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Supreme Court of Texas.
HILCO ELECTRIC COOPERATIVE, et al., Petitioners,
v.
MIDLOTHIAN BUTANE GAS COMPANY, INC., d/b/a Midtex LP Gas, et al.,
Respondents.
No. 01-0336.

March 20, 2002.

Appearances:
Scott Steven Cooley (argued), McGinnis, Lochridge & Kilgore,
L.L.P., Austin, TX, for Petitioners.
Michael G. Cosby (argued), Pakis Giotes Page & Burleson, P.C.,
Waco, TX, for Respondents.

Before:

James A. Baker, Craig Enoch, Thomas R. Phillips, Priscilla Owen,
Harriet O'Neill, Wallace Jefferson, Xavier Rodriguez, Nathan L. Hecht,
Deborah Hankinson.

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JUDGE: Thank you. Please be seated. The Court is ready to hear from petitioners, HILCO Electric v. Midlothian Butane.

SPEAKER: May it please the Court. Mr. Scott Cooley will present argument for the petitioners. Petitioner --

ORAL ARGUMENT OF SCOTT STEVEN COOLEY ON BEHALF OF THE PETITIONER

MR. COOLEY: May it please the Court. Good morning. My name is Scott Cooley and along with Mr. Clay Barton and behind me is Martha McGregor here to represent HILCO Electric Co-op and HILCO United Services, Inc. Just a little bit of background. HILCO United Services was created in 1997 as a wholly-owned subsidiary of the HILCO Electric Co-op. The Electric Co-op had asked its members what are some services that you feel like you could use, and overwhelmingly, it came back that they could use the propane service and HILCO United Services does business as HILCO Propane as we've shown in our briefs. So, by creating this subsidiary, what HILCO Electric essentially had done was to come up with a way to, first of all, satisfy the needs of its members in era -- a new era of competition and restructuring of the electric utility industry and second, it did it in a way that, as you know, it's our position it goes perfectly in line with what the legislature did in

House Bill 3203 in 1997.

Now, before I get to the nuts and bolts of that statute, there's an argument that the respondents have made and it's tough to know what to call them. Some of them are propane dealers. They were the plaintiffs in the trial court, as you know. But there's an argument they've made and I guess it's really kind of a premise that it's one of those things I kind of feel like I could catch myself because if you get set enough you start to accept that it's true and it just isn't and that is that HILCO Electric is now operating as a for-profit or operating at least a for-profit part of its own business and that's just not true. HILCO United Services is a separate legal entity. As the Court knows, the Texas Corporation Law provides for that. It was created in that manner. HILCO Electric is still an electric cooperative organized under the Electric Cooperative Act.

MR. COOLEY: The question here is not, "Can HILCO Electric itself engage in a for-profit propane business?" The question is very narrow and that is, "Can HILCO Electric create and own a subsidiary that is for profit?" And will it -- it will engage in the for-profit propane business. And our answer is, "It absolutely can as long as the purposes of the electric co-op are the ones that are furthered by the creation and ownership of the for-profit subsidiary. House Bill 3203 --

JUDGE: And what happens to the profits, if any?

MR. COOLEY: I'm sorry. Your last question --

JUDGE: What happens to the profits of the subsidiary? Are they subject to rules of distribution of the co-op?

MR. COOLEY: What -- They are subject to those distribution rules and I wanna make the distinction again that they are profits of the subsidiary and, of course, the code, the Utilities Code provide the electric co-op cannot operate as a profit to its members. But yes, the profits, if there are some, in fact; there aren't always profits, as you know especially with a young company, do come back up to the electric co-op and they are designated as such, as non-electric revenues, and if there are costs that are less than these revenues then what the code provides is that they can be put -- given back to the members in a capital distribution. There has not been -- it's not in the record and I can represent to you that there has been a situation where the members of the co-op, if they have received capital back, it has put them above what they have contributed because they would be getting electricity for free. That has not happened but the -- essentially the profits of the subsidiary, to answer your question, yes, are subject to the same distribution rules once those revenues go back up to the electric co-op.

JUDGE: You said that the -- a survey was done and the members said that, "What we would like is propane service."

