AUDITOR OF STATE: Power of cities and towns to own utilities to supply electricity or water service to adjacent community. Is private corporation engaged in furnishing utility services whose stock is owned by city or town, a public agency?

June 10, 1933.

Hon. Floyd E. Williamson,
Auditor of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion in the matter of the application of Cloverdale Municipal Water and Power Corporation filed with the Reconstruction Finance Corporation for a loan of $2,213,585.00. It is represented that the above corporation is organized under the Indiana General Corporation Act of 1929 and that the purpose clause of its articles of incorporation sets out as the purpose for which it is formed “To supply the town of Cloverdale, Putnam county, Indiana, and the inhabitants thereof, and the communities adjacent thereto with water for fire protection, and for domestic and commercial use, and other service including the generation of electricity by water power, the sale and distribution thereof, and to do all things necessary, convenient and incidental to the carrying out of the objects and purposes aforesaid.” (Our italics.)

It is further represented that the total number of shares into which its authorized capital stock is to be divided is four thousand, three thousand of which are to be preferred and of a par value of $100.00 per share and one thousand of which are to be common and without par value.

It is also represented that no preferred stock is to be issued in fact, it being proposed that all necessary funds will be obtained from the loan for which application is made from the Reconstruction Finance Corporation. It is further represented that all the common stock, except the directors’ qualifying shares, are owned by the town of Cloverdale, a town in Putnam County, Indiana, with a population of less than 1,000; and that the directors’ qualifying shares are held by the directors as trustees for the town of Cloverdale.

Section 605b, Title 15 U. S. C. A., provides in part as follows:
"The Reconstruction Finance Corporation is authorized and empowered—

"(1) To make loans to, or contracts with, states, municipalities, and political subdivisions of states, public agencies of states, of municipalities, and of political subdivisions of states, public corporations, boards and commissions, and public municipal instrumentalities of one or more states, to aid in financing projects authorized under federal, state, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities." (Our italics.)

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"For the purposes of this subsection, a project shall be deemed to be self-liquidating if such project will be made self-supporting and financially solvent, and if the construction cost thereof will be returned within a reasonable period by means of tolls, fees, rents, or other charges, or by such other means (other than taxation) as may be prescribed by the statutes which provide for the project."

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In view of the foregoing representations and the provisions of said section 605b, supra, you submit the following questions:

"(1) Is a corporation organized for the purpose as set out above under a general incorporation act whose stock is solely owned and controlled by a municipality, such authority being given under Indiana Statutes, Burns Annotated Indiana Statutes of 1926, section 11146, deemed to be a public agency of the municipality?

"(2) Has an Indiana municipality or a public agency thereof the right to sell electrical energy produced above its own requirements to individuals, firms and corporations located outside the corporate limits of the municipality?

"(3) Since the officials of the Reconstruction Finance Corporation have indicated that such a large loan
should not be made to such a small municipality, the question arises from a legal standpoint as to whether a municipality or an agency thereof should be discriminated against from a legal standpoint on account of the size of the municipality or the number of inhabitants thereof?"

I assume that the language "formed under a general incorporation act whose stock is solely owned and controlled by a municipality" as used in question (1) refers to the Indiana General Corporation Act of 1929 and to an Indiana city or town, and your questions will be considered upon the basis of that assumption.

I desire to consider first your question (2). In the case of The City of Crawwordsville, et al. v. Braden, 130 Ind. 149, the court held that a city, in the absence of statutory prohibition, has the implied power to generate and distribute electricity for the lighting of its streets and other public places and also to furnish the same to inhabitants to light their residences and places of business.

The court said on page 156:

"There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality."

Again, on page 159, the court said:

"The corporation possessing, as it does, the power to generate and distribute throughout its limits, electricity for the lighting of its streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health."

Similarly, in the case of City of Logansport v. Public Service Commission, 202 Ind. 523, at page 531, the court used the following language:

"The power of a city to operate an electric light plant to light the streets for purposes of safety, se-
curity and public convenience (like the power to operate a water plant to obtain adequate fire protection or water for the health and sanitation of a city), may well be included in the implied or incidental powers indispensable to the declared objects and delegated powers of a municipal corporation (and, in City of Crawfordsville v. Braden, supra, it was held that a city had implied or inherent power, not only to light its streets and to establish works to produce the electric current for that purpose, but also, in connection therewith, to furnish its inhabitants with light in their homes and places of business.”

The above recognized inherent power is supplemented further by statute (Acts of 1915, page 528; Burns Annotated Indiana Statutes of 1926, section 11133) which provides as follows:

“All municipal corporations of this state which now own or operate or which may hereafter own or operate electric light, power or water plants shall be and are hereby authorized, upon procuring the consent of the public service commission therefor to furnish either electrical current, or water, or both, to any person, firm or corporation, either municipal or private, living or situated without the corporate limits of the municipal corporation owning or operating such electric light, power or water plants.”

