislature to extend commission jurisdiction over cooperatives which are using highways. In the absence of such legislation, however, there is no difference so far as public service is concerned whether an electric line is built on a highway or half a foot off the highway.

(4) The feasibility of a cooperative enterprise often depends upon the cooperation of a public utility in making its facilities available to the cooperative. In many cases involving telephone cooperatives, it has been urged that the connection of the lines of the cooperative with those of a public utility convert the cooperative into a public utility. Aside from the differences of viewpoint in these telephone cases, it must be recognized that a telephone connection results not only in service to the members of the cooperative, but also in service to all the customers of the public utility in communicating with members of the cooperative. In the case of electricity, however, the connection with the public utility will result merely in delivery of a


a commodity. The activities of the public utility and the cooperative are to be kept separate, just as Justice Cardozo in a recent case stated that the activities of a cooperative in carrying commodities between Pennsylvania and Ohio are to be kept separate from ensuing transportation in Ohio, in determining whether there has been transportation service within the meaning of the federal commission legislation.

(5) In an industry involving a high capital investment coincident with diminishing costs in the extension of service, monopoly tends to result. This tendency may or may not be a ground for public control so far as telephone or electric cooperatives are concerned, but be that as it may, it has no relationship to the question whether the cooperative is or is not serving the public so as to be deemed a public utility within the meaning of commission legislation. The possibility of a monopoly, or the fact that a public utility may not be able economically to enter an area served by a cooperative, may justify the legislature in expanding commission jurisdiction. Manifestly, however, the power to extend the jurisdiction does not reside in the commissions or in the courts.

(6) The number of consumers does not necessarily determine whether there is service to the public. In the leading case of Cawker v. Meyer, it is said:

"But whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public... On the other hand, a landlord may furnish it to a hundred tenants or, incidentally, to a few neighbors, without coming either under the letter or the intent of the law..."

81 The nature of the generation and distribution of electricity is discussed in Broad River Power Co. v. Query, 288 U. S. 178 at 181, 53 S. Ct. 326 (1933), where Chief Justice Hughes said: "Notwithstanding the special characteristics of electric energy, the company is engaged in producing and selling an article of trade... The product is property..."


84 "For a commission to tamper with a statute either by extending its scope or by contracting its provisions would be legislation and not administration." Wyman, "Jurisdictional Limitations Upon Commission Action," 27 HARV. L. REV. 545 at 559 (1913).


86 147 Wis. 320 at 325, 133 N. W. 157 (1911).
In a Pennsylvania case, it was held that service to members of a cooperative was not public service even though there were seventeen thousand members. In the situation where service is given by a company incidental to providing service for itself, the number of persons served might be an important factor in determining whether it is a public utility. In the case of a cooperative, however, the rule is that the offering of service to members does not constitute service to the public and, hence, it would not seem to be material how many members were served.

This examination of the factors which are held immaterial by the courts in the cooperative cases still does not reveal the reason why service to members does not constitute service to the public. A basic cooperative principle is equality. Membership in a cooperative is open to the public. Service is given to all members. Yet there is no service to the public within the meaning of commission legislation. Wherein lies the reason?

**Distinction between Cooperative Service to Members and Service to the Public**

Reason often lies in history. In 1787 a collection of treatises was edited by Francis Hargrave. Although the editor was “mortified” at the lack of interest in his undertaking, it is interesting to observe that his work, referred to in *Munn v. Illinois*, contributed the use of the expression “public interest and public use” as an important constitutional limitation upon legislative power. In one of these treatises by Lord Chief Justice Hale, the following reference to public use appears:

"no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He

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60 94 U. S. 113, 24 L. Ed. 77 (1877).
may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use. . . ."

The exclusion of self-service from public service is significant. Some courts have resorted to this distinction between self-service and public service as a basis for holding that cooperatives which serve their own members are free from commission jurisdiction. An electric line built jointly by a group of farmers could very well be considered the same as a line built by one farmer for himself and his family. In view of the separate identity of a corporation from its shareholders or members, however, it becomes a little more difficult to conclude that an incorporated cooperative is serving itself when it serves its members.

The corporate fiction is often disregarded to the detriment of a corporation or its shareholders. Thus, it has been held that the separate corporate entity of a subsidiary corporation which served only the parent corporation was to be ignored so that there was self-service as contrasted to public service. In that case, however, the corporation was contending that it was a public utility in order to gain an exemption from a tax. There would not seem to be the same reason, however, for courts to benefit a corporation by disregarding the corporate entity which has been created voluntarily. Nonetheless, some courts have taken the view that the corporate entity of a cooperative is to be disregarded for certain purposes notwithstanding the benefit which inures to the cooperative or its members. This might be said to be an example of judicial tolerance toward cooperatives. From another view-

62 1 HARGRAVE, LAW TRACTS 6 (1787). Italics supplied.
63 In The Pipe Line Cases, 234 U. S. 548 at 562, 34 S. Ct. 956 (1914), Justice Holmes stated that it was a "perversion of language" to construe self-service as transportation within the meaning of the Hepburn Act.
64 And what it does, with one exception, is to operate a telephone exchange for itself." State ex rel. L. & F. Mut. Tel. Co. v. Brown, 323 Mo. 818 at 821, 19 S. W. (2d) 1048 (1929).
65 Schumacher v. Railroad Comm., 185 Wis. 303, 201 N. W. 241 (1924).
point, however, it might be contended that it constitutes a common sense recognition of the fact that the incorporation of a cooperative is aimed at little more than a statutory limitation of liability and hence should not be given any greater effect. 69

The separate corporate entity is one difficulty with the explanation that the service to members is self-service rather than public service. Another difficulty is that this reason does not fit the situation where the members of a cooperative are served by a third person rather than by the cooperative. Several courts have held that an individual carrier who hauls only for members of a cooperative is not serving the public. 70

An explanation of these cases might be based upon the existence of a contract between the individual carrier and the cooperative. The service given to the members under such circumstances is afforded them either by the cooperative through its contractor or agent, or as third party beneficiaries of the contract made between the carrier and the cooperative. In any event the service to the members of the cooperative is hardly to be considered self-service even though the service is extended only because of the relationship which exists between the members and the cooperative.

In the final analysis it would seem that the best reason for considering cooperative service to members as distinct from service to the public is that the cooperative purports not to serve the public but only to enter into a special relationship with the public. Manifestly, a special relationship cannot be used merely as a ruse to avoid the consequences which are attached to public service. 71 The special relationship of a

69 In Chaffee, "The Internal Affairs of Associations Not for Profit," 43 Harv. L. Rev. 993 (1930), it is pointed out that the limitation on judicial control over the internal affairs of nonprofit enterprises should apply even though the enterprise is incorporated. The author also points out at p. 1027: "Legal supervision must often be withheld for fear that it may do more harm than good."


71 The Pipe Line Cases, 234 U. S. 548, 34 S. Ct. 956 (1919); cf. Chickasha Cotton Oil Co. v. Cotton County Gin Co., (C. C. A. 10th, 1930) 40 F. (2d) 846 (statutory exemption claimed by a ginner who owned $24,850 of the stock of a company, the remaining $150 of stock being distributed among 150 patrons of the company); Affiliated Service v. Public Utilities Comm., 127 Ohio St. 47, 186 N. E. 703 (1933) (the "presiding genius" and his wife owned 229 out of the authorized 250 shares). In Davis v. People ex rel., 79 Colo. 642, 247 P. 801 (1926), a carrier who was refused a certificate of convenience and necessity subsequently formed an association. In reference to a restriction of service to the members of the association, the court said at p. 644: "the limitation is a mere device to hoodwink the law." See Fort Lee Transp. Co. v. Edgewater, 99 N. J. Eq. 850, 133 A. 424 (1926); cf. Board of Railroad Comms. v. Reed, (Mont. 1936) 58 P. (2d) 271.
cooperative and its members, aimed at equality in ownership and in control, is clearly a bona fide end. The common law, and the statutory law pertaining to the duties of public utilities as set forth in commission legislation, refer to the simple and ordinary relationship of the provider and the recipient of service. If, however, there is no ordinary customer relationship and service is not furnished except as an incident of a special bona fide relationship, the situation does not appear to constitute service to the public within the meaning of the term.

II

Effect of Cooperative Legislation upon Commission Jurisdiction

The conclusion that the service of cooperatives to members is not public service within the meaning of commission legislation still leaves open the question of the extent to which commission jurisdiction is affected by legislation which relates to cooperatives. Until recent years cooperative legislation rarely referred to commission jurisdiction. Under such circumstances it would appear that commission legislation was intended to apply to cooperatives just as to any other entities to the extent that service was rendered the public. A Nebraska court, however, has taken the position that the exercise of powers granted a cooperative is solely within the purview of the cooperative legislation and is not subject to commission legislation.

In several recent cooperative acts pertaining to rural electrification, there appear provisions stating specifically that the activities of cooperatives formed thereunder, are or are not to be subject to commission jurisdiction. In Tennessee, for example, it is provided that the cooperatives, called electric membership corporations, are to be free from commission jurisdiction. At the other extreme is the Virginia Electric Cooperatives Act which subjects cooperatives to the same commission regulation as “other similar utilities.”

75 Va. Laws (1936), c. 442, § 18. It might be noted, however, that a strict construction of the provision might result in the conclusion that it was not intended to extend commission jurisdiction over a cooperative engaged in such activities which theretofore were not subject to commission jurisdiction.
Exclusion of Cooperatives from Commission Jurisdiction

A statutory exemption of cooperatives from commission jurisdiction does not foreclose the matter. A cooperative which serves the public has so many incidents of an ordinary public utility that there may be no constitutional justification for its separate classification. In the Frost case\(^76\) such a legislative classification was attacked by a holder of a certificate of convenience and necessity. A majority of the Supreme Court of the United States sustained the objection to the classification; it took the view that there was an insufficient basis for distinguishing the service of cooperatives, formed under the cooperative statute there involved, from the public service of other entities. Justice Sutherland in giving the opinion of the majority of the Court stressed that the cooperative was "in no sense a mutual association" but was engaged in serving "the general public for the sole purpose of making money."\(^77\)

The opinion, in addition, made note of the fact that if a cooperative served members at cost and non-members on a similar basis, there was no reason to doubt that the classification would be valid.\(^78\) Although "classification good for one purpose may be bad for another,"\(^79\) it is interesting to observe that in a later decision of the Supreme Court it is stated that a classification for purposes of taxation could undoubt-

\(^76\) Frost v. Corporation Comm., 278 U. S. 515, 49 S. Ct. 235 (1929); cf. Chickasha Cotton Oil Co. v. Cotton County Gin Co., (C. C. A. 10th, 1930) 40 F. (2d) 846. In a third case involving commission jurisdiction over ginning, it was held that no constitutional right of an individual was invaded by the power of a cooperative to give patronage refunds. Corporation Comm. v. Lowe, 281 U. S. 431, 50 S. Ct. 397 (1930).


\(^78\) Note one basis upon which the exemption of municipalities from commission jurisdiction has been upheld: "Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must." Springfield Gas & El. Co. v. Springfield, 257 U. S. 66 at 70, 42 S. Ct. 24 (1921); cf. Middendorf v. Jameson, 265 Ky. 111, 95 S. W. (2d) 1057 (1936). But it has been held that a municipality may earn a profit out of its utility enterprise. Shirk v. City of Lancaster, 313 Pa. 158, 169 A. 557 (1933); In re Village of Booneville, 272 N. Y. 40, 4 N. E. (2d) 209 (1936).

\(^79\) Louisville Gas & El. Co. v. Coleman, 277 U. S. 32 at 38, 48 S. Ct. 423 (1928).
edly be based on the non-profit character of an organization engaged in a business affected with a public interest.\textsuperscript{80}

The exemption from commission jurisdiction of enterprises serving the public because of their non-profit character still leaves open the issue already discussed of whether a cooperative is to be deemed non-profit for this purpose. In this sense of the phrase, it would appear that "service at cost" is non-profit, even though it is accomplished by charges in excess of cost which are reduced to cost by way of patronage refunds, or by way of accumulations used to acquire property or to pay debts.\textsuperscript{81} The issue, however, is unimportant where such cooperative legislation permits service to members only, because the exemption provision in reality creates no exemption. Without the provision there would be no commission jurisdiction over the service to members because, as already noted, it would not constitute service to the public. The provision under such circumstances, of course, is of some significance in that it shows expressly the legislative intent which otherwise would have to be gathered from an examination of the case law and the background of commission legislation.

The exemption provision is of importance in those situations in which the cooperative legislation contemplates service to non-members. Assuming that the extent of such service under a given set of facts constitutes more than service to a limited portion of the public, the provision really exempts service which otherwise would be subject to commission jurisdiction. The provision is of further importance in those situations where cooperative legislation provides for the use of the power of eminent domain by the cooperative. The exemption provision in this regard shows expressly that the legislature deems the existence of the power of eminent domain in cooperatives a matter of public interest, but nevertheless it does not deem that it is a matter of such public interest as to necessitate commission control.

**Subjection of Cooperatives to Commission Jurisdiction**

The normal limitation of commission jurisdiction to public utilities does not mean that commission jurisdiction must be confined to public utilities. The memorable decision of Justice Roberts in the *Nebbia* case\textsuperscript{82} put an end any contention that commission jurisdic-


tion can extend only to a limited category of businesses. In that opinion it was expressly recognized that the dairy business "is not, in the accepted sense of the phrase, a public utility." The Court nevertheless upheld a very high degree of administrative regulation.

The extension of commission jurisdiction, however, would have to be warranted by special circumstances. Such special circumstances might be the use of highways, the existence of a monopoly with powers subject to abuse, competition unduly interfering with the regulation of public utilities or any other circumstance for which the police power of the state might be asserted. But the purposes for which commission jurisdiction could be extended would have to be related to the circumstances which justify the imposition of the regulation. As stated in *Stephenson v. Binford*, the constitutional question would be, "Does the required relation here exist between the condition imposed and the end sought?"

An illustration of the relationship which must exist between the regulation and the underlying purpose or purposes of the legislation appears in laws pertaining to the safety of the public in the use of highways. A duty, imposed by legislation with that end in view, upon a cooperative to obtain a permit for the use of highways would be valid so long as the conditions under which the permit was granted were related to public safety. A regulation of rates, however, would hardly seem to come within the purview of that purpose. Similarly, a basis for the detailed regulation and supervision contemplated by commission legislation would hardly seem to exist in a statute which merely purports to provide a method of incorporating cooperatives. Where a state simply sets up a method of forming a particular kind of corporation to engage in a given activity, the conclusion might be drawn from the absence of any relationship between the underlying purpose of the statute and the nature of the regulation that the imposition of the regulation is an unconstitutional provision in the incorporation statute aimed at converting a private enterprise into a public utility. If, however, a legislature sees fit, it would appear that it

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83 287 U. S. 251 at 272, 53 S. Ct. 181 (1932).
could withhold the privilege of operating as a corporation in a business affected with a public interest except upon the condition that the business is conducted for the public use. 86

An examination of the authorities leaves cold the heated cries of freedom by the cooperative and equality by the existing utilities. The issue turns merely on the meaning of the legal concept "public utility." If, on the one hand, a cooperative is a public utility, it has no right to the freedom for which it contends unless such freedom has been expressly and validly granted by the legislature. If, on the other hand, a cooperative is not a public utility, the public utilities cannot validly claim that the cooperative must be subjected to the same regulation which is exercised over them.

Cooperatives like any other entities are public utilities if they engage in an enterprise which is affected with a public interest and which is devoted to public service. Public service in the field of public utility law has acquired a particular meaning which has been distinguished from the service rendered by cooperatives to members. The distinction in some cases has been based on the ground that service to members is self-service rather than service to the public. A better distinction would seem to be that service to members results from a special relationship which differs from the ordinary customer relationship contemplated by public service. The decisions apparently are unanimous to the effect that service to members or even to a limited number of non-members does not make a cooperative a public utility. Cooperatives are held to be public utilities only where they offer to serve the public in addition to serving their members, or where, under the terms of a grant or franchise, a duty is imposed upon them to serve the public.

Cooperative legislation has had little effect on commission jurisdiction. In the absence of provisions expressly relating to commission jurisdiction, cooperative legislation should not be construed as affecting the extent of commission jurisdiction. Cooperative legislation may exempt cooperatives serving the public from commission jurisdiction, but such an exemption must rest upon a reasonable classification such as the doing of business at cost. Cooperative legislation may extend commission jurisdiction to include cooperatives serving only members, but if the detailed regulation of commission jurisdiction is to be so extended, it must be on the basis of a recognized legislative need for such regulation.