MR. COOLEY: Yes, sir.

JUDGE: What if they said, "What we would like is -- you know -- for HILCO to put together a car dealership subsidiary and make profits on that or McDonalds franchises or -- what are the limits to what they can -- what -- what HILCO can create in terms of the subsidiary that benefits its membership?

MR. COOLEY: I think that non-limit, of course, is the most practical one and that is that this is a member of an organization. And the members -- you're talking about a vote by members to create a car dealership or a liquor store is the -- favorite example.

JUDGE: That's a practical limitation, but what -- what -- is there any -- any kind of statutory limitation or constitutional or what -- what are the limits on what can be created under 3203?

MR. COOLEY: I think now that the purposes of the Non-Profit Corporation Act are incorporated, the limits are that the creation has to further those purposes which are set out in 2.01(a) of the Non-Profit Corporation --

JUDGE: And one of those -- one of those services is it just benefits the membership, right?

MR. COOLEY: No. The purposes that it would -- that it can create -- that it can further, excuse me, are as broad as the legislature could have written in my view.

JUDGE: So there aren't any limits?

MR. COOLEY: Charitable, benevolent. Well, there are because they have to be necessary, convenient and appropriate. The powers that are exercised, in this case, the power would be the creation of the car dealership. The statute does state that they have to be necessary, convenient and appropriate to the purpose of the electric co-op. But yes, the purposes appear to be unlimited by Section 2.01(a) in the Non-Profit Corporation --

JUDGE: Well, what about combining funds from these other sources, meaning this propane subsidiary with an unclaimed fund to provide, to promote educational opportunities and to stimulate rural and economic development. Is that still the statutory scheme?

MR. COOLEY: It is and that is --

JUDGE: All right. So, would it be a fair statement to construe that that way? Any funds received from the propane operation have to be used along with unclaimed funds to provide educational opportunities and to stimulate rural economic development.

MR. COOLEY: I wouldn't say that all of the funds from the subsidiary --

JUDGE: Why not?

MR. COOLEY: Because that provides an avenue for use of those funds but there is still the overarching purpose of the co-op in their many overarching purposes and it'd be our position that the funds could go to other things to further the purposes that the co-op has undertaken.

JUDGE: Well, but didn't the scheme evolved from a change from this cheating unclaimed funds to the state.

MR. COOLEY: It did. Yes, your Honor.

JUDGE: And now has been expanded to not only involve unclaimed funds that can remain in the hands of the co-op but other unclaimed funds that could be combined from economic development from other sources. Why doesn't that limit the use of any funds from the propane thing to those two things rather than to your interpretation that it could be used for any purpose the co-op can be involved in?

MR. COOLEY: Because the way I read 74.3013 of the Property Code, non-profit co-operative corporations may combine the development funds with funds from other sources and those other sources are essentially defined in that amendment as "other business and commercial activities." I don't read the limitation that the other funds may only be used in combination with the unclaimed funds.

JUDGE: Well, so what do you use these funds for, if any, that come from the propane business?

MR. COOLEY: They can be re-invested at the level --

JUDGE: No, I'm not asking what they can be. What do you use it for? What does HILCO use it for?

MR. COOLEY: My understanding is as of now, because it's still getting off the ground, it has not operated at a profit until very recently, the last three months as I understand it. And those funds have been brought up into the electric co-op and in fact, if it is in

keeping with the code provision that says that "the co-op can operate or profit to its members" which it has been in keeping with that so far, there is -- it has been in capital distribution of funds to the co-op's members.

JUDGE: Let me ask you. Do you -- these purposes -- At the start you described the scenario of the members all vote to start a liquor store and I didn't -- and I'm not sure you finished that scenario, but you then went on to saying, "Yes, it's as broad as the legislature could say what the purpose of electric co-op is. So, tell me why this Court could say you could -- I mean -- and well maybe not; tell me why you would not be able to have the members vote on having a subsidiary created through the co-op that would own a -- I won't use liquor stores to [inaudible] but -- I don't know -- something -- chicken and feed store or some grocery store or something like that -- a member-owned grocery store that might be a for-profit organization. Describe why they couldn't do that but they can have a propane company?

MR. COOLEY: I would not stand here and say they couldn't do that.

JUDGE: Do you think they couldn't do it before 1997?

MR. COOLEY: No, we think that we could because the powers provisions of the Electric Co-op Act were specific enough. But the key there was -- the only purpose allowed, at least arguably, was rural electrification --

JUDGE: Right.

MR. COOLEY: And that's no longer the case.

JUDGE: But if that was -- that seemed like a fairly big change. And why would it be introduced in a bill that relates to the disposition of unclaimed funds?

MR. COOLEY: Because our answer to that is if it's related to the distribution of unclaimed funds but it also clearly was the most significant portion of the amendment, states two purposes: that is, disposition of unclaimed funds, but also the stimulation of rural economic development.

JUDGE: I noticed that two thirds the way through the extensive briefing in this case that I haven't read a word of legislative history and I started to rejoice, in fact. Go ahead. [Laughter]

MR. COOLEY: Believe me --

JUDGE: They've come to their senses.

MR. COOLEY: I rejoiced when I --

JUDGE: But then it made me suspicious then I wondered what does the legislative history should they do? Did anybody in the legislature ever say that this is gonna change the way co-ops do business?

MR. COOLEY: We have not found that legislative history. If it had been in our favor and we would probably have put in there. Presumably, the other side would have as well.

JUDGE: It actually says the opposite. And then, I mean when Mr. Clay even testified in the Senate Committee about what's -- what is this specific change over in Section 4, "What's it gonna do?" He said, "Oh, it's just a conforming amendment release. It just makes it all work together." But he didn't say, "It's gonna let -- REC is going to the business -- liquor business or car business or propane business or any business.

MR. COOLEY: Right. And presumably he was referring to the Property Code because what -- what he was saying was Section 18 of the Electric Co-op Act is to conform to the rest of the amendment. Section 74.3013 specifically says that this is the kind of thing that can happen: non-profit co-operative corporations, of which we are one, can engage in these other businesses through affiliates with no limitation on for-

profit or not-for-profit and those funds can then be used to stimulate rural economic development. Admittedly, stimulating rural economic development is a broad charge but it is the charge that the legislature put in House Bill 3203.

JUDGE: So, it is fair to say then, even though it had no brief, that when this went on locally, consent in the House and maybe in the Senate, I have forgotten, nobody said a word about the issues that we're talking about here today. One-way event.

MR. COOLEY: That would be my understanding based on our research, exactly what you're talking about. And one thing that we wanna point out -- I notice that my time is almost up is that I've said that Subsection 18 is perfectly consistent with the Property Code 74.3013 as part of the amendment, but the purposes that electric co-ops can now further are listed in by corporation, Article 2.01(a) of the Non-Profit Corporation Act. The Waco Court's premise which was faulty from the get-go was, "But this is a non-profit entity. It cannot be in any way be related to for-profit activities because its purposes are non-profit." We admit the purposes have to remain non-profit. We're not here to argue that losing battle but 2.02 of the Non-Profit Corporation Act specifically allows non-profit corporations to own shares of for-profit or non-profit subsidiaries.

JUDGE: Well, we'll give you that but I'll still ask the same question. What can you do with the money that you receive from your for-profit subsidiaries under the statutory scheme?

MR. COOLEY: It can -- now I'll move to what can be done with it. It can be re-invested in the for-profit subsidiary. It can be brought up to the -- to the electric co-op and it can then be combined -- the electric co-op combines it -- with the unclaimed funds and puts it towards rural scholarship and again broadly stated rural economic development. And as Chief Justice Phillips alluded to --

JUDGE: Oh, so you do agree that whatever has been a profit in the last three months is supposed to go into the account that holds the unclaimed funds?

MR. COOLEY: It's our position that it can. The legislature allows it --

JUDGE: But do you think it's carte blanche with whatever profit's made and there's no limitations?

MR. COOLEY: May I answer?

JUDGE: Yes, please.

MR. COOLEY: The limitations are that whatever is done with it has to further the purpose of the co-op. But yes, to answer your question, it has to be in correspondence with what the Code says, "Electric co-ops can deal with revenues," and that's what Chief Justice Phillips alluded to before. But those are the limits and they are in the Electric Co-op Act.

JUDGE: But there really are no limits. That's what I'm getting at. I mean, any money that comes into a rural community can be said to stimulate rural economic development, I would think. And so, you can have the co-op here and IBM just below it, right, or Microsoft, or I mean anything that can generate profits could, you know, legitimately serve that purpose?

MR. COOLEY: It could legitimately serve those purposes but the limits are still gonna be in effect that it cannot operate as a profit to its members. We have not come to that point yet, I'll be honest with you. So, we had thought about it. We don't know exactly what we will do if the for-profit subsidiary makes such a profit that there's money coming out our ears but the Code says what electric co-ops can do with

its revenues, we don't see anything fishy, we're not bound by that.

JUDGE: Thank you, Counsel.

JUDGE: The Court is ready to hear argument from respondents.

SPEAKER: May it please the Court. Mr. Michael Cosby will present argument for the respondent.

ORAL ARGUMENT OF MICHAEL G. COSBY ON BEHALF OF THE RESPONDENT

MR. COSBY: Good morning. May it please the Court. Mr. Hill, Mr. Moore, and Mr. Rogers and I represent the respondents who are all members of the co-op. Yes, some of them are propane dealers, some are not, but their common interest is and their standing has arisen from their membership in the co-op.

MR. COSBY: We want to begin with the proposition that was actually cited by the petitioners in their brief on page 21 with respect to "an approach to interpreting statutes." They cite this Court's opinion in *Fitzgerald v. Advanced Spine Fixation Systems* where this Court said, "We look at the entire Act and not a single section in isolation." What we did, therefore, is attach to our brief on the merits and under tab A the entire House Bill of 3203.

MR. COSBY: The entire House Bill can be viewed as a whole. And I think it's viewed just as a whole rather than the manner in which those specific amended provisions were reintegrated into the codes. The reason is this. If you look at House Bill 3203, you have to ask yourself, "What is this Act? What wrong was sought to be remedied? What was the objective here that a legislator thought was necessary to propose this legislation and see it through to a conclusion? Just a fact to mention that there's a comment; well it's just conforming legislation -- conforming to the degree to do what?"

MR. COSBY: Well, hypothetically speaking, I have an uncle who's a farmer in Hill County. He moved into a house, a new house. He will need electricity. He'd likely have to pay a deposit to get electricity for his new house and I suppose he got called away to California to have a new job and left no forwarding address. What happens to that \$100 deposit? It becomes unclaimed money. So unclaimed money is what this statute is all about. This unclaimed fund accumulates and there needs to be a means by which to dispose them. And the legislature, through this House Bill, permits certain enterprises, certain cooperatives to dispose them. But why -- why is legislation necessary? Because these are special purpose corporations. Special purpose corporations don't have broad powers. They have only the powers that the legislature gave us. The *Upshur* case is sort of scattered throughout our brief and we rely on it heavily obviously because *Upshur* in 1957, this Court directly dealt with the powers of an electric cooperative. Electric cooperatives are governed by and their powers are derived from the Act which creates them.

JUDGE: Why would the members of a co-op object to an expansion of its activities that might come up?

MR. COSBY: Well, let's look at --

JUDGE: Unless they were competitors.

MR. COSBY: Let's look at Denton's County co-op. Denton County Co-op went bankrupt because it tried to diversify: *Dallas Morning News* and the *Corporate Star Telegram* in December of 2001. Of course, that's not quite -- who'd ever guess a hypothetical reason why they might not want

to. We don't want to invest our money -- our membership into a potentially money-losing entity. As Mr. Cooley knew that they went in business in 1997. This is 2002 and then just now broke even, of course, that's no part of the record either, but they've been investing in a money-losing proposition for a long time. That's a reason -- a rationale not to wanna do it. And this members' survey was distributed. Of course, we can make a members' survey read anyway you want to, to elicit the interest in propane business that you want to elicit. And we -- we've noted that in our brief and that the members' surveys are part of record [inaudible]. But that -- that's a rationale for not wanting to.

JUDGE: And do you think that there's no way to read the original Act not with just the amendments that apply but there's not gonna be the original Act to say that an electric cooperative couldn't branch out and do some other activities.

MR. COSBY: That's correct, your Honor.

JUDGE: Even if the money that's left over for economic development -- I guess the money that's left over for economic development doesn't -- would include creating jobs or trying to encourage other businesses or anything like that.

MR. COSBY: I'm not sure I understand the question on that prior to 1997 prior to this amendment?

JUDGE: Right.

MR. COSBY: Prior to this amendment, any money left over in unclaimed fund --

JUDGE: That is cheated.

MR. COSBY: That's cheated. So now, under 3203, the first part of it is set out in tab A bar of our index, demonstrates the mechanism by which you can take those funds and you pay them to the comptroller and you account for it. Okay.

The second half of the statute or the House Bill deals with the various entities affected by this new opportunity to keep local funds local instead of sending them to the good post in Austin. And so, several entities had to have their statutory derivative powers amended slightly in order to accomplish that. And all of those are set out in the House Bill.

JUDGE: There's a practical manner to get the money -- Did the comptroller send the money back to the counties?

MR. COSBY: I don't know that.

JUDGE: One is stimulate rural economic development.

MR. COSBY: Well, if we read this as a whole, it's clear we're dealing with funds, almost identifiable funds. You can either create a scholarship fund or an economic development fund as it's stated in most of these -- most of these provisions. If there is one or two instances when it gets a little broader in the language where it says "stimulate rural economic development" but read in context, it seems to be pump priming. The legislature has often created economic development corporations or funds and if we're gonna construe the words "economic development fund" consistent with the way the legislature did previously, we're talking about pump priming funds that can help the local folks create jobs, create some opportunities, help rural kids with scholarship money for his college and keep the money locally for these specific local uses. I don't think --

JUDGE: But they didn't -- they don't seem to have thought that would be more than a million dollars. There's a million-dollar cap, right?

MR. COSBY: I believe there is, your Honor.

JUDGE: And actually, there's a testimony that it might have been a whole lot lesser than that. It seems to be a fairly modest stimulus.

MR. COSBY: Our understanding is it is a modest stimulus. This is not the type of bill that was intended to change the law in a dramatic fashion argued by co-owners.

JUDGE: But since cooperatives may engage in other business and commercial activities in their own behalf, entities or subsidiaries and affiliates as deemed necessary in order to stimulate rural economic development.

MR. COSBY: To provide logistic accounting -- [inaudible]

JUDGE: [inaudible]

MR. COSBY: Okay. Well, it's -- it's to provide and promote educational opportunities just they can combine these funds with other funds to do those things.

JUDGE: Propane for kids.

MR. COSBY: I'm sorry.

JUDGE: Propane for kids.

MR. COSBY: Well, we disagree. When you get past the mechanical aspect of the statute, what we believe in the broad sense is it was intended to do and that was to simply amend these specific special purpose corporation ever so slightly. In order to permit this to occur, the primary provision relied upon by the co-op is this Section 18 which was amended as part of the list of powers to pick up where it left off. It used to be that the co-ops had powers as may be necessary to bring in or appropriate to effectuate the purpose for which the corporation is organized. Used to be a period. The legislature added including other or additional purposes benefiting members or nonmembers whether directly or through affiliates described in Section A of the Non-Profit 2.01. Well, what are those purposes listed there?

Mr. Cooley said, well, that's where you get into the argument about. Well, it's as broad as you want it to be. We disagree strongly with that. There's a statutory construction concept to be a latin phrase of *ejusdem generis*, of course different people say it differently, but if you've got specific words and general words, the specific words are gonna control the general. And on page 11 of our brief, we set out what those purposes from the Non-Profit Act are that "they're limited to," "they are charitable, benevolent, religious, eleemosynary, patriotic, etc." Those are not liquor stores. Those are not propane businesses. Those are not for-profit exercises. Those are things that are consistent with the notion of scholarship funds, perhaps some economic development fund for local use --

JUDGE: But --

MR. COSBY: -- But non-profit.

JUDGE: But the non-profit corporation can invest in a for-profit corporation.

MR. COSBY: Well, there's a problem with that. 2.03 (b) of the Non-Profit Act says that if it does that the Non-Profit Act does not apply to electric cooperatives. It just doesn't. And therefore, the powers that most non-profits have to do that, to invest in for-profit or not for-profit companies, electric cooperatives have never made that. And we don't think that this changed anything. All it did was permit this limited expansion of its powers to engage in purposes benefiting members or nonmembers as described in Section A 2.01 which is the list of charitable, benevolent, eleemosynary type activities. It does not give them the additional power to own stock in a subsidiary for profit or otherwise. That's a power that they didn't bring. They certainly could have but did not in our reading of the statute.

JUDGE: Well, but if a non-profit can do those things, what in this language keeps electric co-ops?

MR. COSBY: 2.03(b) keeps nonprofit -- keeps co-ops from doing it.

JUDGE: 2.03 of the Non-Profit Act?

MR. COSBY: Correct. Expressed as --

JUDGE: -- [inaudible] says at 2.01.

MR. COSBY: That's correct. And it's the only expansion of power -- was an expansion to do the purposes described in 2.01(a). If they wanted to adopt all of the powers of non-profit, they could have done so.

JUDGE: That would be a [inaudible]. What would they have said differently?

MR. COSBY: Well, they could have said, instead of "additional purposes benefiting members or nonmembers," limiting it to 2.01(a), they should have expanded it to "all powers of the Non-Profit Act" instead of just limiting it to the purposes described in 2.01(a). It was a very limited deal. This -- and this is consistent with the expansion of powers for the other effective special purpose entities plus other effective special purpose entities also add some little provision within their special purpose act amended slightly to permit them to do that which was the purpose for this deal, and that's to expose of or keep these unclaimed funds, because otherwise, they were going Austin. So, if it was a -- hope I've answered your question.

JUDGE: How did categories in 2.01(a) -- how can they be said to be used in a way that stimulates economic development in the rural areas?

MR. COSBY: Well, I think an economic development fund whereby there is some local pump priming could fall within that. It's a missionary, educational, scientific, social, charitable, benevolent -- I think that that's not inconsistent where I do think that a formation of an exercise of a for-profit corporation, whether it's a propane or car dealer or chicken feed, is not consistent.

JUDGE: Well, part of -- part of those in agricultural and horticultural activities which could be, I mean -- those aren't necessarily non-profit. They could be, you know, farming operation or something. So, could -- under your analysis, could a co-op create a for-profit agricultural enterprise?

MR. COSBY: No, not in my analysis.

JUDGE: Why not?

MR. COSBY: Because these are powers -- these are the limited purposes of a non-profit corporation. Electric cooperatives are non profit. There's a reference over to the non-profit section or the non-profit purposes for which -- for which they may expand their powers slightly. If they wanted to permit non-profit electric cooperatives to get into for-profit business, it was easy to say so. Just as I just said, there's plain English language to use to do this. To bury that change in the law, that expansive change in the law, in this little House Bill just designed only to deal with unclaimed funds, is way too dramatic which, of course, leads us over into our secondary argument which we don't think we ever have to get to and our secondary argument with respect to the constitutional issue.

MR. COSBY: On pages 21 and 22 of the brief of the petitioners, pardon me, they walked through how, if you look at the -- these Acts that were amended, for example, the Agriculture Code, that it was amended to permit delivery of money to a scholarship fund for rural students, that the Marketing Association Act was amended, it's also to permit that to occur. But then they say "But wait a minute. If this Section 18 changed the Electric Cooperative Act, that's completely

different. It expands our powers greatly. It permits us to go into for-profit businesses. And the legislature decided to treat us differently than they do these other entities." Then we say, "Wait a minute. Why did they -- If they're treating you differently, they're giving you new powers that they didn't give everybody else. And if the House Bill clearly says there's dealing only with the disposition of unclaimed funds, then there's a second subject buried in this bill. And you can't have it both ways. If there's a second subject buried in this bill that permits you all these additional powers that nobody else got ...

JUDGE: Well, what if the caption had been, "an Act relating to the action of operations of Rural Electric Co-ops and the disposition of unclaimed funds. I'm sure, that would be okay.

MR. COSBY: It would help but there's still no language within the rest of the Act which could give that power.

JUDGE: What does -- the petitioner points out though that you can't have a misleading caption problem anymore.

MR. COSBY: That's correct. But that doesn't make the caption irrelevant to the assessment that this Court has to make over whether they tried to bury two subjects in the same bill. And again we -- we agree with petitioner that this Court is duty bound to try to find a constitutional interpretation for the statute. We don't ever wanna get to the unconstitutional --

JUDGE: I'm not sure the constitutional is concerned about burying the subject of the bill as it was putting in two or three or four or five or even ten things in a bill that make people vote things that they don't wanna vote for.

MR. COSBY: Writers in Walgrove used the term [inaudible] in the cases. And I agree but -- but to that extent, we've been well-groomed. If -- if that expansive new purpose was intended by somebody in the legislature to occur because there's certainly things that you've read and no debate on that issue on whether it's a good thing or bad thing to expand and permit electric cooperatives to diversify. All the amicus curiae or several amicus curiae said, "Well, you know, it's a good thing, it's a national treasure, it's a growing thing." Those are great policy arguments to make but they're not to made here. They're gonna be made next door. And that's where we think that that argument ought to be taken whether this is a good idea for for non-profits to be able to engage in this. And we're not here to argue. As the Upshur case has stated in 1957, the court saw this sort of thing coming and it said "that it was not surprising to discover that extraneous matters have crept into the case." The court said, "We cannot as a court is concerned in this case with questions of public policy. That is a matter for the legislature. Our duty to -- is to interpret the language of the Electric Cooperative Corporation Act and in that case, they clearly stated that the Electric Cooperative Corporation Act is a limited- purpose Act, that the only powers an electric cooperative has are those strictly prescribed by statute and no more, and those powers were not expanded in this House Bill to permit them to enter a non-profit or for-profit corporation. They were not expanded to permit them to own shares in for-profit corporations. The Non-Profit Act still contains that prohibition, but it does not apply to the Electric Cooperative Act. And therefore, we don't think that any statutory interpretation can get that from here to there. We've relied on our briefs in our argument and I've saved a couple of seconds, if anybody has a question.

JUDGE: Any other questions? Thank you, Counsel.

MR. COSBY: Thank you very much.

REBUTTAL ARGUMENT OF SCOTT STEVEN COOLEY ON BEHALF OF THE PETITIONER

MR. COOLEY: Just a few things. We're gonna respectfully disagree with the purposes from the Non-Profit Corporation Act are as limited as Mr. Cosby says they are because what the actual language says "such purpose or purposes may include without being limited to" and then it goes on through the laundry list. And we said this in our brief and I'll reiterate it. We feel like the court of appeals unquestionably confused purposes and powers. And I feel like Mr. Cosby just did the same thing because he said liquor stores are not charitable, are not benevolent, neither is propane gas. That is the exercise of a power by the electric co-op. The purposes are what those ventures are to further. They are not the same thing. You cannot say, "Well, the powers section doesn't say any word that they can create a liquor store. Note that the powers section is very explicit in saying that "it can carry out any and all acts and things to benefit members and nonmembers directly or through affiliates" which is exactly what HILCO U.S. is.

JUDGE: Petitioner will be impleading. Your position on that is because the co-op is -- that's its mission anyway and that's the nature of its membership, anything it did, car dealership or whatever -- Bloomingdales or whatever -- would be in the furtherance of that purpose by that mission so that there's none -- So, the court of appeals is right about this. Under your position there are no practical limit at all. There are no limits, period, on what the cooperative --

MR. COOLEY: As long as the power that they exercise is necessary, convenient or appropriate to further its purposes, then my answer to that has to be "no." The legislature chose not to put the type of limit that you're talking about in the statutory language and I would say the same thing Mr. Cosby did. If they need to be in there, it needs to be taken up in the legislature.

JUDGE: Mr. Cosby said that 2.03 can be read to prohibit the electric cooperative in engaging and having subsidiaries for profit and can you respond to that?

MR. COOLEY: Absolutely. Predictably, we disagree with that. All 2.03 (b) says is the Non-Profit Corporation Act as a whole does not apply to electric co-ops. There's no question about that, but certainly, the Electric Co-op Act has now incorporated Section 2.01 of the Non-Profit Corporation Act into the Electric Co-op Act. And our point regarding that is simply that the entire premise of the court of appeals' opinion which was, "You know -- come on, non-profit corporations can't own for-profit subsidiaries. Their purposes are non-profit. Or I'm sorry, electric co-ops can't own for-profit subsidiaries because their purposes are non-profit." It's completely guided by the fact that non-profit corporations whose purposes are non-profit can own for-profit subsidiaries. And our position would be that our powers of provision is even broader than the laundry list of powers that is found in the Non-Profit Corporation Act.

I wanna do it very quickly with "one subject rule" because we feel like the Court is going to get to it because we feel like the statute is gonna be found to be valid and in that case, the "one subject rule" will be analyzed. Our position there and I will quote the Court's opinion in Gimenez which said, "any sort of code necessarily involves many different kinds of individual provisions because it involves those

provisions." Nothing in this letter will violate the "one subject restriction" if it has any logical relationship to the general subject. And the provision at here not only -- at issue here not only has a logical relationship to the general subject but there is an actual reference as I've talked about before in the Property Code amendment portion of the statute to the exact kind of activity that it is -- that we're saying we're allowed to engage in and that's significant because we were able to find one case where the Austin Court of Appeals invalidated a statute based on the body of the statute via the bill. And the courts specifically singled out the fact that that there was no reference in either the so-called road provision to other portions of the statute and consequently, no reference in the other portions of the statute to it. That's not the case here. We don't have a specific reference to Subsection 18 in the Property Code Provision but we do have a specific reference like I said to the exact type of activity that it is that we are trying to and are engaging in at this point. It can't be mistaken that Subsection (g) says that there are affiliates that can be carrying out activities within the [inaudible]

JUDGE: Let -- let me ask you this one question. There are some 60 to 70 electrical co-ops in Texas. Is that right?

MR. COOLEY: Yes, ma'am.

JUDGE: What percentage of those operate for-profit corporations or do you know?

MR. COOLEY: I don't know the answer to that. I can -- I can say each of the amicus brief filed by Texas electric cooperatives, they said many. They said many owned for-profit subsidiaries. I know of a couple, Fernell's, if you drive by their office on 620, you can see their for-profit subsidiary signed right below it.

JUDGE: But then -- okay. So, if we were to hold that those were not legal, that you could not do that, what happens to those for-profit subsidiaries?

MR. COOLEY: I think the only -- the only answer is people are out of jobs, they would have to be the standard.

JUDGE: Or spun off.

MR. COOLEY: Or spun off.

JUDGE: I'm just trying to figure out what -- what effect holding it if we were to rule that by the hand.

MR. COOLEY: Absolutely. I think that if you would have that effect -- if not people losing jobs and like you said [inaudible].

JUDGE: So what about -- I guess I -- it's not so much a policy question I'm asking as if we were to hold that they have been operating illegally. What are the ramifications of that decision?

MR. COOLEY: I can envision suits by other members like this lawsuit saying, "Well, look at you've been doing. You've been wasting all of our money." If indeed that's the case. I mean, if facts would support it, lawsuits, you know. I can't go so far as to say co-ops are gonna suffer but I can -- I can say that there is a new era of restructuring that this system [inaudible]

JUDGE: Well, we can't really say that unless we know what percentage of non-profits -- I mean, for profits there are.

MR. COOLEY: We can't really say well [inaudible]

JUDGE: To be fair that there's some [inaudible]

MR. COOLEY: Right. Right. Those co-ops that presumably did create for-profits because of the restructuring.

JUDGE: We don't know how many. That's all.

JUDGE: Any other questions? Thank you, Counsel. As we close the argument under Section 12, we will take another recess.

SPEAKER: All rise.

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