Your attention is called also to the following provisions of section 1 of chapter 107 of the Acts of 1931:

“All city or town may erect or construct water works, gas works, electric light works, heating, steam and power plants, or combination of such utilities, together with all buildings, lines and accessories necessary thereto, and may purchase or lease any such works and utilities already constructed, or in course of construction and owned by any other person; and may also purchase, condemn or lease other lands for said purposes; and may also extend, change and improve such works and utilities when so acquired, and may also lease any such works or utilities owned by the city or town to any other person, all for the purpose of fur-
nishing the inhabitants of such city or town and vicinity thereof with the use and convenience of any or all of such utilities.” (Our italics.)


The last quoted provision, it is true, does not apply to the question under consideration in its entirety, but it does show that under it a city or town may own a utility for the purpose of supplying service not only to its own inhabitants but also to the inhabitants of the “vicinity thereof.”

In my opinion your question (2) should be answered in the affirmative.

As already stated, section 605b, supra, provides that “The Reconstruction Finance Corporation is authorized and empowered:

“(1) to make loans to or contracts with, * * * public agencies * * * of municipalities. * * *”

Your question (1) is whether a corporation organized for the purpose as set out above under the Indiana General Corporation Act of 1929, whose stock is solely owned and controlled by an Indiana city or town, whether such a corporation is a public agency of a municipality within the meaning of the foregoing provision. The term “agency” as above used is evidently synonymous with “instrumentality” and does not refer to or mean simply a person or corporation acting for the city or town. I do not think it can be said that such a corporation represents the town which owns its stock in the sense that an agent represents his principal; but I do think that such a corporation is an “instrumentality” of such town, a means by which the town may accomplish a purpose for itself which it may and in many instances certainly could not accomplish without the use of this or some other instrumentality. I think the opinion of the court in the case of Clallam County v. United States, 263 U. S. 341, is applicable. In that case, an action was brought against Clallam County, State of Washington and its taxing officers for a decree cancelling the taxes levied by the county and state for the years 1919, 1920 and 1921 upon land and other property to which the United States Spruce Production Corporation had the legal title. The question was whether the property of the corporation was taxable in view of the facts set out in the opinion as follows:
"The act of July 9, 1918, c. 143, ch. xvi, sec. 1, 40 Stat. 845, 888, authorized the director of aircraft production to form one or more corporations under the laws of any state for the purchase, production, manufacture and sale of aircraft, or equipment or materials therefor, and to own and operate railroads in connection therewith, whenever in his judgment it would facilitate the production of aircraft, etc., for the United States and governments allied with it 'in the prosecution of the present war.' By section 3 within one year from the signing of a treaty of peace with Germany proceedings were to be begun for the dissolution of the corporation so formed. In August, 1918, this corporation was organized under the laws of Washington. The stock except seven shares for the trustees of the corporation was subscribed for by the United States and those shares were controlled by the United States and all property and dividends accruing from them were assigned to the United States. The United States conveyed to the corporation the lands and property now sought to be taxed and a partially performed contract under which these lands were to be acquired and a saw-mill and logging railroad were to be built. The corporation issued bonds that were all taken by the United States for cash or in payment for the property conveyed to the company. It proceeded to complete the railroad and mill and to get materials for aircraft for the use of the United States in the war and its activities 'were wholly directed to the government's program of production of airplane lumber. * * *'"

The learned justice in characterizing the relationship as above described said:

"In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and was used by it solely as means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. When the winding up is accomplished there will be a loss, but whatever assets may be re-
alized will go to the United States. Upon these facts immunity is claimed from taxation by a state."

Clallam County v. United States, 263 U. S. 341, at page 344.

The court sustained the claimed immunity.

In my opinion, your question (1) should be answered in the affirmative.

Passing now to your question (3), I do not think it presents a legal question. Section 605b, supra, simply authorizes and empowers the Reconstruction Finance Corporation to make loans and contracts under the conditions set out and with the states and public agencies therein designated. That question, therefore, in my opinion, necessarily addresses itself to the sound judgment and discretion of the Reconstruction Finance Corporation.

ACCOUNTS, BOARD OF: Construction of chapter 250 of Acts of 1933 concerning "Flood Districts" as to who shall collect waived assessments.

June 12, 1933.

Hon. William P. Cosgrove,
State Examiner,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter referring to chapter 250 of the Acts of 1933 and submitting the following question:

"Does this amendment of 1933 make it the duty of the city treasurer as ex officio treasurer of the board to collect waived assessments or will the county treasurer continue to collect these assessments as certified to him by the county auditor?" (Sections 10822 and 10824 B. R. S. 1926.)

Chapter 250, supra, amends sections 8 and 11 of chapter 81 of the Acts of 1915 as said sections were amended by chapter 2 of the Acts of 1920 and also repeals section 49 of said chapter 81 of the Acts of 1915 as the same was amended by section 13 of chapter 2 of the Acts of 1920. The title of the original act of 1915, supra, as the same was amended in 1920, Acts of 1920, page 11, is as follows: