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CONTROL OF PUBLIC UTILITIES IN MINNESOTA†

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CHAPTER I. INTRODUCTION

Section 1. The Establishment of Control by State Commission

IT WOULD be easy to say, "Regulation of public utilities by state commission has been a failure." Broad statements of this sort, however, are so indefinite that they reveal little more than the mental attitude of the writer. An examination of the evidence, on the other hand, shows that state regulation of local public utilities has fallen so far short of being satisfactory that we may safely state that such regulation as it exists to-day is not the final solution of the problem of control of these utilities.

The movement toward control of public utilities through state commissions was remarkable both for its rapidity and its generality. Within a few decades every state in the Union save one established

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a state utilities commission in some form, and control of utilities was largely taken from the hands of municipalities or other agencies and vested in these commissions. In only a scant minority of the states was municipal control of such utilities as telephones, gas, water, electricity, and street railways left intact. Commission regulation swept the country like a political reform.

Section 2. Present Criticism of Control by State Commission

Now we have had a test period for the device, and we have discovered that, as usual, inflated expectations meeting with modest results have produced a reaction. State control by commission has produced some results; it has also introduced some new difficulties. We are still confronted with the necessity for much careful, patient effort before we shall have worked out any satisfactory solution of the difficult and many sided problem of utility control. The easy device of leaving it all to a commission and substituting faith in the commission for careful consideration of all the factors, state, local, and regional, merely has postponed the necessity for effort devoted to working out a solution which will take account of the whole problem. We are in the third stage of a four stage cycle. Enthusiasm, disappointment, criticism, and reconstruction are stages quite plainly discernible in the careers of political reforms. We appear to be in the stage of criticism of state commission control of public utilities. It may be profitable to examine some of the criticism and see upon what it rests.

It is apparent, first of all, that the criticism goes beyond the mere normal discontent with any institution, which discontent may be ascribed to the fact that human beings are too varied to be united in complete approval of any human creation. The criticism is sufficiently widespread, intelligent, informed, and insistent to indicate serious defects in the subject criticised. Hormel[1] calls attention to increasing criticism of the present state of public utility regulation and says, speaking of events during the year 1929:

"On every hand was heard the criticism of the public service commissions for their failure to make utility rates reflect the decreasing cost of operation due to inventions, technological developments, and increased economies; and for their failure to constitute a public instrumentality capable of protecting the consuming public against the power and resources of the public utilities corporations."

[1]Hormel, Public Utilities Legislation in 1929, (1930) 24 Am. Pol. Sci. Rev. 109.

He pointed out that during the single year in three states, New York, Massachusetts, and South Carolina, commissions had been appointed to investigate the situation.

As experienced an authority in this field as Bauer repeatedly calls attention to the growing disappointment with regulation. He notes, "The question has been raised frequently whether the huge costs have been justified by the results."[2]

A recent book by Mosher and others[3] contains sharp criticism of existing conditions. The sub-title of the book indicates the attitude of its authors. The sub-title is, The Crisis in Public Control. Statements made in the book bear out the sub-title. "Rate making in 1928, despite a score of years of effort on the part of the regulatory bodies, is almost as hopelessly muddled, indefinite, and 'unscientific' as it ever has been."[4] At another point reference is made to "the rising tide of legislative proposals to abolish or restrict the state commissions."[5] Statements equally extreme by other writers are not hard to find.

"Without citing specific instances to prove that regulation has fallen far short of fulfilling the hopes of its advocates, it is enough to say that it has given little or no relief to the public so far as the larger utilities are concerned. By many who have studied the question, regulation in New York and nearly every other state has been declared a failure."[6]

All of the above quotations are not set forth as accurate and representative statements describing the present status of commission regulation. They are put forward not for their intrinsic truth but rather to illustrate the fact that all is not well with commission regulation and that the public is aware of it.

Section 3. Defects In Control by State Commission.

A. General.—Examination of the defects and failures of commission regulation which have caused the above criticism shows that many of them are not due to the necessary qualities of commission regulation as such, but merely to imperfections in such commission regulation as we have. If all the defects and

[2]Bauer, Effective Regulation of Public Utilities 11.
[3]Mosher and Others, Electrical Utilities.
[4]Mosher and Others, Electrical Utilities 35.
[5]Mosher and Others, Electrical Utilities 124.
[6]Malcom, Public Operation versus State Regulation, (1929) 18 Nat. Mun. Rev. 75, 76. See. also Groninger, Discontent with Public Utility Rate Regulation, (1929) 4 Ind. L. Jour. 248; also (1930) 19 Nat. Mun. Rev. 720, containing excerpts from the sensational address of American Ambassador Frederick M. Sackett at the World Power Conference in Berlin.

failures were of this kind, no more would be needed than the application of remedies and changes to the system as it stands. However, all the shortcomings are not of this sort. Control of public utilities, especially the so-called local utilities, by state commission is subject to some objections which arise from the very fact of such control. In order to have the problem before us it will be necessary to state briefly some of the defects which may be styled transient, and some of those which are inherent.

It is not the purpose to set forth at this point those specific matters in which the commissions have fallen short in the performance of their duties, such as failure to secure adequate reductions in the charges for electric current for domestic use, failure to prevent improper financing of the utilities, etc.; but rather to examine the system itself in order to discover the defects which have produced these specific failures to perform.

One of the defects in state commission regulation most frequently commented upon is the fact that it is inadequately financed. State legislatures have not made appropriations sufficient to maintain the technical staffs necessary in order to enable the commissions to obtain that thorough and constant knowledge of each utility company which is vital to complete regulation. Thus Mosher complains that commissions do not audit the accounts of utility companies, they merely accept them, for the reason that they have not the funds necessary to maintain auditing staffs.[7] Any ineffectiveness of commission regulation which may be traced to inadequate financing is transient and not peculiar to the system. Whatever agency or group of agencies is given control of the utilities of a state must be enabled to pay for the work if detailed and continuing knowledge of the operations of each utility is to be obtained, and without such knowledge control must be at best approximate and incomplete.

Further, the matter of insufficient funds for commissions is bound up with the question of the proper rate base, which will be dealt with more fully hereafter. If a better method of fixing the rate base than the one now required can be substituted, much of the existing resources and man power of commissions will be available for work at present neglected.[8]

[7]Mosher and Others, Electrical Utilities 181.

[8]A bill, S. F. 725 (H. F. 853), introduced during the legislative session of 1931, proposed an appropriation of $200,000 for securing a valuation of the telephone properties in the state of Minnesota. The bill failed of passage, but it serves to indicate the expense attendant on utility valuations. The Minnesota Railroad and Warehouse Commission, in its order, In the

Some of the ineffectiveness of commission regulation is ascribed to the fact that politics plays a strong part in the selection and performance of commissioners. This is likely to be true in those states where commissioners are elected.[9] An amusing incident is related concerning an aspirant for the office of railroad and warehouse commissioner in Minnesota. He addressed a meeting, and during the course of his speech declared that he sought the office in order to serve the public in the regulation of such vital necessities as water, gas and electricity. He did not know that the Minnesota commission does not regulate water, gas or electric companies. It is not inconceivable that by some political accident a man of this type might be elected. Such extreme ignorance of the business of the office sought is rare, but thorough knowledge of such business on the part of the candidate, especially if he has not filled the office before, is rare also. Bauer bluntly says, "after nearly a quarter of a century devoted to active regulation, we still find that a large proportion of the commissioners do not understand even the primary principles."[10]

Short terms and low salaries are likewise obstacles in the way of securing the best type of men for utility commissions. The terms of office in the different states vary from two to ten years. Salaries range from $2,250 to $15,000.[11] Few of the states prescribe the qualifications to be possessed by the commissioner.[12]

Politics plays its part in the performance of commissioners as well as in their selection. Such gross dishonesty as that cited by Groninger in calling attention to a case in which a public utility operator contributed $125,000 to the campaign fund of a candidate for the Senate, which candidate was at that time chairman of the rate making body of the state,[13] is not so common nor so important as the more subtle and often unconscious practice on the part of the public officials generally of making their official conduct serve the ends of political advantage.

Matter of the Application of the Tri-State Consolidated Tel. Co. and the N. W. Bell Tel. Co., etc., dated July 21, 1931, calls attention to the failure of the legislature to provide funds to enable the commission to complete rate investigation and recites, "because of the Commission's lack of funds to continue its state-wide telephone rate investigation, the investigation now pending as to the St. Paul exchange is indefinitely postponed."

[9]In twenty states the commissioners are elected by popular vote. Mosher and Others, Electrical Utilities 8.

[10]Bauer, Effective Regulation of Public Utilities 353.

[11]Mosher and Others, Electrical Utilities 9.

[12]Mosher and Others, Electrical Utilities 9.

[13]Groninger, Discontent with Public Utility Rate Regulation, (1929) 4 Ind. L. Jour. 248.

However, the fact that many incumbents are not fully qualified and some are incompetent is not peculiar to commissions. Neither is the playing of politics. Since regulation must be vested in some public body the problem of divorcing that body from politics and insuring the selection of competent members will be presented whatever the nature of the body. Means of attaining these ends are well known; civil service, appointment in place of election, long terms or tenure for life, a measure of independence from other governmental agencies, adequate salaries, and specified qualifications are all matters warranting consideration if the personnel and performance of commissions and their staffs are to be placed on a high level.

When commissions were first established, they were expected to make investigations of utility affairs, to discover and correct evils, to familiarize themselves with what utilities were doing, and to take steps on their own motion to regulate those utilities. The charge is made that they are not fulfilling this purpose; that they are more and more taking the attitude of impartial judicial tribunals awaiting the presentation of cases for them to decide.[14] In fact, the position of the commissions is a difficult one; they have been expected to represent the public in the ascertainment of facts and conditions, and then to decide cases involving those facts and conditions. In short, they are to prepare cases, particularly one side of cases, and then decide the cases. It is not strange that these functions are not continuing side by side, but that one is supplanting the other. Further, the tendency of the commissions to become mere tribunals for the decision of cases is contributed to by one of the factors already considered, that of inadequate financing. The commissions have not enough money to do all the work expected of them, especially in view of the vast burden imposed on commissions by rate cases to be decided under existing requirements as to rate base. The solving of the problem of finance will be of some assistance. Nevertheless, it is questionable whether it is sound policy to place in the same body the preparation and the decision of cases. One function calls for zeal on

[14]Mosher and Others, Electrical Utilities 20. An early instance of discontent on the part of a legislature with the inertia of a utilities commission is to be found in Minn. Gen. Laws, 1893, p. 412, Joint Resolution No. 4. The resolution pointed out that traffic on the railroads of the state had been increased and the costs reduced, but that the tariffs had not been revised, and called on the railroad and warehouse commissioners to exercise the powers granted them by law, and establish a schedule of maximum rates that would give to the people of Minnesota as fair rates as were enjoyed by the people of other states.

behalf of the public's rights, the other for impartiality and open mindedness. The tendency of commissions to assume a judicial attitude and to lose their zeal in representing the public interest may be inevitable by reason of the linking of incompatible functions. Coupled with inadequate representation of the public in controversies before the commissions due to the limited resources of municipalities and private persons, it presents a serious defect in commission regulation.

Another defect in commission regulation as it exists to-day is the inability of the commissions to deal with holding companies. In the first place, commissions have no control over holding company financing and security manipulations. Morehouse says:[15] "Certainly no rare discernment is needed to detect many cases of over-capitalization equalling that in early street railway and railroad days." The commissions generally lack statutory authority to regulate the security issues of holding companies. Further, it is doubtful whether such authority would be valid under the constitution if it were given them. In many instances the holding companies themselves operate no public utilities; they merely hold the stock of companies which do; hence it may be questioned whether they are subject to regulation as public utilities. Further, even if state commissions could validly be given control of security issues of holding companies, would such control be effective? Suppose a New York holding company owns no stock in any New York utility operating company, but does control companies operating utilities in Minnesota and North Dakota. It is difficult to see how any valid and effective regulation of the New York holding company could be carried on by Minnesota or North Dakota commissions. Further, it would be of little benefit if the New York commission were validly given authority to regulate the New York holding company. The company operates no utilities in New York; we could scarcely expect the New York commission to be informed as to the condition of the actual properties held by the New York company in states a thousand miles away. It may be argued that there is no need for regulation of the securities of holding companies; that so long as the state commissions are able to regulate the local operating companies it matters little to the utility using public whether the holding companies play catch with utility securities. Such an argument ignores

[15]Morehouse, Utility Regulation and Centralized Management, (1930) 15 Minn. Municipalities 377, 381.

the adverse effect on local companies which the crash of a holding company must have, especially if the holding company has brought about an organization of many local companies into a single system. Further, the argument loses sight of one of the purposes of utility regulation, a purpose already too much ignored; that is, the fitting of public utilities into the economic structure of the country in such a manner as to further sound economic conditions. It is quite commonly assumed in discussion of public utility problems that the parties involved are the utility using public and the companies. The fact is that the utilities are an important part of the economic structure of the country. The evils of speculation, inflation and manipulation in public utility securities cannot be confined to the holding companies engaged in such practices; they affect both the operating companies and the economic structure of the country.

Commissions likewise have no adequate control over contracts between operating companies and holding companies. Holding companies commonly sell operating companies materials, supervision, and technical services. Under the decisions of the United States Supreme Court it is uncertain whether effective control over the contract prices can constitutionally be given state commissions. The court in passing on the validity of charges made in such contracts and the authority of commissions to reduce those charges has looked to such matters as prices charged by others, good faith of the parties, and charges paid by other operating companies of the same system.[16] These tests are no tests at all. Prices charged by others are no standard of reasonableness if those others are other holding companies equally in a position to enact monopoly prices. Good faith is equally elusive; when does the contract price become so high as to indicate bad faith? The price paid by other operating companies in the same system likewise furnishes no standard of reasonableness. If the holding company charged too much to one subsidiary it is entirely possible that it would charge too much to the others.

When a contract has been upheld by the application of such tests, the commissions must allow the contract price as an operating expense of the subsidiary, otherwise they will be held to be usurping the function of management rather than exercising their right to regulate.[17]

[16]Houston v. S. W. Bell Tel. Co., (1922) 259 U. S. 318, 42 Sup. Ct. 486, 66 L. Ed. 961; Southwestern Bell Tel. Co. v. Pub. Serv. Comm. of Missouri, (1923) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.

Where a monopoly is enjoyed of the business of furnishing materials and services to operating companies, the reasonableness of the price charged should be made to depend upon the return earned upon this business by the company having the monopoly. The latest decision by the Supreme Court on the subject leaves some hope that state commissions may constitutionally examine this return in passing upon the reasonableness of such contracts.[18]

The Court said:

"We see no reason to doubt that valuable services were rendered by the American Company [the holding company] but there should be specific findings by the statutory court with regard to the cost of these services to the American Company."

This is far from equivalent to a direct holding that the reasonableness of the contract price depends upon the cost to the holding company of furnishing the service, including a fair return. The best that can be said is that the language of the court looks in that direction. No attempt was made by the court to reconcile this attitude with its previous holdings.

B. The Rate Base.—The inability of state commissions to control the holding company device is an objection to the present form of utility control which is growing increasingly serious, but the defect in commission control which is still the subject of the most widespread and insistent criticism is the rate base upon which a fair return is allowed the operating company. This is a subject upon which a staggering mass of material has been written; it is the storm center of a controversy in which lawyers, economists and engineers have been engaged for decades and are engaged still. No adequate exposition of the whole matter could be given in the space of a few pages; nevertheless the problem has such a direct bearing upon the desirability of the present form of regulation that its general outlines must be borne in mind.

When commissions were first established for the purpose of controlling such public utilities as gas, electricity, street cars, and the like, they were faced with the requirement under the federal constitution as interpreted by the Supreme Court of allowing the utilities a fair return on the fair value of their property. They set about determining that fair value, in general adopting the actual cost or prudent investment basis for arriving at such fair

[17]Southwestern Bell Tel. Co. v. Pub. Serv. Comm. of Missouri, (1923) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.

[18]Smith v. Ill. Bell Tel. Co., (1930) 282 U. S. 133, 51 Sup. Ct. 65, 75 L. Ed. 255.

value. That is to say, they sought to determine what the companies had actually and reasonably paid for their property, excluding fraudulent purchases at excessive prices, and the like. In the absence of reliable records as to what the companies had paid in fact, the amount it would cost to reproduce the properties was calculated. There was at that time little inconsistency in the two methods. The reproduction cost over a period of five or ten years prior to 1915 did not differ much from the actual reasonable cost of the properties, and was used as a substitute method of arriving at such cost in the absence of any reliable record of it. The commissions hoped in the course of years to value all the property of all the utilities under their jurisdiction, and from then on to keep track of the value of such property by the mechanical means of prescribed records of additions and replacements exceeding the cost of the replaced property, coupled with proper allowances for depreciation.

Then came the war and with it a skyrocketing of prices. The difference between original cost and cost of reproduction became important. Property built before the war could not be duplicated except at a greatly increased cost. The companies insisted that in valuing their properties the basis should be what it would cost to reproduce them. The United States Supreme Court in a long series of cases took the position that in valuing the utility properties substantial consideration must be given to the cost of reproduction.[19] The commissions have tended under the influence of these decisions to stress cost of reproduction in their determination of the fair value of the company property upon which a return is to be allowed.[20]

Here, then, is the storm center of the controversy over the proper method of determining the rate base. On one side we have those who insist that a return should be allowed on the amount prudently invested by the utility concerns in their property, and that the commissions should determine that amount as nearly as possible and then keep account of the value of the property mechanically by bookkeeping. On the other side are those who believe that the property should be valued according to the cost

[19]See St. Louis & O'Fallon R. Co. v. United States, (1929) 279 U. S. 461, 49 Sup. Ct. 384, 73 L. Ed. 798, and cases cited therein on page 484 of 279 U. S.

[20]This brief summary of the history of commission policy as to rate base follows Bauer, Trends in Public Utility Regulation, (1930) 15 Minn. Municipalities 383 and 409.

of reproducing it. There are many variations in the positions of the partisans of each side; for example Bauer has taken the position that if cost of reproduction must be taken into account it should be done so once and for all; that is, the utility properties should be valued considering cost of reproduction, but the values once thus determined should be forever adhered to, value to be kept account of thereafter by bookkeeping as above suggested.[21] However, the whole dispute centers about the relative merits of cost of reproduction as compared with prudent investment. Inasmuch as for the purposes of subsequent discussion it will be assumed that the supreme court's requirement that cost of reproduction be considered is a positive defect in commission regulation, the reason for the preference herein given to prudent investment will be indicated.

In the first place the cost of reproduction method of valuing utility properties leads to huge and unduly fluctuating profits to stockholders. It is estimated that about three-fourths of the capital of utilities is secured through bonds. Suppose for the sake of argument that the other fourth is contributed by the holders of common stock. Consider the case of a corporation owning a utility just completed at a reasonable cost of $100,000. We will assume that it has outstanding $75,000 in bonds drawing 6 per cent interest, and $25,000 in common stock. Its cost of reproduction and the prudent investment in it are the same, as was approximately true of utilities in general in the years just preceding 1915. Under either theory the value is $100,000. Suppose the commission allows a return of 7 per cent on this value, which means that the return is $7,000. To the bondholders must be paid 6 per cent on $75,000 or $4,500. This leaves $2,500 to the stockholders, which

[21]Bauer, Trends in Public Utility Regulation, (1930) 15 Minn. Municipalities 383 and 409. It is hard to see either the advisability or legal validity of this position. The idea that the value of the properties is what they are worth at the time of valuation rather than what they once were worth lies behind the supreme court's insistence on reproduction cost. Bauer's proposal does not accord with this idea. Further, the proposal contains the vice that what happens to be the value of the company's property at the time of one valuation will remain the value forever. Thus value is affected for all time by the incidental matter of when valuation occurs. It is much less objectionable to take the value as of when the property is acquired. Utilities must be built when the public needs them; there is less objection to requiring the public to pay a return on their cost when produced to satisfy the need, than requiring the public to pay forever for the fact that they happened to be valued when prices were high. Bauer's proposal is subject to all the objections to prudent investment, and lacks some of its virtues. Its only advantage over prudent investment is a doubtful claim to legal validity.

is a return of 10 per cent. Now suppose prices double, so that the cost of reproducing this utility is $200,000. Suppose the commission allows a return of 7 per cent on this value. The return is now $14,000. But the bondholders still draw the same amount, $4,500. The amount available to the stockholders is now $9,500, which is a return of 38 per cent. In short, when the cost of reproduction doubles the return to the stockholders does not double; it nearly quadruples. Add the facts that all the stock is not common stock, but some is preferred stock, which like bonds draws a fixed return, and that when price levels rise the rate of return allowed by the commission on the fair value of the property would be increased, not held constant, and it is easy to see that when price levels rise an extraordinary profit to the stockholders is possible. On the other hand, when price levels fall, if cost of reproduction is followed out, companies are likely to go into bankruptcy. In the above illustration if prices fall 40 per cent the company will be earning less than enough to pay the interest on its bonds, hence will face bankruptcy. It is obvious, then, that cost of reproduction introduces a highly speculative element into utility stocks. Herein the reproduction method fails in the test of fitting utilities wisely into the economic order.

A serious objection to the reproduction method is that the cost of reproducing any utility fluctuates. It varies with the efficiency of labor and the improvement of construction technique; and most important of all, with the price level. The result is that valuations fixed according to cost of reproduction are never stable. Cost of reproduction may change materially during the very time that commissions are endeavoring to ascertain it. When this method is used, there is a never ending necessity for changes to be made in the values arrived at, and as a result a never ending series of rate controversies before the commissions. These controversies absorb the time, money and energy of the commissions to the exclusion of other work they should be doing. Further, these valuations are unreliable and not worth the expensive task of performing them. In trying to arrive at cost of reproduction of properties the most diverse results are reached by the experts representing the companies and the other parties involved.[22] The

[22]See the dissenting opinion of Justice Brandeis in Southwestern Bell Tel. Co. v. Pub. Serv. Comm. of Missouri, (1923) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807 for an exposition of the amount of guess-work which goes on in valuation cases. The report of the Minn. Railroad and Warehouse Commission for 1920, page 15, contains a statement which will serve to illustrate the magnitude and complexity of valuation

results are likely to be compromises. Professor Rottschaefer says, "The actual figures arrived at usually represent compromises, and the courts have not yet evolved the principles that circumscribe the area of legitimate compromise."[23] Nor is there any indication that the courts are likely to evolve any such principles in the near future. It is obvious that under a system leaving so much room for diversity of results the possibility of inequalities in treatment of different utilities is great. Furthermore, public ill will is fostered by the frequent litigation. There are writers who believe that the reproduction element is rapidly leading to the breakdown of commission regulation.[24]

On the other hand, if properties were valued according to the amount prudently invested in them, once that amount were determined it would never have to be determined again.

The question arises whether the requirement that cost of reproduction be considered is a defect inherent in commission regulation. For all practical purposes it is such a defect. The United States Supreme Court has repeatedly taken the position that the due process clause of the fourteenth amendment requires that cost of reproduction be considered. The prospect of a constitutional amendment in order to eliminate the requirement is so remote as to be negligible. Also, the chance that the Supreme Court will abandon its long established position, repeatedly asserted against able dissents and public criticism, is likewise remote. It is possible that a change in the personnel of the court might effect a change in its position, and that if a majority of the members of the court came to believe that prudent investment should be substituted for the existing requirements, the court would find some change in conditions to warrant a change of rule. However, such prospects are entirely speculative, and as matters

hearings. The commission was investigating the rates charged by the Northwestern Telephone Exchange Co., and the Tri-State Telephone Co., the two largest telephone companies operating in the state. The statement reads, "During this investigation, 65 days were devoted to public hearings and conferences on various subjects pertaining to the Northwestern and Tri-State rates and valuation. The transcripts of the testimony already has reached 2,200 typewritten pages of approximately 605,000 words. In addition, the telephone companies have filed about 200 volumes of exhibits, some of which run as high as 1,150 pages, together with various studies and statements. This entire library of testimony and exhibits must be read and digested before the commission can reach its final conclusions."

[23]Rottschaefer, Valuation in Rate Cases, (1925) 9 MINNESOTA LAW REVIEW 211, 215.

[24]See Bauer, The O'Fallon Case, (1929) 18 Nat. Mun. Rev. 458.

stand there is little likelihood that the Supreme Court rule can be changed.

It is true that the supreme court does not require that utility properties be valued according to either prudent investment or cost of reproduction, but rather in effect requires that both be considered among other factors. From the standpoint of the public there is little superiority in this position over the adoption of either of the theories outright. During the high price period beginning with the war we have seen that the court stressed cost of reproduction, and the commissions followed. It is probable that the country is now at the beginning of a long period of lower prices. As has been indicated above, the reproduction theory if stringently applied to utilities constructed during the high price period would be likely to throw them into bankruptcy. We may be sure that the utilities in future rate litigation during a low price period will urge this fact upon the attention of the court, and that the court will hold that "reasonableness" requires such emphasis on prudent investment as will prevent the utilities from facing bankruptcy. More than that, we may anticipate the argument by the companies that the rate base should be fixed so that a sufficient return will be allowed to enable the utilities to attract capital, otherwise they cannot continue to function to the best advantage of the public; and we may anticipate that the Supreme Court will yield to this argument also. It could scarcely be otherwise. No advantage to the public would be gained by the bankruptcy or ineffectiveness of the utilities. The vice of the whole procedure is in allowing inflated profits by emphasizing reproduction during high price periods when it is perfectly obvious that equivalent losses cannot be forced on the utility owners during low price periods without injuring the public along with the utilities. In other words the "flexibility" of the supreme court rule strikingly resembles that of the old saw: "Heads I win, tails you lose."

C. State Control of Local Problems.—A final inherent objection to commission regulation lies in the fact that the device brings under the jurisdiction of a state body problems which are municipal or regional, and not state wide. Even though utility companies operate systems covering one state or many states, the plant in each municipality may be a unit and may be treated as such by the commission. The rates are determined with reference to the local plant and the local situation. In a great number of other instances the local utility is an entirely separate plant having

no physical connection with any wider system. This is likely to be true in the case of concerns supplying manufactured gas, water, and street car transportation. These plants are usually confined to one municipality or a few municipalities located close together. The problem is at most regional, not state wide. All other things being equal, the territorial jurisdiction of the body having control of a problem should coincide as closely as possible with the boundaries within which the problem arises. The reason for this principle is easy to see. Suppose a controversy over street railway rates arises in the city of Duluth, in northern Minnesota. Suppose the commission makes a decision which is arbitrary, or ill advised, or corrupt. The people in Pipestone, in the southern part of the state, hundreds of miles away, will not be greatly aroused. The people of Duluth are only a small portion of the people to whom the commission is responsible. In short, when a local or regional problem is placed in the hands of a state body responsibility is diluted, and responsibility is one of the ultimate guarantees of good government. Appeal to the courts is but a partial check upon the performance of the commission. There is a margin between rates which are so low as to be legally invalid and rates which are so high as to be legally invalid. Within that margin the action of the commission is final. Further, appeal to the courts ought to be used sparingly as a last resort; every possible guarantee of just and reasonable conduct without appeal to courts ought to be retained.

To summarize: Control of local utilities by state commission has the inherent defects that commissions tend to become judicial bodies only, that commission control does not reach the holding companies, that it is legally tied fast to the cost of reproduction theory, and that it loses the advantages to be derived from local control of local problems.

Chapter II. The History of Public Utility Legislation in Minnesota

Section 1. The Purpose of the Study

As has been indicated, there is growing opposition to the present system of commission control. It is becoming increasingly apparent that there is need for the perfecting of some form of control which will preserve the advantages of the state commission method and remedy the defects which its failures have exposed.

It is purposed in order to shed light on this problem to examine herein the history and present situation in the state of Minnesota with regard to legal provisions for the control of street railways, gas, water, electricity and telephones.

In tracing the history of legislation regulating these utilities in Minnesota no attempt will be made to set forth all of such legislation. The staggering number of enactments granting to different municipalities from time to time varying powers of control over utilities prevents any such attempt. However, an endeavor will be made to set forth enough of such legislation to show the nature and progress of the whole.

Section II. Utility Legislation of the Territory of Minnesota

The earliest form of utility control in the Territory of Minnesota was regulation by the legislature. The first legislative assembly of the territory, held in 1849, passed no acts concerning any of the utilities here under consideration, but it did pass an act[25] incorporating a plank road company, and authorizing it to construct a plank road from St. Paul to St. Anthony, settlements which have since become the city of St. Paul and part of the city of Minneapolis respectively. A schedule of maximum tolls was provided. The legislature the same year granted to one Steele the exclusive right for five years of maintaining a ferry across the Mississippi at the Falls of St. Anthony.[26] Standards of service were prescribed, and a schedule of maximum rates was fixed. A bond was required of the grantee conditioned upon the fulfillment of the provisions of the act. The grantee was likewise made liable for all damages any person might sustain by reason of the grantee's neglect to fulfill the duties imposed by the act. The legislature thus resorted to a bond, the self interest of private persons, and a time limit on its franchise, as means for making the terms of the act effective.[27]

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[25]Minn. Laws 1849, ch. XXXII.

[26]Minn. Laws 1849, ch. XXXIX.

[27]The fact that the legislature itself was the original regulating agency for public utilities was in accord with the legislative practice of the time. The first and subsequent legislatures by special act incorporated boom companies, bridge companies, manufacturing companies, insurance companies, lodges, academies, and a great variety of other enterprises. It was usual for the legislature to incorporate companies and grant rights to them by special act, and utilities were no exception. The earliest utility regulation in Minnesota took the form of merely adding to the special acts certain requirements such as a fixed schedule of rates.

A departure from the legislative practice of granting corporate existence

In 1851 an act was passed giving county commissioners authority to license ferries and to prescribe rates at the time of licensing.[28] The act also laid down certain general regulations for ferries. The law was most incomplete; the authority of the county commissioners even over rates was not a continuing control, but mere power to prescribe the rates when a ferry was licensed; however, this is an early instance in which a measure of control was yielded to local bodies. Nevertheless, the legislature continued to grant exclusive rights by special act to operate ferries, and to prescribe rates and standards of service in the acts.[29] In fact, the year 1852 saw a veritable flood of such legislative grants.

The first railroad companies were also incorporated and granted franchises by special act of the legislature.[30] In 1855 the legislature granted to two individuals the right to construct and operate a telegraph line between designated cities and towns, the right to be exclusive for fifteen years.[31] No regulation was imposed; the act was a mere grant of rights.

At an early date there began to appear in special acts incorporating towns,[32] villages and cities provisions giving these municipalities powers of control over water and gas. The provisions were highly erratic; differences in the measure of control were numerous, and some municipalities were given no powers of control at all.[33] This lack of uniformity which was to prove

and privileges by special act came in 1853, in the form of a general law whereunder colleges, seminaries, lyceums and libraries might incorporate. Minn. Laws 1853, ch. XXV.

[28]Minn. Laws 1851, ch. X.

[29]See for example Minn. Laws 1851, chs. XIV, XVI, and XVIII.

[30]See for example Minn. Laws 1853, ch. V (also numbered ch. VI).

[31]Minn. Laws 1855, ch. XXII.

[32]The towns incorporated by the early legislatures were not townships, but were like cities and villages.

[33]In 1854 the legislature incorporated the city of St. Paul. Minn. Laws 1854, ch. VI. In the enumeration of the powers of the common council, the act specified:

"To make and establish public pounds, pumps, wells, cisterns and reservoirs, and to provide for the erection of water-works for the supply of water to the inhabitants; to erect lamps and regulate and license hacks, cabs, drays, carts, and charges of hackmen, cabmen, draymen, and cartmen in the city: and to provide for lighting the streets, public grounds and public buildings, with gas or otherwise." Minn. Laws 1854, ch. VI, sub-ch. IV, sec. 3, sub-sec. 11. The city of Stillwater, incorporated the same year, was given no control over utilities. Minn. Laws 1854, ch. 52. The council of the city of St. Anthony was given the meager power, "To provide for the lighting of streets and the erection of lamp posts." Minn. Laws 1855, ch. III, sub-ch. V, sec. 11.

the bane of charters granted by special legislation was at times striking. In 1856 the legislature amended the charter of the city of St. Paul, and changed the provision for control over utilities.[34] The charter of the city of Stillwater was amended the same year,[35] and exactly the same provision for control over waterworks was adopted for Stillwater as the one which had just been replaced for St. Paul. St. Paul's old provision became Stillwater's new one.

These early charter provisions were, of course, incomplete at best.[36] It is not to be expected that in those days, when utilities were new and regulation was just beginning, complete and definite provisions for municipal control would be made or even conceived. However, due to the habit legislators have of copying the terms of previous statutes, these incomplete, inadequate and indefinite earlier provisions were carried over into later charters and statutes specifying the extent of municipal authority, enacted at a time when complete municipal control of utilities was intended and assumed. The result was that municipal authority over utilities had to be tortured out of such provisions as those we have in these pre-Civil War charters.

At the same time that the legislature was developing the practice of granting municipalities some authority over water and gas, it began incorporating and granting franchises to water and gas companies. In 1856 the St. Paul Gas Light Company was incorporated[37] and given the exclusive right to lay gas pipes in the streets of the city. Save for a provision for municipal purchase

[34]This amendment made the provision quoted supra note 33 read:

"To make and establish public pounds, pumps, wells, cisterns and reservoirs, and to control the erection of water works for the supply of water to the inhabitants; to erect lamps and regulate and license hacks, cabs, drays, carts, omnibusses, and charges of hackmen, cabmen, draymen, cartmen and omnibus drivers in the city; and control the erection of gas works for lighting the streets, public grounds and public buildings with gas." Minn. Laws 1856, ch. XXVII, sec. 12.

[35]Minn. Laws 1856, ch. XXVIII.

[36]The earlier provision of the St. Paul charter, supra note 33, by a strict reading of its terms limited the power of the council to making provision for the erection of water works and for light for public purposes. The amendment, supra note 34, enlarged upon the previous grant of authority to the extent that the council could then "control" the erection of water works and gas works. Even as amended the provision does not specifically confer upon the city council authority to grant a franchise to a gas or water company. In fact, the earlier provision could more easily be construed to imply such authority than the later. Further, the later provision says nothing about controlling the operation of the gas or water works, but merely specifies control over the erection.

[37]Minn. Laws 1856, ch. LIII.

and its effect as a threat, the act was devoid of any potent regulatory measures. It is true that the act did provide as follows:

"The corporation of the City of St. Paul and the Board of Directors of the St. Paul Gas Light Company may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally contracts in relation to the business of the company as may be beneficial to them and the public."

No doubt this provision authorized the regulation of the company by ordinance contract, but inasmuch as the company already had exclusive rights in the streets of the city, there was no necessity for the company to enter into any such contract.

Some inkling of the reason for the failure of the legislature to make provisions for regulating this utility is to be found in the fact that the act gave the city authority to subscribe for stock in the corporation. It was a time of promotion rather than one of regulation. Utilities were needed; inducements rather than restrictions were in order.

The St. Paul Water Company was likewise incorporated and granted a franchise by the legislature in 1856.[38] There were no provisions regulating the company as a public utility.

In 1857 two omnibus bills, one incorporating fifty-four towns[39] and the other thirty-seven towns[40] were passed, but in neither was any mention made of any public utility of the kinds here under consideration.

The confused and hasty nature of the special legislation of the time concerning municipalities is illustrated by the act incorporating the town of Buffalo.[41] The government for Buffalo was provided for in some detail, but there was a rider to the act incorporating three other towns, which rider made no provision for their organization and government, nor did it make the provisions of the rest of the act, concerning Buffalo, applicable to these towns.

Section III. State Utility Legislation Prior to the Amendment of 1881

In 1857 the constitution of the state of Minnesota was adopted, and in 1858 the state was admitted to the Union. The constitution

[38]Minn. Laws 1856, ch. CLVI.
[39]Minn. Laws Extra Sess. 1857, ch. III.
[40]Minn. Laws Extra Sess. 1857, ch. XVIII.
[41]Minn. Laws Extra Sess. 1857, ch. XLI.

contained the following prohibition: "No corporations shall be formed under special acts, except for municipal purposes."[42] The result was that the first state legislature, meeting in 1858, passed a series of general laws under which corporations might be formed. One of these acts[43] provided for the organization of corporations for the purpose of manufacturing and supplying illuminating gas. Such corporations were given "authority to make the apparatus and erect the buildings necessary for manufacturing and distributing gas, with the right to enter upon any public streets, lane or highway, for the purpose of laying down all necessary pipes, by and with the consent of the municipal authorities having legal jurisdiction."[44]

By implication this act might be held to give municipalities not otherwise authorized to control gas companies the right to impose regulations as a condition to granting their consent. However, municipal control was not clearly authorized nor was its extent specified.

The act further provided: "The Legislature may at any time, upon gross neglect of duty, or fraud being shown against the officers of such Company, declare their right to the privileges of this Act to be null and void, and may appoint Commissioners to close up its affairs."[45] This provision loses some of its significance by reason of the fact that no duties of a nature peculiar to public utilities are imposed to be neglected. Nevertheless, it would doubtless apply to common law duties. Further, the provision illustrates the continuance of direct control by the legislature itself over utilities, in this case by the reservation of the right to declare their privileges forfeited. The idea that the legislature was not the sort of body best fitted for the performance of such work was making headway, but was not as yet supreme.

General laws were likewise passed under which other types of corporations, including ferry, railway, and telegraph companies might be incorporated.[46]

Evidently the St. Paul Water Company failed to function, for in 1865 a special act was passed reviving and amending the

[42]Article X, sec. 2, constitution of the state of Minnesota, printed in Minn. Pub. Stat. 1849-1858.

[43]Minn. Gen. Laws 1858. ch. XXXVIII.

[44]Minn. Gen. Laws 1858, ch. XXXVIII, sec. 10. This whole chapter was repealed in 1866. Minn. Gen. Stat. of 1866, ch. CXXII.

[45]Minn. Gen. Laws 1858, ch. XXXVIII, sec. 11.

[46]Minn. Gen. Laws 1858, ch. LV, LXX and LXXVIII.

act of 1857 incorporating the company.[47] By the device of reviving the old act the legislature dodged the provision of the constitution forbidding the formation of corporations by special act. The new act made no provision for municipal regulation, and expressly left rates and service in the control of the company.

Laws authorizing municipalities to issue bonds for the erection of water works appeared at this time,[48] and soon became common. Municipalities were thus armed with the power of public ownership.

The first state legislature combined the original authority of the St. Paul city council over waterworks and lighting and the authority later substituted by amendment.[49]

In 1866 Minneapolis was incorporated as a city.[50] Among the powers of the council was specified authority to contract for the erection of gas works for lighting the streets, public grounds, and public buildings.[51] This provision varied from those commonly made theretofore. Continuing control of a utility and control by franchise contract are two different matters. The departure was short lived. The next year the provision was changed so as to specify power to control the erection of gas works.[52] The reason for the change was apparent. The legislature during the same session itself granted a franchise to a gas company to operate in the city.[53] Although the legislature could not under the constitution incorporate utility companies by special act, it could and did grant such companies franchises.

The act of 1867 gave the Minneapolis council authority to permit the laying of gas and water pipes in the streets.[54] Power to permit implies power to refuse permission; it might likewise be held to imply power to impose terms.

An act amending the charter of the city of Winona in 1867 gave the city control of horse railway cars. The power of regulation was phrased in broad terms.[55] The same act likewise

[47]Minn. Sp. Laws 1865, ch. LXII.

[48]Minn. Sp. Laws 1858, ch. I, sub-ch. IV, sec. 8; Minn. Sp. Laws 1868, ch. LXXXIV.

[49]Minn. Sp. Laws 1858, ch. I, sub-ch. IV, sec. 3, sub-sec. 11.

[50]Minn. Sp. Laws 1866, ch. XVIII.

[51]Minn. Sp. Laws 1866, ch. XVIII, sub-ch. IV, sec. 3, sub-sec 11.

[52]Minn Sp. Laws 1867, ch. XIX. sub-ch. IV, sec. 3, sub-sec. 11.

[53]Minn. Sp. Laws 1867, ch. CXXXV.

[54]Minn. Sp. Laws 1867, ch. XIX, sub-ch. IX, sec. 2.

[55]The council was empowered, "To regulate the running of horse-railway cars, the laying down of tracks for the same, the transportation of pas-

broadened the language hitherto used in granting municipal control over water and light utilities by the addition of a new clause. The act read:

"To make and establish public pounds, wells, cisterns and reservoirs, and to provide for the erection of water works for the supply of water to the inhabitants. And to provide for the erection of lamps or other means whereby to light the city, and make all necessary regulations in the premises."[56]

An instance of team work on the part of the legislature and a city occurred in 1868. A street railway company was authorized by the legislature to construct a line in Ramsey county, and in the city of St. Paul in accord with a specified ordinance of the city already enacted.[57]

In 1868 provision was made for the incorporation of transportation companies under general laws,[58] and in 1870 for the incorporation of gas companies.[59] In neither case was any provision for regulation, municipal or otherwise, included.

An important departure from the practice of incorporating municipalities by special act was made by the passage in 1870 of an act under which cities of not less than 2,000 nor more than 15,000 inhabitants might be incorporated.[60] To the council of any city incorporating under the act was given power:

"To establish and construct public pounds, pumps, wells, cisterns, reservoirs and hydrants; to erect lamps, and provide for the lighting of the city, and to control the erection of gas works or other works for lighting the streets, public grounds and public buildings, and to create, alter and extend lamp districts."[61]

The council was authorized to contract for lighting the streets, and to permit the laying of gas pipes and water pipes in the streets.[62]

In 1871 came the forerunner of the Minnesota Railroad and

sengers thereon, and the kind of rail to be used." Minn. Sp. Laws 1867, ch. XX, sub-ch. IV, sec. 2, sub-sec. 24.

[56]Minn. Sp. Laws 1867, ch. XX, sub-ch. IV, sec. 2, sub-sec. 30.

[57]Minn. Sp. Laws 1868, ch. VI. See also Minn. Sp. Laws 1872, ch. CXII.

[58]Minn. Gen. Laws 1868, ch. XXIII.

[59]Minn. Gen. Laws 1870, ch. XXVI. The former provisions for incorporation of gas companies under general laws had been repealed at the time of the revision of the Minn. statutes in 1866. Minn. G. S. 1866, ch. CXXII.

[60]Minn. Gen. Laws 1870, ch. XXXI. In 1922 there were still six cities incorporated under this act. Anderson, City Charter Making in Minnesota 10.

[61]Minn. Gen. Laws 1870, ch. XXXI, sub-ch. IV, sec. 3, sub-sec. 11.

[62]Minn. Gen. Laws 1870, ch. XXXI, sub-ch. IX.

Warehouse Commission. One commissioner was appointed and given power to investigate the railroads of the state and report to the legislature.[63] The personnel and authority of the commission was altered from time to time thereafter.[64] It was almost half a century before the commission was given any authority over local utilities.

The great irregularity in charter provisions for different municipalities was further illustrated by an act passed in 1875.[65] The act contained provisions for the charters of villages thereafter to be incorporated under it by special act; that is, the legislature instead of setting forth a complete charter every time it incorporated a village could include the provisions of this general act by reference. By its terms the councils of villages chartered under it were given the meager power to "provide for the sinking of wells, cisterns or tanks." In view of the much more extensive powers now commonly granted over utilities this provision appears entirely inadequate.

The legislature occasionally supplemented incomplete municipal authority by curative acts legalizing franchise ordinances already granted.[66]

In 1881 a new utility appeared in Minnesota legislation. The general statutes for 1878 contained the provision, "Any telegraph corporation, organized under this title, has power and right to use the public roads and highways in this state" for the erection of lines.[67] This provision was amended by inserting after the word "telegraph," the words, "or telephone."[68]

The supreme court of Minnesota in 1901 held that the above provision as amended authorized telephone companies to use city streets as well as rural highways.[69] There was no requirement made in the statute for securing the consent of municipalities. The legislature, then, according to the interpretation of the supreme court, in general terms authorized telephone companies to use the streets of municipalities regardless of municipal approval. This sweeping grant illustrates again the fact that the public

[63]Minn. Gen. Laws 1871, ch. XXII.

[64]Minn. Gen. Laws 1874, ch. XXVI; Minn. Gen. Laws 1875, ch. CIII; Minn. Gen. Laws 1885, ch. 188.

[65]Minn. Gen. Laws 1875, ch. CXXXIX.

[66]Minn. Sp. Laws 1879, ch. CCXCIX; ibid., ch. CCCI.

[67]Minn. G. S. 1878, ch. 34, sec. 42.

[68]Minn. Gen. Laws 1881, ch. 73.

[69]Northwestern T. E. Co. v. City of Minneapolis, (1901) 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

usually begins by promoting and encouraging new utilities. Regulation and restriction come with maturity.

The charter of the village of Duluth passed in 1881 contained an unusually complete provision for control of street railways by the municipality. The council was empowered: "To authorize, control and grant the power to construct street railways in the streets and avenues of said village by any private company or companies, and to control and direct the operation of the same by contract or ordinance."[70] This provision directly and not merely by implication authorized the council both to make franchise contracts and to control the street railways by ordinance. If a provision of this kind had been made in municipal charters generally both as to street railways and other utilities, or better still if such authority had been granted municipalities by a general law, much of the confusion attendant upon unnecessary differences in municipal authority over utilities from village to village and city to city would have been eliminated.

The erratic nature of a combination of municipal control of utilities with direct action by the legislature is shown by the fact that later in the same year that Duluth was given broad powers of control over street railways, the legislature in extra session itself granted to the Duluth Street Railway Company, a corporation organized under the general law, during the term of its charter, the exclusive right to operate a street railway in the village of Duluth and its suburbs.[71] The act provided for a measure of control by the municipality, including control over rates and extensions, but the authority of the municipality lacked substance. For example, in case the company failed to make extensions ordered by the village, the latter was given only the ethereal power of granting to some other company the right to construct and operate a railway "upon the streets or lines of extension" upon which the company failed to build. The village could scarcely be expected to find anyone willing to build a single line over a route so unprofitable that the company would not build upon that route.

Requirements were made for paving by the company between its tracks.[72] This policy was not so objectionable then as it was to become later when more thorough rate regulation resulted, in

[70]Minn. Sp. Laws 1881, ch 11, sub-ch. 5, sec. 1, sub-sec. 11.
[71]Minn. Sp. Laws Ex. Sess. 1881, ch. 200.
[72]Minn. Sp. Laws Ex. Sess. 1881, ch. 200, sec. 6.

theory at least, in passing the obligation on to the car rider, so that the latter was charged for expenses which should have been borne by the taxpayer.

A new charter for the city of Minneapolis passed in 1881 granted the council power over water and gas in terms almost word for word the same as those used in the charter of 1866 before it had been amended. Once more the city had authority to "contract for the erection of gas works for lighting the streets and public grounds and public buildings."[73] However, it is striking that this seventy-five page charter of the city of Minneapolis did not contain provisions granting municipal control over street cars or gas to the extent provided for in the charters of other municipalities.

Electricity began to take its place in Minnesota legislation at this time. An act was passed in 1881[74] giving the council of the city of St. Paul the right to authorize the St. Paul Gaslight Company, and empowering the company on such authority, to erect equipment in the city streets for the furnishing of electric light. The act authorized the company to charge "reasonable rates." The franchise was not exclusive. No equipment was to be placed in the streets without the consent of the council, and any resolution or ordinance authorizing such placing of equipment might embody such restrictions and reservations as the council deemed proper.

Two facts of importance are apparent in the above act. First, the rights granted the company were not exclusive. The legislature may have had in mind competition as a potential force in the regulation of this new utility. Second, the municipality was given extensive control. It will be recalled that in the case of telephones the right to the use of municipal streets was at first granted outright and without reservation by the legislature itself.

In its extra session of the same year a new act was passed covering the same ground, without in any wise referring to the former act.[75] The second act contained provisions largely identical with those of the first, but instead of leaving it to the council to authorize the company to furnish electricity, the act itself authorized the company to do so. However, the authority of the council to impose restrictions and reservations in granting the use of the streets was preserved.

[73]Minn. Sp. Laws 1881, ch. 76, sub-ch. 4, sec. 5, sub-sec. 11.
[74]Minn. Sp. Laws 1881, ch. 194.
[75]Minn. Sp. Laws Ex. Sess. 1881, ch. 105.

Another franchise granted by the legislature of 1881 was to the Duluth Telephone Company.[76] The company was granted for the period of ten years the exclusive right to erect telephone wire and poles in the streets of the municipality. It was provided that the company should furnish service as cheaply as such service was furnished in other places. This idea of judging the reasonableness of the rates charged by a company enjoying a monopoly on the basis of rates charged by other companies equally in a position to exact monopoly prices is a fallacy which has lingered in utility control to the present day.

Municipality regulation appeared to be limited to control of the physical installation of poles and wires in the streets.

The year 1881 concludes the period prior to the first constitutional amendment against special legislation. Examination of the utility legislation passed during this period reveals in it inequalities so general as to indicate that there was little effort to perfect provisions and develop principles to be applied uniformly in the absence of sound reasons for differences. Particularly the provisions whereby municipalities were delegated portions of the legislative power to control utilities varied so widely and were changed so often that the result was a confused mass in which no policy is to be distinguished save a sort of year to year policy of handling particular local situations after the fashion which expediency dictated at the time. However, although no policy on the part of the legislature is discernible, still there is to be seen in the confusion of varied provisions a progress. This progress is not uniform or steady, and may be seen only over considerable periods of time; it is a progress toward wider municipal control of local utilities.

Section IV. Utility Legislation Between the Amendments of 1881 and 1892

An amendment to the constitution was adopted[77] in 1881 prohibiting the legislature from enacting any special or private laws granting corporate powers or privileges, except to cities; incorporating any town or village; or granting to any individual, associa-

[76]Minn. Sp. Laws 1881, ch. 215.

[77]Minn. Gen. Laws 1883, p. 2. For an account of the evils of special legislation and the events leading to the action taken against it see Anderson, City Charter Making in Minnesota 15.

tion or corporation except municipal any special or exclusive privilege, immunity or franchise.

The amendment did not forbid the granting of corporate powers to cities. Further, it was open to the construction that although towns and villages might not be incorporated by special acts still their charters could be amended by such acts. In fact, this was the interpretation given the constitutional amendment, both by the courts and the legislature.[78] Thick volumes of special laws and thin volumes of general laws continued to be legislative output.

One of the immediate effects of the amendment was the passage of a general law in 1883 whereunder villages might incorporate.[79] However, this law was held by the supreme court to be unconstitutional on the ground that it delegated legislative power to the courts in the procedure specified for the incorporation of villages.[80] The legislature in 1885 passed another law under which villages might be incorporated, and under which existing villages might reincorporate if they so desired.[81] This law did not contain the objectionable feature of its predecessor.

Although according to figures compiled in 1926 over half of the villages of the state were operating under this law,[82] the provisions it made for control by the villages over public utilities were meager. The councils were authorized, "to provide protection from fire—by the erection or construction of pumps, water mains, reservoirs or other water works,"[83] etc. Also, "To make and regulate the use of public wells, cisterns and reservoirs."[84] And "To erect lamp posts and lamps, and provide for lighting any portion of the village or streets thereof, by gas or otherwise."[85]

These provisions fail to give the village specific power to control water-works, gas works, and electric plants by franchise and by regulatory ordinance. Only by implication can any such

[78]Anderson, City Charter Making in Minnesota 15.

[79]Minn. Gen. Laws 1883, ch. 73.

[80]State v. Simons, (1884) 32 Minn. 540, 21 N. W. 750.

[81]Minn. Gen. Laws 1885, ch. 145. By ch. 66, Gen. Laws of Minn. for 1889, all villages whose incorporation had been previously attempted under any act of the legislature, and which were attempting to exercise corporate powers, were endowed with all the powers and made subject to all duties conferred by ch. 145 above.

[82]Walker, Village Laws and Government in Minnesota 61.

[83]Minn. Gen. Laws 1885, ch. 145, sec. 21, sub-sec. 10.

[84]Minn. Gen. Laws 1885, ch. 145, sec. 21, sub-sec. 24.

[85]Minn. Gen. Laws 1885, ch. 145, sec. 21, sub-sec. 25.

authority be derived from them. Telephones and street railways are not mentioned in the act at all.

The powers granted particular municipalities over public utilities were greatly expanded after the constitutional amendment of 1881. The legislature having been shorn of its power to grant franchises it increased the powers of the municipalities. It made no effort to grant general authority to all municipalities; it merely in specific instances granted increased powers to particular municipalities.[86] The grants varied widely, but in the aggregate there was a hastening of the tendency toward more complete municipal powers in the provisions of the special charters.

As we have seen, this tendency was not reflected in the general village law of 1885.

In the absence of universal and complete municipal authority to grant franchises, and of any power in the legislature itself to do so, the legislative practice of confirming franchise ordinances passed by municipalities was continued.[87]

A resolution passed by the legislature in 1887[88] does not relate to any utility of the kind dealt with herein, but it is of value because it shows the ideas which at this time controlled the minds of legislators. A bill was then pending in Congress for national control of the railroads. The resolution urged upon Congress the passage of the bill, and instructed the Minnesota senators and requested Minnesota representatives to vote for it. The resolution contained the following language:

"The people of Minnesota cannot understand why there should not be the same competition between railway corporations as exists between all other forms of business enterprise. . . . And all combinations by pooling of business or earning, to prevent competition, simply mean high rates of profit to the holders of railroad stock at the expense of low rates of earnings to the people. . . . The pros-

[86]See for example Minn. Sp. Laws 1883, ch. I, sub-ch. IV, sec. 5, subsecs. 11, 25, 46, 47 and 48, concerning Fergus Falls; Minn. Sp. Laws 1883, ch. 3, sec. 13, relating to Minneapolis; Minn. Sp. Laws 1883, ch. 13, St. Cloud; Minn. Sp. Laws 1883, ch. 15, Anoka; Minn. Sp. Laws 1883, ch. 19, Winona; Minn. Sp. Laws 1883, ch. 80, sec. 3, Village of Duluth; Minn. Sp. Laws 1887, ch. 5, sub-ch. IV, sec. 3, sub-sec. 28, Winona. Stillwater was expressly given power to prescribe lighting rates. Minn. Sp. Laws 1887, ch. 6, sec. 13, sub-sec. 11. Why in this instance specific authority was given to prescribe rates whereas ordinarily such authority was left to implication is not apparent.

[87]Minn. Sp. Laws 1883, ch. 297, confirms a street railway ordinance of the city of St. Paul; Minn. Sp. Laws 1885, ch. 284, confirms a water-works franchise of Brainerd; Minn. Sp. Laws 1885, ch. 310, confirms a gas ordinance of Fergus Falls.

[88]Number 9, contained in Minn. Gen. Laws 1887, p. 398.

perity of the people is a national necessity, the continued existence of railway companies based largely on fictitious or fraudulent capital, is not. Even should some of these companies be driven to the wall, under the pressure of unlimited competition, the railroads themselves will still remain, and they would, in all probability, earn a reasonable interest on the money actually invested in their construction. . . . Unrestricted competition is the great force to which all men and interests in the world have to submit."

This resolution is hard to reconcile with exclusive franchises previously granted by the legislature itself. The legislature was vacillating between faith in competition and a policy of setting up regulated monopolies. The incompleteness of legislation for control of utilities may be ascribable in part to this survival of faith in competition.

The resolution is of further interest in showing the belief of the legislature that a reasonable return on actual investment is a fair measure of what utilities ought to earn.

The county commissioners of Ramsey county were authorized by an act passed in 1889[89] to grant upon such terms as they might consider proper for a period of not over thirty years the use of the "streets, roads, alleys, and highways in the said county of Ramsey and outside of the corporate limits of the city of St. Paul, for the purposes of any railway using as motive power, electricity, steam or horses." The councils of villages within the county were given similar powers.

The act was not carefully drawn. Obscurity of meaning was far from rare in the legislation of the time. Apparently the county commissioners were authorized to grant the use of the village streets, and so were the villages. One thing was clear; street car lines were expected to extend beyond municipal boundaries, and municipal authority was combined with county authority in the handling of the common problem. However, there was no welding of the authority of the various municipalities and that of the county into one system of control. The measure is no more than a forerunner of regional control of utilities.

Another special act of 1889[90] authorized the common council of any of the villages in either Martin or Pipestone counties,

"to contract with or grant the right to any person, co-partnership, association or corporation to furnish for a period not exceeding fifteen (15) years, electric lights, steam heat or water

[89]Minn. Sp. Laws 1889, ch. 176.

[90]Minn. Sp. Laws 1889, ch. 314.

works, for public use and for the private use of citizens of such village, on such terms and with such limitations and conditions as the common council of such village shall by ordinance prescribe."

This odd piece of legislation is an extreme illustration of one of the major vices of legislation dealing with utility problems; that is, the vice of yielding to local demands and dealing with specific local situations rather than determining what principles and policies are sound and carrying out these principles and policies generally. It is hard to believe that all the villages of Martin and Pipestone counties were so different from the villages of other counties that they ought to have been authorized to exercise the large measure of control granted by this act, and that the villages of no other counties should have been given such authority.

The act is of additional importance in that the group of villages was in general terms given broad powers of control. A fault of much utility legislation is that the lawmakers try to enumerate each item of authority they intend to convey. The result is that the acts are involved and lengthy, and needed items of authority are not thought of, hence not included.

Legislation furthering municipal ownership of electric light plants was common by this time. In 1889 the village of Monticello was authorized to issue bonds to purchase such a plant;[91] the village of Litchfield was authorized to construct an electric light plant and to issue bonds therefor;[92] and the purchase by the city of Brainerd of an electric light plant was legalized.[93] An act passed in 1891[94] amended the general village law of 1885 so as to authorize the councils of villages incorporated under that law to, "Dispose of, for any purpose and in any manner, all surplus light, heat, steam, water or electricity which may be had or produced after providing for the streets and the furnishing of water for the use of the village and its inhabitants."

A general law under which all villages in the state having a population of over three thousand were to be governed was passed in 1891.[95] At the time only one village had the population required to bring it under the act. Probably no other village ever came under it. It was repealed in 1905.[96] Since the law is now of

[91]Minn. Sp. Laws 1889, ch. 234.
[92]Minn. Sp. Laws 1889, ch. 246.
[93]Minn. Sp. Laws 1889, ch. 564.
[94]Minn. Gen. Laws 1891, ch. 149.
[95]Minn. Gen. Laws 1891, ch. 146.
[96]Minn. Rev. L. 1905, sec. 5539. See Walker, Village Laws and Govern-

historical value only and since its provisions concerning utilities were lengthy, they will not be set forth. Suffice it to say that more than ordinarily comprehensive powers of control were granted.

Section V. Utility Legislation Between the Amendment of 1892 and the Revised Laws of 1905.

An amendment to the constitution made in 1892 entirely prohibited special legislation.[97] An immediate result of the amendment was a general law dealing with utilities.[98] This law contained

ment in Minnesota 59, where possible applicability of the law is discussed at some length.

[97]The amendment read:

"In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating . . . any . . . city, village . . . or prescribing the powers and duties of the officers of . . . the same, or . . . creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever. . . . The legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same." Minn. Gen. Laws 1893, p. 1.

This amendment put an end to special legislation as such in Minnesota. Thenceforth the legislature was obliged at least to cloak such legislation in the verbiage of general acts. The legislature soon perfected the scheme of passing laws applying to all municipalities fitting a general description, which description would be so drawn that only one municipality or a few municipalities could fit, and thus introduced an endless amount of confusion and uncertainty into the statutes, making them a maze and a mystery to all persons not acquainted with such matters as the population, location with regard to one another and to streams, etc., of all the municipalities in the state, since such details were used as the basis for the descriptions of those municipalities to which acts were to apply.

[98]Minn. Gen. Laws 1893, ch. 74, amending sections 1 and 40 of title 1, ch. 34, Minn. G. S. 1866. The law provided for the incorporation of a variety of utility companies, including railways and works "for supplying the public with water, gas light, electric light, heat or power." It was specified, "any corporation formed hereunder or under any act hereby amended, may charge and collect a reasonable compensation for its service. But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village, a railway of any kind or any subway, pipe line or other conduit for supplying the public with water, gas light, electric light, heat, power or transportation or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making just compensation therefor, as herein provided.

"Provided, that the state of Minnesota shall at all times have full power and authority to supervise and regulate the business methods and management of any corporation existing and operating hereunder, and shall also have full power and authority at all times to fix the compensation which

at least strong implications of municipal authority.

Laws legalizing franchises granted by municipalities thenceforth were phrased in general terms,[99] as were acts authorizing the issue of municipal bonds for municipal utilities.[100]

General laws granting authority to municipalities were likewise common from this time forth. In 1893 an act was passed which read, "All villages now organized under the special or general laws of this state shall have power to make, erect, establish, purchase, lease and control waterworks for the supply of water for public and private use, also purchase, lease, build, establish and control all necessary buildings, machinery, apparatus and

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shall or may be charged or received by any corporation existing and operating hereunder. And any corporation organized under this act shall be subject to any condition from time to time imposed by such village or city, through its board of trustees or city council."

A provision follows for the right of purchase by municipalities at the end of each and every five years after the granting by them of "any franchise for the construction of any street railway, telephone, water works, gas and electric light, heat or power works."

Note that the provision for municipal purchase of telephone lines is tucked away in an act dealing with other utilities. Such irregularities heightened the confusion existing in the utility law.

The above provisions introduced a mixture of state control by means of regulations and requirements contained in the act itself; plus municipal control; plus a right of control reserved to the state. The act raised a rich variety of legal problems. It specifically authorized corporations formed under it to collect reasonable compensation for their services. It also required them to obtain franchises from cities and villages in certain instances: Suppose a franchise were entered into calling for more or less than a reasonable rate. Would such a franchise be valid? Further, the franchise was to be obtained from the city or village "according to the terms of its charter." Suppose the charter did not authorize the municipality to grant franchises. The company could not operate in the municipality without one. Was the municipality impliedly authorized to grant franchises? Again, the state reserved the right to fix the compensation to be charged by any company. If a municipality duly authorized to do so by its charter entered into a franchise contract with a company in which rates were fixed, could the state reduce the franchise rates under this reserved power? Further, the companies were to be "subject to any condition from time to time imposed by such village or city." Did this provision impliedly authorize municipalities to make conditions, or did it merely refer to conditions validly made under existing charter powers?

However incomplete and inconclusive the act was, it is of importance, first, because the legislature assumed in it that municipalities had authority to grant franchises; second, because it contained the basis for an implication that municipalities were authorized to regulate utilities by ordinance if not by franchise.

[99]An act passed in 1893 legalized telephone franchises theretofore granted by the council of any incorporated village. Minn. Laws 1893, ch. 202. See Minn. Laws 1893, ch. 191 for an act legalizing a more restricted group of franchises.

[100]See Minn. Laws 1893, chs. 204 and 208.

material for making, generating and supplying light for public or private use in said villages."[101]

The above act and others since enacted granting authority to municipalities contain, although in a lesser degree, one of the chief vices of special legislation; they are restricted in application, and a multitude of them may be passed without granting to all municipalities complete authority in a given matter. In order to ascertain whether a particular municipality has certain powers a wilderness of such acts must be explored and the results put together. The above act does not apply to cities; it does not even apply to all villages, but rather to villages "now organized"; it does not apply to telephones, gas, or any utilities except waterworks and electric light plants. It is doubtful whether the act includes plants furnishing power along with light.

Many demands for special legislation were made upon the Legislature of 1893, but the legislature in view of the constitutional amendment of 1892 refused to yield to them. Municipalities operating under antiquated special charters found that those charters could not be altered in order to enable the municipalities to meet new needs and changed conditions. Two remedies resulted; another general law under which cities might be incorporated, and a home rule amendment to the constitution.

The general law for the incorporation of cities was passed in 1895.[102] Under it cities of not less than 1,000 inhabitants could

[101]Minn. Laws 1893, ch. 196.

[102]Minn. Laws 1895, ch. 8. The act enumerated among the general powers of cities incorporated under it the power to grant franchises. Ibid. sec. 40. The mayor was given the absolute veto over franchise ordinances. Ibid. sec. 60. Among the powers of the council was specified the following:

"To provide for the lighting of streets, avenues and public grounds and buildings, and to purchase, acquire or establish gas, electric and other lighting plants, and to furnish gas, heat and electricity to persons within the city limits on such terms as it may provide; to purchase, procure, or establish water works and to provide water for the use and convenience of the inhabitants of such city, and to prescribe and fix the charge for the same and the manner in which the same shall be paid; and to provide for systems of public transportation within the city and to regulate the operation thereof. It shall also have the power to make contracts with individuals, firms or corporations for the use of water for protection against fire and other purposes. It shall also have the power to contract with individuals, firms or corporations for the use of electric or gas light for street lighting and other purposes. Such contracts for water and electricity and gas to be made for such time as the council may deem for the best interests of the city, not to exceed thirty (30) years for water, and not to exceed five years for gas or electricity for street lighting and other

be incorporated, and cities and villages of not less than 1,000 inhabitants could be reincorporated as cities. Also, whenever the general or special law under which any existing city operated was repealed, that city was to become incorporated under the act by operation of law.[103]

In case of reincorporation of any municipality under this act it was provided:

"All laws and parts thereof not inconsistent with the provisions of this act shall continue in force and be applicable to such city or village the same as if such reorganization had not taken place, and no reorganization shall be construed to be a repeal or surrender of any rights, powers, privileges or franchises heretofore by law conferred upon such city or village, and not inconsistent with the provisions of this act."[104]

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public purposes." Ibid. sec. 132.

To "regulate openings and excavations in streets, alleys and public grounds, for the laying of gas, electric conductors, water mains and pipes, . . . and to regulate the construction and use of all structures and conduits underneath the streets, alleys and sidewalks." Ibid. sec. 135, sub-sec. 3.

"To regulate and control or prohibit the placing of poles and the suspending of wires along or across the streets and alleys"; also to compel the placing of wires underground. Ibid. sub-sec. 6.

"To regulate and control the quality and measurement of gas, and to prescribe and enforce regulations for the manufacture and distribution of gas, and to inspect gas and gas meters, and to control and regulate the measurement and use of electricity and electrical apparatus for furnishing light, heat and power in the city." Ibid. sub-sec. 71.

"To prevent and regulate or prohibit the locating, construction and laying of street railway tracks in, under or over any street, alley or public place; *provided,* that it shall grant all public franchises and rights over, upon or under the public streets and highways of the city only to such parties as will contribute to the city the greatest amount of money for and give the best service in the exercise of the same." Ibid. sub-sec. 15.

The practice of selling franchises, thereby raiding the utility user for the benefit of the taxpayer, was thus encouraged by specific authorization from the legislature.

No franchise could be granted save by a three-fourths vote of the council. Ibid. sub-sec. 78. No exclusive or perpetual franchise could be conferred. Ibid. sec. 138. A bond was required of every grantee of a franchise for "the just and lawful exercise of the powers and privileges conferred." Ibid. sec. 144. Provisions were made for the operation of municipal water works and light works. Ibid. sec. 289-293.

The above act confers general authority on the municipalities to grant franchises, but hedges that authority about with burdensome restrictions. The legislature evidently was trying to prevent abuses arising from the granting of franchises by councils, and fell into the error of imposing restrictions which would tend to make the passing of franchises unduly difficult. Any franchise could be vetoed by one-fourth of the council or by the mayor. It is plain that an obstructive minority could force the inclusion of provisions to its liking or else defeat the franchise. Provisions such as these promote wrangling and the reaching of results by compromise rather than on the merits.

[103]Minn. Laws 1895, ch. 8, sec. 21. In 1922 five cities appeared to

Accordingly, in order to ascertain the exact powers over public utilities of any municipality reincorporated under this act, it is necessary to examine its authority under the act, under the charter it enjoyed at the time of reorganization, under any laws applicable to it at the time of reorganization, and under any laws enacted subsequent to its reorganization and applicable to it.

In 1896 the home rule amendment to the Minnesota constitution was adopted.[105] The amendment provided that any city or village in the state might "frame a charter for its own government as a city consistent with and subject to the laws of this state." Procedure was specified. The charter was to "supersede any existing charter and amendments thereof." The legislature was to "prescribe by law the general limits within which such charter shall be framed." All courts were to take judicial notice of the charter. Procedure was provided for amendments. The charter was to be always "in harmony with and subject to the constitution and laws of the state of Minnesota."

As part of the same amendment the legislature was authorized to provide general laws relating to the affairs of cities the application of which might be limited to cities of over 50,000 inhabitants, or to cities of 50,000 and not less than 15,000, or to cities of 15,000 or less [sic]. Such laws were to "apply equally to all such cities of either class;" and to "be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for."

An amendment covering much of the same ground was enacted in 1898, but the only alteration made in the provisions above set forth was that the classification of cities by population was changed to cities of over 50,000 inhabitants; of 50,000 and not less than 20,000; of 20,000 and not less than 10,000 and cities of 10,000 or less. [sic].

Pursuant to the terms of the amendment the legislature in 1897 passed an act providing for home rule charters.[106] The act embodied much of the language of the amendment, and made certain additional provisions, among which was the following:

"It shall be lawful for any such city in such charter or by

be still governed by the 1895 law. Anderson, City Charter Making in Minnesota 39. Since the revision of 1905 no municipalities may be incorporated under this law. Minn. Rev. L. 1905, ch. 108, sec. 5536.

[104]Minn. Gen. Laws 1895, ch. 8, sec. 27.

[105]This amendment is printed in Minn. Laws 1897, p. v; the 1898 amendment is Minn. constitution, art. 4, sec. 36.

[106]Minn. Laws 1897, ch. 255. See also Minn. Laws 1899, ch. 351.

amendment thereof to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places in such city, whether such franchises or privileges have been granted by said city or by or under the state of Minnesota, or any other authority; but no perpetual franchise or privilege shall ever be granted; nor shall any exclusive franchise or privilege be granted unless the question of granting the same shall have been first submitted to the qualified voters of such city and adopted by a majority voting at such election on the question, nor in such case for a longer period than ten years."[107]

Provisions concerning bonds for municipal water and light plants were also included.[108]

Another broadening of authority hitherto conferred only by special act occurred when the legislature empowered the boards of county commissioners of the state to grant the right to construct and operate street railways upon the public roads and highways in their respective counties outside of cities and villages, for a period not exceeding twenty-five years, "upon such terms and conditions as to the use and occupation of the same for such purpose as the said boards of county commissioners shall prescribe."[109]

An amendment to a statute dealing with the rights of way of certain utilities, including telephone companies, added a proviso that nothing therein should be construed to grant any rights for the maintenance of a telephone system within any city or village until such right be obtained impliedly from the city or village), nor for a period beyond that for which the right was granted by the municipality.[110]

An act passed in 1901 gave certain water power and other electric companies the right to use the public highways, provided "that in the construction and maintenance of such lines such corporations shall be subject to reasonable regulations to be imposed by . . . the governing body of the village or city wherein said road or highway may be situated."[111] Another act passed during the same session[112] covers much of the same ground. It again amends the statute[113] concerning rights of way of certain utilities. As amended the statute grants water power, telephone, telegraph,

[107]Minn. Laws 1897, ch. 255, sec. 9.
[108]Ibid. sec. 10.
[109]Minn. Laws 1899, ch. 305.
[110]Minn. Laws 1899, ch. 51.
[111]Minn. Laws 1901, ch. 301.
[112]Minn. Laws 1901, ch. 360.
[113]The previous amendment is cited supra, note 110.

pneumatic tube, and electric companies the use of the highways for equipment, provided that such corporations

"in the construction and maintenance of any such line, subway or conduit, shall be subject to all reasonable regulations that may be imposed by—the council, or other governing body of any village or city wherein said road or highway may be situated; and *provided,* that nothing herein contained shall be construed to grant to any person, persons, association or corporation any rights for the maintenance of a telephone, telegraph, pneumatic tube, or electric system within the corporate limits of any city or village in this state until such person, persons, association or corporation shall have obtained the right to maintain such system in such village or city, nor for a period beyond that for which the right to operate such system is granted by such city or village."[114]

Why two laws, the second in large measure inclusive of the first should have been passed at the same session of the legislature, is hard to see. At any rate, the second act is important in that it contains additional implications of municipal authority.

Another forerunner of the regional idea in Minnesota utilities legislation is to be found in an act passed in 1902,[115] which authorized the council of any city of 10,000 or less owning and operating an electric light plant to extend the lines to any village within three miles of the city limits and to sell current in the village. The consent of the council of the village was required. The act is, of course, of very limited application, but it contains the germ of future developments.

The hand-to-mouth nature of much utility legislation is illustrated by a law passed in 1903. The supreme court of the state in 1901 held that villages of less than 3,000 population incorporated under the 1885 village law previously referred to herein[116] had no authority to grant street railway franchises for definite terms.[117] The court pointed out that although such villages were given power to control and govern their streets, they had no specific authority over street railways. The court further indicated that express authority had been given villages of over 3,000 population to control street railways,[118] and that similar power had

[114]This act (Minn. Laws 1901, ch. 360) dealt with some of the same matters as did sec. 2641, Gen. Statutes of Minn. for 1894, which embodies Chap. 34, sec. 42, Gen. Stat. of Minn. for 1878 as amended by Chap. 73, sec. 1, Gen. Laws of Minn. for 1881, to which attention has previously been called. supra note 68.

[115]Minn. Laws Ex. Sess. 1902, ch. 66.

[116]Supra note 81.

[117]City of Stillwater v. Lowry, (1901) 83 Minn. 275, 86 N. W. 103.

[118]This was one of the provisions of the village law of 1891 cited

been granted to the principal cities. It concluded that if the legislature had intended to grant such authority to villages of population under 3,000 it would have done so expressly.

The case involved the authority of the village of Stillwater to grant a franchise for a street railway to connect with the city of Stillwater. The legislature in 1903 passed an act which provided:

"That the village council of any village in this state having a population of less than three thousand (3,000) inhabitants is hereby empowered to grant by ordinance to any person, persons, or corporation, for the purpose of connecting any such village with other villages, cities or outside territory, by what is commonly known as street railway lines, the right to construct, maintain and operate street railway lines . . . for the transportation of passengers on any of the public streets of said village for a period not exceeding twenty-five (25) years."[119]

Previous franchises of the nature prescribed were legalized.

The act is made to apply to the situation involved in the court decision. No principle is accepted and embodied in an act carrying it out. Municipalities in general are not granted the authority specified, but only the kind of municipalities involved in the decision, i. e., villages having less than 3,000 inhabitants. These villages are not given general authority to grant franchises to street railways and to control such utilities, but only to grant the right to construct and operate such lines for the purpose of connecting any such village with other municipalities or outside territory. The effect of the court decision on the facts in hand was eliminated, and the exact situation dealt with in the case was cared for; with that the legislature was content.

In 1903 an act was passed authorizing any city then or thereafter having a population of more than 10,000 and not more than 50,000 to provide water for the use of the city and its inhabitants by contract with private parties in the absence of a municipal water works. The terms were left to the discretion of the councils. The contracts were to run not more than thirty years. Similar provisions were made concerning light, but the contracts were to run not more than fifteen years.[120]

Another act in furtherance of the home rule amendment, passed in 1903, contained an important addition to previous provisions The act specified:

supra note 95. Minn. Gen. Laws 1891, ch. 146.

[119]Minn. Laws 1903, ch. 139.

[120]Minn. Laws 1903, ch. 185.

"It shall be lawful for any such city or village, in such charter or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege, in any of the streets or public places in such city, whether such franchises or privileges have been granted by said city or said village, or by or under the State of Minnesota, or any other authority, *to the same extent, and in the same manner as might the legislature of said state.*"[121]

No broader grant of authority within the bounds specified could have been made.

The period following the enactment of the constitutional amendment of 1892 was marked by the passage of a number of general laws dealing with utilities and their control. These laws were incomplete and left much to implication. Under them no system of control, municipal or other, was planned and embodied in legislation.

Section VI. The Revised Laws of 1905

A revision of the laws of the state, including the laws passed previous to and during the session of 1903, was made and adopted, and became known as the Revised Laws of Minnesota for 1905.

The revision altered the language of the previous legislation pursuant to the home rule charter amendment. The home rule provisions of the revision of interest in this discussion exist unchanged today, and will be considered hereafter.[122]

No general law for the incorporation of cities was included in the revision. All cities were to continue to be governed by the laws applicable at the time of the revision, unless they adopted home rule charters.[123]

Villages existing under special charters or general laws were to continue to be governed thereby, gut they were authorized to reincorporate under the Revised Laws. Also, new villages might be incorporated thereunder. The Revised Laws, then, provided an additional general law under which villages might incorporate.[124] The provisions for municipal control of the kinds of

[121]Minn. Laws 1903, ch. 238, sec. 9.

[122]Ch. IV, sec. 1 of this article.

[123]Minn. Rev. L. 1905, sec. 747.

[124]In 1926, two hundred and twelve villages were operating under the 1905 law. Walker, Village Laws and Government in Minnesota 61.

utilities herein considered extended only to water and light, and as to those were incomplete.[125]

Authority was given all villages to erect, purchase or lease and operate municipal water and light plants.[126]

The act of 1903 concerning street railways connecting villages with outside territory, above set forth,[127] was substantially repeated and made to apply to all villages.[128]

The revision also made changes in the terms of the general laws dealing with public utilities.[129] Comparison of these provisions with the accumulated assortment of acts each covering or re-covering part of the field which have been set forth herein in the order of their adoption, shows that the revision performed the valuable service of consolidating these laws and bringing together under them groups of utilities formerly variously dealt with by the scattered acts. However, the revision still left the implications of municipal authority which had existed under the former laws; no attempt was made to inaugurate a complete and definite system of utility control.[130]

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[125]The councils were authorized:

"To provide . . . pumps, water mains, reservoirs, and other waterworks." Minn. Rev. L. 1905, sec. 727, subsec. 7.

"To provide, and regulate the use of, wells, cisterns, reservoirs, waterworks, and other means of water supply." Minn. Rev. L. 1905, sec. 727, subsec. 18.

"To erect lamp-posts and lamps, and provide for lighting any portion of the village streets or grounds by gas, electricity, or other means." Minn. Rev. L. 1905, sec. 727, subsec. 19.

[126]Minn. Rev. L. 1905, sec. 744.

[127]Supra note 119.

[128]Minn. Rev. L. 1905, sec. 745.

[129]However, it was specified: "Until otherwise provided by law, all private corporations existing and doing business at the time of the taking effect of the Revised Laws, shall continue to exercise and enjoy all powers and privileges possessed by them under their respective articles of incorporation and the laws applicable thereto then in force, and shall remain subject to all the duties and liabilities to which they were then subject." Minn. Rev. L. 1905, sec. 2838.

[130]In the section authorizing the organization of street railway, telephone, water, light, heat, or power corporations and other public service corporations is included the following, "But no corporation so formed shall construct, maintain or operate a railway of any kind, or any subway, pipe line, or other conduit in or upon any street, alley, or other public ground of a city or village, without first obtaining from, and compensating said city or village for, a franchise conferring such right." Minn. Rev. L. 1905, sec. 2841.

It was further provided, "The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation, and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and

Section VII. Utility Legislation Since the Revised Laws

Most of the laws concerning the utilities herein discussed enacted since 1903 are still on the statute books, and will be considered in the next chapter. Some of them will be briefly mentioned here to complete the chronological account of the development of public utility law in Minnesota.

A number of acts authorized in specified situations the furnishing of municipal utility service of particular kinds beyond the municipal limits.[131]

In 1905 cities having a population of not less than 10,000 nor more than 20,000 and not operating under home rule charters were given power to grant by ordinance authority to construct and operate street railways, and "to connect such street railway lines . . . with other territory, cities, and villages."[132]

An act was passed in 1907 conferring upon every city of the state extensive authority in the matter of municipal ownership of public utilities.[133]

An act passed in 1911 authorized any two cities meeting a certain description to unite with the executive head of any state institution in the cities to form a public corporation for the purpose of supplying the cities and the state institution with electrical energy developed from water power.[134] This law is important as an instance of meeting regional needs by the device of enabling public officials to form a public corporation. It is also an extreme example of special legislation wearing the cloak of general language.

All villages in 1913 were authorized to contract for the purchase of electric energy for municipal purposes and for distribution by the municipality to its inhabitants.[135] Municipal distri-

restrictions as from time to time may be imposed upon it by such municipality." Ibid. sec. 2842.

Provision was made for purchase by municipalities. Ibid. sec. 2843.

A section giving water power, telegraph, telephone, pneumatic tube and electric companies the use of public roads contains reservations of municipal authority in substance the same as those of the act of 1901, already set forth, cited supra note 112. Ibid. sec. 2927.

[131]Minn. Gen. Laws 1905, ch. 228; Minn. Laws 1909, chs. 174, 218; Minn. Laws 1919, ch. 313; Minn. Laws 1921, ch. 91; Minn. Laws 1927, ch. 134.

[132]Minn. Laws 1905, ch. 250.

[133]Minn. Laws 1907, ch. 452.

[134]Minn. Laws 1911, ch. 141.

[135]Minn. Laws 1913, ch. 317.

bution systems purchasing current wholesale and retailing it to the inhabitants have become common in Minnesota.

Some indications of a tendency away from municipal ownership are to be found in such laws as that passed in 1915 authorizing any village to sell, lease or abandon waterworks and light plants.[136]

In 1915 the council of any city then or thereafter having a population of more than 50,000 inhabitants and not operating under a home rule charter was given detailed powers to grant franchises to street railways and to regulate such railways. The act itself imposed many regulations.[137] Only one city in the state, Minneapolis, met the description prescribed in the act. By means of the same description a considerable volume of special legislation was being passed at this time applicable to Minneapolis only.

The first extreme departure from municipal regulation of local utilities in favor of regulation of such utilities by state commission came in 1915. The legislature virtually stripped municipalities of the power to control telephone companies, and vested control of all telephone lines in the state railroad and warehouse commission.[138]

In 1915 cities and villages were authorized to permit suburban railways using other than steam power to enter such municipalities, and were given powers of control.[139]

It was provided the same year that in all cities of the fourth class where any person or corporation conveyed or delivered electric current obtained in another state and used any of the streets of the city for equipment without having a written franchise, the council could fix an amount to be paid the city for the privilege. Nothing in the act was to be construed to prevent the city from causing the removal of such equipment from the streets.[140]

All the cities of the third and fourth classes were authorized in 1919 to prescribe by ordinance from time to time the rates to be charged for electricity and gas.[141] Valuations of utility property were provided for. No valid reason is apparent why this

[136]Minn. Laws 1915, ch. 79. See also Minn. Laws 1917, ch. 172.

[137]Ch. 124, Session Laws of Minn. for 1915. This act was incorporated almost verbatim into the home rule charter adopted by Minneapolis in 1920. See Ch. XII of that charter.

[138]Minn. Laws 1915, ch. 152.

[139]Minn. Laws 1915, ch. 310.

[140]Minn. Laws 1915, ch. 311.

[141]Minn. Laws 1919, ch. 469.

authority should have been granted to these cities and not municipalities in general.

Provision was made in 1921 for telephone systems to be owned and operated by one or more townships. Rates and charges were subjected to the approval of the railroad and warehouse commission, but the control of the commission in other matters was not complete.[142]

A general law whereunder the "inhabitants of contiguous territory not organized as a city and having not less than one thousand (1,000) inhabitants and not more than ten thousand (10,000) inhabitants" could incorporate as a city was passed in 1921.[143]

[142]Minn. Laws 1921, ch. 439.

[143]Minn. Laws 1921, ch. 462. This law is still on the statute books, and is to be found in Mason's 1927 Minn. Stat. secs. 1828-17 through 1828-99. In 1922 there were three cities incorporated under this act. Anderson, City Charter Making in Minnesota 35.

Each such city was given all the powers "granted and applicable to cities of the fourth class" not operating under a home rule or special charter. Minn. Laws 1921, ch. 462, sec. 2.

The councils were empowered: "To regulate openings and excavations in streets, alleys, and public grounds, for the laying of gas, electric conductors, water mains and pipes, or for other purposes, and the building of sewers, tunnels and drains, and to regulate the construction and use of all structures and conduits underneath the streets, alleys and sidewalks." Ibid. sec. 41, subsec. 3.

"To regulate and control or prohibit the placing of poles and the suspending of wires along or across the streets and alleys." Ibid. subsec. 6.

"To prevent and regulate or prohibit the locating, construction and laying of street railway tracks in, under or over any street, alley or public place; provided, that it [the council] shall grant all public franchises and rights over, upon or under the public streets and highways of the city only to such parties as will contribute to the city the greatest amount of money and give the best service in the exercise of the same." Ibid. subsec. 14.

"To establish and regulate public wells, cisterns, hydrants and reservoirs." Ibid. subsec. 66.

"To regulate and control the quality and measurement of gas, and to prescribe and enforce regulations for the manufacture and distribution of gas, and to inspect gas and gas meters, and to control and regulate the measurement and use of electricity and electrical apparatus for furnishing light, heat and power in the city." Ibid. subsec. 67.

The council was authorized to contract for the lighting of the streets and public places, and was empowered to permit the laying of gas and water pipes, in language identical with that of the act of 1867 giving the Minneapolis council similar authority. Minn. Sp. Laws 1867, ch. XIX, sub-ch. IX. Thus the habit of legislative bodies of repeating the same language year after year and decade after decade in dealing with the same problem is strikingly illustrated. The danger in such a practice is likewise illustrated; these provisions are inapt and incomplete, leaving much to be covered by inference and much not covered at all. They represented progress in 1867; they were archaic in 1921.

General grants of powers not specifically mentioning public utilities but possibly having a bearing upon them were included in the act. Minn. Laws

This comparatively recent act providing a general law for the incorporation of cities shows the lagging development of legal provisions for municipal regulation of utilities. Instead of a single compact and concise statement of the authority of the cities over utilities we find scattered about in the law a repetition of ancient, incomplete and long outworn provisions patched with a general grant of the powers possessed by cities of the fourth class. Further, the legislature still clung to the discredited idea that franchises should be sold for the highest possible price, thus fastening upon future generations of utility users the necessity of paying a return on sums exacted by the city for the relief of taxpayers.

The second large departure from municipal control of utilities in favor of regulation by state commission came in 1921, when street railways were placed under a scheme which combined control by state commission with control by municipalities.[144] The principal power which was stripped from the cities and villages and given to the state railroad and warehouse commission was the power to determine rates.

In 1925 the railroad and warehouse commission was given certain control over telephone, telegraph, and electric wires crossing or running parallel to the lines of "any railroad, interurban railway or any other public utility."[145] The language of the act is not altogether clear, but it appears to relate to the control of the physical nature, location, maintenance, and operation of the wires rather than of the business done over them.

The commission in 1927 was given authority in certain instances to require the extension of township telephone lines beyond the limits of the townships.[146] No utility measures of major importance were passed during the legislative sessions of 1929 and 1931.

Section VIII. Conclusions

The above account of the course of legislation providing for the control of public utilities in Minnesota reveals certain general facts. In the first place, three stages in such control are fairly

1921, ch. 462, sec. 41, sub-secs. 71 and 73.

No franchise could be granted save by a three-fourths vote "of all members elect of the council." Ibid, sub-sec. 73.

No exclusive or perpetual franchise or privilege was to be granted. Ibid. sec. 43.

[144]Minn. Laws 1921, ch. 278.

[145]Minn. Laws 1925, ch. 152.

[146]Minn. Laws 1927, ch. 193.

discernible, although there is much overlapping of the three. The earliest was one of control of utilities by the legislature. That body created the utility companies; it granted the franchises to utility operators; and it prescribed general regulations for the conduct of their enterprises.

Legislative control by means of special acts incorporating utility companies, by means of the grant of franchises to particular companies, and by means of regulations applying to particular companies were all terminated by constitutional amendments. Legislative control by laws applying to utilities generally has of course continued to exist until the present time.

Even before the ending of legislative control by constitutional amendment municipal control was growing in scope. Almost from the beginning of legislation in the territory of Minnesota such old and familiar utilities as hacks, drays and omnibuses were completely subject to municipal regulation; as other utilities grew older and more established, control of them also was transferred in increasing measure to the municipalities. Water and then gas came to be the subjects of municipal regulation. Street railways followed. By the time telephones and electricity had been developed constitutional amendments had deprived the legislature of much of its power in this field, and from the first these utilities, in so far as they were subjected to any regulation beyond that of general state laws, were regulated by municipalities.

The third stage of utility control was control by state commission. Municipal regulation continued intact in Minnesota long after it had been replaced by state commission control in other states. It was not until 1915 that any one of the utilities herein considered was placed under the state commission. Perhaps the belated establishment of commission control accounts in part for the fact that it never gained more than partial acceptance. If it had been adopted in the early days when it had the character of a reform, it might have been taken in bodily. By the time it was adopted there had been sufficient experience with it elsewhere to show that it was no perfect device ordained by its own nature to solve utility problems infallibly. After it had been applied to telephones, there were attempts to extend it to other utilities, but those attempts encountered vigorous and effective opposition. As a result, when it was extended to street railways, it was not extended completely. Instead an attempt was made

to combine it with municipal regulation in such a manner as to secure the advantages of each form of control. Sufficient doubt as to the desirability of the outcome has existed to keep the state from extending any substantial measure of commission control to water, gas, or electricity.[147] Municipal regulation still occupies the field in the case of these three utilities.

The course of utility legislation in Minnesota reveals a slight tendency in recent years to recognize the regional aspects of the problem. This tendency so far has been largely limited to provisions dealing with municipal ownership, whereby the utility service of one municipality has been made available to others or to surrounding territory, or two or more municipalities or other local subdivisions of the government have been authorized to combine in the operation of a utility plant.[148]

Another fact apparent from the course of Minnesota utility legislation is that the extent of municipal control over utilities and the language granting such control have varied tremendously from the first and still vary. Worse yet, variations exist without any apparent reasons or sound principles to account for them. Haphazard laws enacted to meet particular needs after the needs have arisen, rather than carefully planned and thorough measures embodying principles consciously accepted, characterize legislative provisions for municipal control of utilities. In spite of endless repetition there has been little uniformity; in spite of verbosity the provisions have not been comprehensive. The principal objection to such a state of affairs is, of course, serious and needless deficiencies and differences in municipal powers. A very serious objection is the fact that in the motley confusion of laws the authority of any particular municipality is hard to find. A great deal of unnecessary uncertainty even on the part of those fairly well versed in such matters exists as to the precise state of the law.

As we have seen, some of the municipalities of the state, ac-

[147]A bill, H. F. 939, to empower the commission to control light and power companies to the same extent as it now controls telephone companies, failed of passage in the 1931 session of the legislature.

[148]Two attempts, one in 1923 and one in 1925, were made to secure laws to permit the railroad and warehouse commission, whenever that commission deemed it for the public interest, to consider the street railways of St. Paul and Minneapolis as a single operating unit and to designate the two cities as one metropolitan transit district for valuation purposes. In both years the bills introduced for this purpose failed of passage. See Report of the Minn. R. R. & W. Comm. for 1927-1928, p. 238.

cording to the latest available information, are still operating under special charters granted them by the legislature during the last century, and have the powers for utility regulation provided in those special charters. Others are acting under the general city incorporation law of 1870, or the general village law of 1885, or the general city law of 1895, or the village laws contained in the Revised Laws of 1905, or the general city law of 1921, or under home rule charters,[149] and have the powers granted in their respective sources of authority. Besides these original sources of powers there are numerous general laws, some applying to all municipalities, others to one or more classes of municipalities, others to municipalities meeting a description embodied in the law. A thorough revision of the law concerning municipal control of utilities, eliminating needless differences and inequalities, filling gaps, and combining all the present scattered laws into a single compact act embodying principles intentionally adopted after consideration of the problem is needed if we are to expect municipal control in Minnesota to function successfully. If the state is to adhere to its policy of exclusive municipal control of water, gas, and electricity such a step should be taken.

CHAPTER III. MINNESOTA UTILITY LAW TODAY

Section 1. Municipal Ownership

There are numerous laws in Minnesota dealing with public ownership of utilities. All of these will not be treated here. A variety of provisions authorizing municipal ownership are to be found in the statutes under which cities and villages are incorporated, set forth in Chapter II. A few statutes treating public ownership generally will be dealt with either because they have a bearing on the subject of utility control, or because they illustrate some principle of public ownership.

An act passed in 1913 empowers certain cities[150] to own and

[149]Anderson, City Charter Making in Minnesota 35; Walker, Village Laws and Government in Minnesota 61.

[150]It is doubtful what cities are subject to the act. The title begins, "An act to authorize and empower cities of this state of over fifty thousand inhabitants to acquire," etc. An act passed in 1909 provides that no act regulating any of the affairs of cities of the first class, that is, cities of over fifty thousand population, shall be deemed applicable to home rule charter cities, "unless the intention to make the same so applicable shall by such act be expressly declared." Mason's 1927 Minn. Stat. sec. 1300. No such intention was expressly declared in the act of 1913. All cities of over

operate and to lease any of the five utilities herein considered.[151] Any city included is empowered, for the purpose of acquiring a utility or equipment therefor, to issue bonds to an amount not exceeding one-fifth of the cost, and to pledge the full faith and credit of the city for payment; and to issue interest bearing certificates, which are to be a lien against the utility property acquired by reason of their issue, are to be payable from the revenue derived from the utility, and are not to be an obligation of the city nor payable from its general funds, nor to be deemed a part of the city indebtedness for any purpose. The combined certificates and bonds are not to be in an amount exceeding the cost of the utility plus ten per cent.[152]

Every city adopting an act passed in 1907 is by the terms of the act authorized to own and operate and to lease any of the five utilities considered herein,[153] but the 1907 law differs from the 1913 law in that the entire cost of the utility plus ten per cent may be paid either in bonds pledging the full faith and credit of the city, or in certificates of the kind specified in the 1913 law.[154]

Two sound principles of municipal ownership are partially embodied in the above provisions, namely, that the faith and credit of the municipality should not be pledged for the benefit of utility users, and that securities not pledging such faith and credit should not be included in the city indebtedness, especially for the purpose of ascertaining whether the city has exceeded the maximum indebtedness it may legally incur. These principles are not carried out in all the public ownership legislation of the state.

In the case of electrical utilities a common form of public ownership is the municipally owned distributing system which buys its current wholesale and retails it to the consumers in the municipality. All villages are authorized to contract for the purchase of electric energy to be distributed and supplied by the municipality to its inhabitants.[155]

50,000 inhabitants in the state now operate under home rule charters. The act of 1913 had the additional peculiarity that although its title limits it to cities of over 50,000 inhabitants, the provisions of the body of the act purport to apply to "every city of this state," "any city," etc. Minn. Laws 1913, ch. 310.

[151]Mason's 1927 Minn. Stat. sec. 1484 and 1485.

[152]Ibid. secs. 1485 and 1486.

[153]Ibid. secs. 1311 and 1312.

[154]Ibid. secs. 1312 and 1313.

[155]Ibid. sec. 1252. See also ibid. sec. 1764.

The significance of these and other statutes authorizing public ownership in Minnesota from the standpoint of control of privately owned utilities lies in the fact that over those utilities is the constant threat of public ownership in case the private utilities fall short of serving the public interests as well as do municipally owned utilities. The actual existence in the state of numerous municipal utility plants likewise furnishes a standard of comparison whereby private ownership may be judged. When municipal utilities furnish better service at lower rates, the burden falls upon the private utilities of showing a reason for the disparity. Both as a threat and as a yardstick municipal ownership exerts a very real influence on utilities operating under private ownership.

The usefulness of public ownership under modern conditions, which call for larger and larger systems, especially in the case of electrical utilities, will be greatly reduced unless adequate legal provisions are made enabling cities and villages to extend their systems beyond municipal boundaries, or enabling the local governments in any part of the state to band together under some prescribed procedure for the purpose of owning and operating utilities, or providing for the formation of special subdivisions of the government having jurisdiction over prescribed regions for the purpose of owning and operating utilities in those regions.[156]

A few incomplete provisions already exist for the extension of municipal systems beyond the municipal boundaries. All cities and villages owning water works have been authorized to extend their systems along any street, alley or public highway within or without the corporate limits, and to supply water to consumers accessible to the lines thus built.[157] The council of any city of 10,000 inhabitants or less may enter into contracts with any adjoining municipality having a water system for the furnishing of water to the citizens of the city.[158] Any city of the first class, including those operating under home rule charters, which maintains a municipal water plant, is authorized to furnish water to any city, town or village whose territory is contiguous to such city, upon a resolution requesting the service by the governing body

[156]A bill, S. F. 470, to permit the extension of municipal power lines outside municipal limits and to permit their interconnection was introduced during the legislative session of 1931, but failed of passage.

[157]Mason's 1927 Minn. Stat., sec. 1864.

[158]Ibid. sec. 1753.

of the contiguous city, town or village.[159] Village councils probably have authority to enter into contracts with adjoining municipalities for the furnishing of water by the adjoining municipalities.[160]

The council of any city having a population of 10,000 or less and owning and operating an electric light plant is authorized to furnish current in any incorporated village within three miles of the city limits, with the consent of the village.[161] Any village, or city of 10,000 inhabitants or less, owning and operating an electric light and power plant is authorized to dispose of surplus electricity to consumers residing outside the municipal limits.[162] This falls far short of being general authority to enter into the business of furnishing current beyond the municipal limits; only the surplus current may be sold outside the city or village. Cities having a population of not less than 10,000 nor more than 20,000 may sell and dispose of electricity to private consumers outside the corporate limits.[163]

The above provisions for the furnishing of municipal utility service outside the boundaries of cities or villages are a mere patchwork of measures each covering some immediate need. They deal only with water and electricity, and confer authority in small parcels rather than generally.

One instance exists in which local governments are authorized to band together for the purpose of owning and operating a utility.[164]

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[159]Mason's 1927 Minn. Stat., secs. 1491-2 and 3.

[160]See ibid. secs. 1236 and 1244.

[161]Ibid. secs. 1761-1763.

[162]Ibid. secs. 1253-1 and 1765-1.

[163]Ibid. sec. 1703-1.

[164]In cases in which a city is situated upon a river where there may be secured a developed water power near enough to supply the city and any state institution therein with electrical energy, the city may proceed to form a public corporation to supply such energy. If there is another city adjacent thereto, it shall be invited to unite in the formation of the corporation. By resolutions of their respective legislative bodies the executive heads of the cities and the executive head of any state institution in the cities may be requested to form the public corporation. If there be no adjacent city, or if there be one and it fails to act, the legislative body of the city desiring to avail itself of the act, shall by resolution request its executive head, the head of its engineering department, and the executive head of any state institution within the city, to form the public corporation. The designated officials are to meet and organize themselves into the corporation, the members of which are to be themselves and their successors in office. The corporate organization is provided for in the act. The corporation is authorized to aquire any developed water power within or near the

There are at present no laws in Minnesota providing for the formation of special subdivisions of the government, that is, special municipal corporations, having jurisdiction over prescribed regions for the purpose of owning and operating utilities in those regions.

It is apparent, then, that the Minnesota laws make no comprehensive provision for publicly owned utility plants extending beyond municipal boundaries. If publicly owned plants are to continue to be a potent regulatory force by furnishing a threat and a standard of measurement, they must be enabled by adequate legislation to develop as privately owned utilities are developing.

Section 2. Utility Control. Laws Dealing with Two or More Utilities

In order to show the nature of the utility control provided and authorized in Minnesota today by the law of the state it will be necessary to set forth that law in some detail. For the purpose of avoiding repetition, laws dealing with two or more utilities will be set forth first, and will not be considered anew in sections relating to each separate utility. The general laws on the subject must be considered in connection with the authority granted the different municipalities of the state by the acts and charters under which they exist. These are considered elsewhere herein.[165]

Many of the provisions of the Revised Laws of 1905[166] are still in force with some modifications. Until otherwise provided by law, all private corporations existing and doing business at the time of the taking effect of the Revised Laws are to continue to

corporate limits of the cities, and to provide itself with a suitable hydro-electric plant, with necessary means of distribution. The electric energy developed is to be disposed of first to the grantor from whom the water power is acquired if the contract so provides, second to any state institution in the city or cities, and the surplus, in equal shares, to the cities. The same rate is to be charged each user. The rate shall be sufficient to pay the cost of operation, maintenance, interest, retirement of indebtedness, renewals of plant, and a reasonable emergency fund, and no more. The corporation is authorized to issue bonds or certificates of indebtedness, which are to be a lien on its property. Mason's 1927 Minn. Stat., secs. 1341-1348.

It is obvious that the above act could not have other than a very limited application. Nevertheless it is of note because it suggests one possible line of development in the framing of machinery to handle publicly owned utilities operating in territory covered by two or more local subdivisions of government, i. e., the formation of public corporations by voluntary act of the local subdivisions.

[165]See chap. II and chap. IV.

[166]See chap. II, sec. 6.

enjoy all powers and privileges possessed by them under their articles of incorporation and the laws applicable thereto then in force, and to remain subject to the duties and liabilities to which they were then subject.[167] Private corporations are all corporations which are not formed solely for public and governmental purposes.[168]

The section of the statutes which authorizes the organization of street railway, telephone, water, light, heat or power corporations concludes:

"But no corporation so formed shall construct, maintain, or operate a railway of any kind, or any subway, pipe line, or other conduit, or any tunnel for transportation or pedestrians in or upon any street, alley, or other public ground of a city or village, without first obtaining from, and compensating said city or village for, a franchise conferring such right."[169]

The provision of the Revised Laws reserving the right of the state to supervise and regulate the business methods and management of such corporations, and to fix their rates, exists intact, as does that subjecting every such corporation obtaining a franchise from a city or village to such conditions and restrictions as from time to time may be imposed upon it by such municipality.[170] The provision granting "any water power, telegraph, telephone, pneumatic tube, or electric light, heat or power company" the use of the public roads was amended in 1911 by striking out the word "electric," thus making the provision applicable to all light, heat or power companies. The grant retains the qualifications that:

"In the construction and maintenance of such line, subway, canal or conduit the company shall be subject to all reasonable regulations imposed by the governing body of any town, village or city in which such public road may be. Nothing herein shall be construed to grant to any person any rights for the maintenance of a telegraph, telephone, pneumatic tube, light, heat or power system within the corporate limits of any city or village until such person shall have obtained the right to maintain such system within such city or village, or for a period beyond that for which the right to operate such system is granted by such city or village."[171]

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[167]Mason's 1927 Minn. Stat., sec. 7429.
[168]Ibid. sec. 7430.
[169]Ibid. sec. 7432.
[170]Ibid. sec. 7433.
[171]Ibid. sec. 7536.
[172]In the case of telephones these provisions are no longer applicable. See the subsequent section on telephones herein.

It is plain enough from the above statutes that the utilities dealt with may not operate in cities and villages without franchises from the cities and villages.[172] The language of some of the Minnesota decisions is to the same effect. A case decided in 1907[173] involved the question whether the plaintiff corporation had the right of eminent domain. Its business, as stated in its articles of incorporation, was to generate electricity and supply the current to the public for light, heat and power purposes. Objection was made that the company had received no municipal franchises. The court said:[174]

"It may never be called upon to serve a city or village. If it does, it must obtain a franchise and submit itself to such further conditions and restrictions as from time to time may be imposed upon it by such municipality."

In a later case[175] the court, speaking of an electric company, said: "Before this franchise ordinance was enacted the respondent's predecessor and so the respondent, had no right whatever to maintain its system in the city of St. Paul."[176]

Clearly, then, the utilities specified in the above statutes must have municipal franchises if they are to do business in cities and villages. This requirement constitutes a strong implication that cities and villages have authority to grant the required franchises. Such an implication should be considered in connection with any construction of specific grants of authority to municipalities over utilities found in the charters or incorporation acts under which the municipalities exist.

An act passed in 1919[177] authorizes any city of the third or fourth class, whether existing under general or special law or under a home rule charter, through its council or like governing body, by ordinance to prescribe from time to time the rates which any public service corporation[178] supplying gas or electric current for lighting or power purposes within said city may charge for such service. Nothing in the act is to be construed to impair the obligation of any existing franchise or contract between the city

[173]Minn. Canal & Power Co. v. Pratt, (1907) 101 Minn. 197, 112 N. W. 395.

[174](1907) 101 Minn. 197, 215, 112 N. W. 395, 398.

[175]State ex rel. Mason v. Consumers Power Co., (1912) 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N.S.) 1181, Ann. Cas. 1914B 19.

[176]The court cited sec. 2927, Minn. Rev. L. 1905, which is the predecessor of Mason's 1927 Minn. Stat., sec. 7536, cited supra note 171.

[177]Mason's 1927 Minn. Stat. secs. 1714-1716.

[178]Includes persons and partnerships.

and the company. It is made the right and duty of the governing body of the city to fix a rate which shall permit the corporation "to make a reasonable return on the capital investment in the business, under an economical and efficient management of the same."

This latter provision is of importance in that the investment rather than the value of the utility property is made the base for the fixing of rates.[179] The significance of this provision is somewhat impaired by the fact that in at least one instance the term "capital investment" was defined in a franchise made by a Minnesota city to mean the fair and reasonable value of the plant as a going concern, etc.[180] However, no definition of the term is made in the statute and in the absence of a general interpretation of "capital investment" to mean "value," the words should be taken to mean what they say.

The provision that the rates shall be fixed at such a figure as will produce a reasonable return under "economical and efficient management" is important, but the extent to which the council under this clause may go in setting rates which in fact do not yield the prescribed return but which the council can show would yield the return if certain economies in management were introduced is a matter raising a constitutional question as to the right of the state or its subdivisions to assume the function of management of a privately owned utility.[181]

For the purpose of determining rates it is made the duty of the corporation to give the governing body of the city or its agent access to the books of the company to obtain information necessary and proper in making the determination.

In cases where the utility supplies customers outside the city limits, the governing body of the city in fixing rates is to consider their effect on the rates charged customers outside the city, but the governing body may not fix the latter rates.

The rates are to be prescribed only after notice to the company and a hearing. "Such proceedings may be instituted by the council or other governing body of said city or upon petition of any such

[179]The provision is invalid under the decisions of the U. S. Supreme Court previously referred to, supra chap. I, note 19, but it shows legislative support for the investment principle.

[180]See Minneapolis Gaslight Co. v. City of Minneapolis, (1913) 123 Minn. 231, 143 N. W. 728.

[181]See Southwestern Bell Tel. Co. v. Pub. Serv. Comm., (1923) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.

public service corporation, or upon petition of twenty-five per cent of the customers served by such corporation within such city." Failure of the governing body to determine the rates within sixty days after the petition is filed with the city clerk is deemed a denial of the petition. The governing body is not required to act on the petition of a company which refuses to give access to its books and other information relative to the operation of its business necessary and proper to the determination of the rates. In case of the failure of the company to give the governing body of the city such access, the latter body may determine and prescribe rates upon such information and evidence as may be adduced at the hearing.

"Any such city, public service corporation or person aggrieved by any such determination of rates" is given the right of appeal to the district courts of the state. Procedure is prescribed. It is specified:

"There shall be no pleadings upon such appeal and the only question that shall be passed upon or considered shall be whether the rates prescribed by the determination of such council or other governing body of such city were fair and just to such public service corporation and the consumers and would permit such public service corporation a fair and reasonable return on the capital investment in the business under an economical and efficient management of the same."

Until final determination of the appeal the rates fixed by the governing body of the city are to be in force.

The reason this law was made to apply to cities of the third and fourth classes only appears in a report made for the Committee on Legislation of the League of Minnesota Municipalities in 1919, the year the act was passed.[182] The member making the report stated that the above bill was drafted by the City Attorney of Red Wing, and added that it "was intended to help out that city." He continued: "I think it applied in the first instance to the cities of the fourth class but at the instance of the Mayor of St. Cloud and other officers of that city, it was amended to include cities of the third class."

"After a considerable fight," the bill was passed. "The credit for the enactment of that bill is due almost entirely to the officers and representatives of the two cities."

A world of light is cast by the above disclosure on the causes

[182]O'Neill, Report of the Committee on Legislation, (1919) 4 Minn. Municipalities 132.

which produce the hand-to-mouth sort of legislation which we have observed from the beginning in Minnesota provisions for utility control. Legislatures are not always concerned with the development of general and consistent principles and policies. Legislators are concerned with the demands of their constituents for measures designed to meet immediate wants. Two cities wanted control over the rates of two kinds of utilities, and were willing to fight for what they desired. They drew a bill designed to secure exactly what they wished, and the legislature passed it. Had a second class city entered the tussle, the law might have applied to second class cities. Had a few powerful villages taken up the fight, the law would probably have been drafted to embody a description which would have included those villages. If municipal control of utilities be represented by the surface of a table, and laws granting such control be represented by cloth, we observe that the table, instead of being all covered by one cloth, is littered with a confusion of patches of assorted sizes and shapes, which in places lie one over another and in many other places leave the table uncovered and bare.

Another measure covering a portion of the table is to be found in a law which provides:

"Any city of the second or third class, if it have no water system of its own, may contract with a private person or corporation to supply its inhabitants with water for public and private use, for such period, not exceeding thirty years, and upon such conditions, as its council may determine."

In like manner, any such city not owning a lighting system may contract for the public and private lighting thereof for a period not exceeding fifteen years. Any such contract may be extended from time to time.[183]

There are several statutes dealing with the physical equipment of utilities. The commissioner of highways is given authority to make and enforce regulations for the placing and maintenance of certain utility equipment along or across highways.[184] The railroad and warehouse commission has powers of control over telephone and electric wires which cross "or more or less parallel" the lines of "any railroad, interurban railway or any other public utility."[185] The commission is given certain authority to inspect and test meters and devices for measuring electricity, gas or water

[183]Mason's 1927 Minn. Stat., sec. 1326.
[184]Ibid. sec. 2558.
[185]Ibid. sec. 4718-1 and 2.

sold to the public.[186] The governing bodies of all cities and villages are authorized to appoint inspectors of gas, electric light, heat and water meters, who have authority to inspect and read such meters.[187]

The wave of popular agitation against high prices following the World War left stranded upon the Minnesota statute books an odd piece of legislation which by its terms has a direct bearing upon the problem of utility control. The commissioner of agriculture, whose powers have since been transferred to the department of agriculture,[188] was authorized by a law passed in 1919[189] to "investigate the prices of kerosene, gasoline, electricity and other things used for light, heat and power, and all common necessities of life," including a list of named necessities.[190] To that end he was authorized to exercise the powers he then had to hold hearings, to compel the attendance of witnesses and the production of books and papers, to administer oaths and to take testimony.

The second section of the act reads:

"He may from time to time prepare and publish reports apportioning in detail the cost of production and the wholesale and retail cost of necessities of life investigated by him, so as to disclose the cost of production, the cost of distribution and the profits to each manufacturer, producer, dealer, wholesaler or retailer, of such necessities so investigated by him, and may at the same time prepare and publish prices deemed by him to be fair retail prices in any given locality, in order that the public may know whether or not excessive profits are being exacted by any person, firm, association or corporation producing or dealing in such necessities."

The question arises whether "necessities" in the second section includes "electricity and other things used for light, heat and power," mentioned in the first, or whether necessities are distinguished and placed in a separate category by the first section. If the former construction were made, then we would have here a sharp weapon for utility control placed in the hands of the department of agriculture. Whether the weapon would be retained if the department were to take it out of the case of legal curios and lay about vigorously with it is an inquiry not within the scope of this discussion.

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[186]Minn. Laws 1931, Ch. 98.
[187]Mason's 1927 Minn. Stat., secs. 1861 and 1862.
[188]Ibid. sec. 53-26.
[189]Ibid. sec. 6241-6245.
[190]Among them automobiles!

Section 3. Laws dealing with Electricity.

Most of the statutes relating to electrical utilities have been considered. A law passed in 1915 provides that the governing bodies of cities of the fourth class may make a charge for the privilege of selling in or conducting into or through such cities electricity obtained in another state if written authority has not been given by the city involved.[191]

Section 4. Laws dealing with Gas.

The principal provisions relating to gas have been discussed in sections one and two. In addition there is a law passed in 1921 authorizing in some instances and under certain conditions any gas company granted a franchise by a first class city to use its equipment to furnish gas in an immediately adjoining second class city without paying the first class city any gross earnings tax on the proceeds.[192] The occasion for the above act was probably the gross earnings tax levied by St. Paul upon the proceeds from gas furnished in South St. Paul.[193]

Section 5. Laws dealing with Water.

There are practically no privately owned water companies in Minnesota.[194] Provisions for control of private water companies are accordingly of minor importance. What provisions there are have been dealt with under other heads. The municipal water systems are almost entirely under the control of the municipalities. As previously indicated, the railroad and warehouse commission has power under given circumstances to inspect meters.

Section 6. Laws dealing with Telephones.

In 1915 the railroad and warehouse commission was given the same jurisdiction and supervisory power over telephone companies doing business in the state as it then had over railroad and express companies.[195] The term "telephone company" as

[191]Mason's 1927 Minn. Stat., secs. 1771-1773.

[192]Ibid. secs. 1491-4.

[193]See Ordinance No. 3074, City of St. Paul, approved July 12, 1912, Comp. of Ord. of St. Paul (1922) sec. 2086. The ordinance authorizes the St. Paul Gas Light Co. to use its equipment in the streets of St. Paul to furnish gas in South St. Paul, but requires the gas company to pay a gross earnings tax to St. Paul upon the proceeds of the gas supplied in South St. Paul.

[194]Fuller, Some Aspects of the Franchise Problem, (1930) 15 Minnesota Municipalities 415.

[195]Mason's 1927 Minn. Stat., sec. 5286. This and subsequent sec-

used in the act means any person, firm, association or corporation, private or municipal, owning or operating any telephone line or exchange for hire, wholly or partly within the state, or furnishing any telephone service to the public.[196] Municipally owned telephone systems are thus subjected to commission regulation, as well as the privately owned systems.

The act specified:

"It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for the accommodation of the public, and its rates, tolls and charges shall be fair and reasonable for the intrastate use thereof. All unreasonable rates, tolls and charges are hereby declared to be unlawful."[197]

Upon the taking effect of the act every telephone company was forthwith to file with the commission a schedule of its exchange rates, tolls and charges for every kind of service, together with all rules, regulations and classifications used by it in the conduct of its telephone business, all of which are to be kept on file by the commission subject to public inspection.[198] "Whenever such rates or schedules are found to be unreasonable by the commission, upon its own motion or upon complaint," it is to prescribe "reasonable rates," which are then to be filed in place of the old rates or schedule. No rates filed with the commission are to be changed by a telephone company without an order of the commission approving the change. It is made unlawful for any telephone company to receive a greater or less rate for any intrastate service than the rate named in the schedules on file with the commission.[199]

In determining the value of any telephone property for rate making purposes, nothing is to be allowed upon the value of any franchise granted by the state or any municipality if no payment was or is being made on account of such franchise. The requirement as to reasonableness of rates applies to each exchange unit as well as to telephone plants as a whole. The act specifies: "No telephone rates or charges shall be allowed or approved by

tions dealing with telephone companies embody Minn. Laws 1915, ch. 152, with a few amendments. Except as otherwise provided in the act, all applicable provisions of ch. 28, Minn. Rev. Laws 1905 and amendments thereto concerning railroads and express companies were made to apply to telephone companies. Mason's 1927 Minn. Stat., sec. 5288.

[196]Ibid. sec. 5287. Township owned telephone lines, however, are governed by a later statute.

[197]Ibid. sec. 5289.

[198]Ibid. sec. 5290.

[199]Ibid. sec. 5291.

the commission under any circumstances, which are inadequate and which are intended to or naturally tend to destroy competition or produce a monopoly in telephone service in the locality affected."[200]

The quoted provision illustrates the fact that at the very time when the legislature embarked upon the policy of commission regulation of telephones it still retained a remnant of faith in competition as a force in the regulation of utilities. This provision makes incongruous company for sections of the same act requiring certificates of public necessity in some instances before lines may be constructed where other lines are already rendering service.[201]

It is provided that no telephone company or agent of such company shall, directly or indirectly, knowingly charge or receive from one person a greater or less compensation for any intrastate service than is charged or received from any other person "for a like and contemporaneous intrastate service under similar circumstances."[202] However, nothing in the act is to release any telephone company from carrying out existing contracts with municipalities for the furnishing of service free or at reduced rates. Probably for the political purpose of avoiding a ground for opposition to the law by municipalities, this unsound practice of rendering free service to cities and villages, thus compelling the users of telephones to help out the taxpayers, was sanctioned to the extent that it already existed by contract, but only to that extent. Contracts for telephone service at discriminatory rates other than

[200]Mason's 1927 Minn. Stat., sec. 5304.

[201]Shortly after the act was passed the commission approved the purchase of properties of each other by the Northwestern Telephone Exchange Co. and the Tri-State Tel. & Tel. Co., the two largest telephone companies operating in the state, so that the Tri-State Company should operate in the southern part of the state and Northwestern Co. in the rest. The aim of the companies to eliminate competition was sanctioned. The commission said, "Since state legislative enactment has placed the regulation of telephone rates and service in the hands of the commission, all the causes that formerly gave rise to the demand for competitive conditions can now be adjusted through complaints to this commission and by investigation and orders issued by the commission."

However, the commission made the reservation that its action was not to be taken as a precedent interfering with the granting of indeterminate permits to telephone companies to compete in any city or village should occasion arise in which competitive conditions would be for the best interests of the public. Report of the Minn. Railroad and Warehouse Commission for 1918, p. 110.

[202]Mason's 1927 Minn. Stat., sec. 5292.

those with municipalities were to be terminated by the companies as soon as by their terms they might be ended.[203]

It is made the duty of the commission to prescribe uniform rules and classifications pertaining to the conduct of intrastate telephone business, and a system of accounting, and to prescribe and furnish blanks and forms for reports, all of which shall conform as nearly as practicable to those prescribed by the Interstate Commerce Commission for the interstate business of like size companies.[204]

The commission is to use its best endeavors toward establishing uniformity in practice in all matters pertaining to regulation of the business of telephone companies between the federal government and the governments of Minnesota and adjacent states.[205]

Every telephone company is required to make an annual report and such other reports to the commission as it may from time to time require. The books, files and property of all telephone companies are subject to inspection by the commission. If a company fails to make its annual report, the commission is authorized to examine its records to procure the necessary data and make the report at the expense of the company.[206]

The circumstances under which telephone companies must establish physical connections with other companies and offer connected service are prescribed. In case the companies fail to agree upon such connections or the terms thereof, the commission may determine the matter in accordance with certain rules. The connecting companies are required to give service over the connected lines without discrimination. Where connections already exist, they are not to be discontinued without an order of the commission.[207]

The commission, whenever it deems necessary, is to determine the value of all the property of any telephone company devoted to the public use. In so doing it shall, after notice to the company, hold a public hearing, giving all interested persons an opportunity to furnish evidence and be heard. Provision is made for the appointment by the commission, and the compensation, of experts and assistants, and for the conduct of investigations.[208]

[203]Mason's 1927 Minn. Stat., sec. 5297.
[204]Ibid. sec. 5293.
[205]Ibid. sec. 5293.
[206]Ibid. sec. 5294.
[207]Ibid. secs. 5295 and 5296.
[208]Ibid. sec. 5298.

The requirements for a depreciation charge are specified, and the commission is authorized to fix and from time to time change such charge.[209]

"For the purpose of bringing about uniformity of practice," the commission is given the exclusive right to grant authority to any telephone company to construct telephone lines or exchanges for furnishing local service to subscribers in any municipality, "and to prescribe the terms and conditions upon which construction may be carried on." Such authority is to be granted the company in the form of a permit of indeterminate duration and is to be coupled with the right of the municipality to purchase the telephone plant as provided in the act. The governing body of any municipality is accorded "the same powers of regulation which it now possesses with reference to the location of poles and wires so as to prevent any interference with the safe and convenient use of streets and alleys by the public." No lines or equipment are to be constructed or installed for the purpose of furnishing local rural or toll telephone service in any locality when there is in operation in the affected territory another telephone company already furnishing such service, unless there is secured from the commission "a declaration, after a public hearing, that public convenience requires such proposed telephone lines or equipment."[210]

Any telephone company is authorized to extend its long-distance lines into or through any city or village, subject to regulation by the municipality relative to the location of the poles and wires and the preservation of the safe and convenient use of the streets and alleys. If such lines are to furnish service between localities then served by another company, a certificate of public convenience must be obtained from the commission.[211]

The act specifies:

"Any telephone company operating under any existing license, permit or franchise . . . may, upon filing with the clerk of the municipality which granted such franchise, a written declaration that it surrenders such license, permit or franchise, receive in lieu thereof, an indeterminate permit as defined in this act; and such telephone company shall thereafter hold such permit under all the terms, conditions and limitations of this act. The filing of such declaration shall be deemed a waiver by such telephone company

[209]Mason's 1927 Minn. Stat., sec. 5305.

[210]Ibid. sec. 5299.

[211]Ibid. sec. 5300.

of the right to insist upon the fulfillment by any municipality of any contract theretofore entered into relating to any rate, charge or service made subject to regulation by this act. Upon filing such written declaration by the telephone company, the clerk of the municipality shall file with the commission a certificate showing that fact and the date thereof, and thereupon it shall receive an indeterminate permit from the commission conferring the same rights as if originally granted under this act."[212]

Although the company by the above quoted provision is to receive an indeterminate permit "as defined in this act," the act does not specifically define an indeterminate permit.

It is to be noted that the taking effect of the act with regard to any particular company is not definitely made to depend upon the surrender by the company of its previous franchises. In fact, the other sections of the act in terms apply to "every telephone company," "any telephone company," etc. Apparently the act authorizes the commission to regulate companies whether or not they elect to come under the law. Probably the commission could not constitutionally regulate a company which had not elected to come under the act in a manner contrary to the provisions of a franchise existing between the company and the municipality, if the company were to make objection.

The act provides that any municipality shall have the right to own and operate a telephone exchange within its borders, and makes provisions for the acquisition of plants by municipalities. The municipality may not construct a new exchange where one already exists unless the proposal is favored by 65% of those voting upon it at a general or special election.[213]

Before any telephone company subject to the act may purchase or acquire the property, securities or franchises of any other telephone company doing business within the state, the consent of the commission must be obtained. Nothing in this provision is to be deemed to prevent the holding of stock already lawfully acquired prior to the enactment of the provision, nor to prevent the acquisition of additional stock by any telephone company owning a majority of the stock of another.[214]

This section does not include in its language sales by a telephone company to any purchaser not already owning or operating a telephone system in the state. Nothing in the section requires the

[212]Ibid. sec. 5301.

[213]Ibid. secs. 5302 and 5303.

[214]Ibid. sec. 5306.

consent of the commission for the transfer of securities or property of a company to a holding or other company not owning or operating a telephone system within the state, or the transfer from that holding company to another such company, etc.[215]

Records of all proceedings before the commission upon any formal investigation or hearing are required, and transcripts are to be "furnished to any party to such investigation." Whenever an appeal is taken from any order of the commission, a certified transcript of all proceedings, pleadings, files and testimony is to be made and filed with the clerk of the district court where the appeal is pending.[216]

"Any party to a proceeding before the commission or the attorney general may make and perfect an appeal from such order."[217] The appeal is to be tried by the court without a jury, and is to be "determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it. At such trial the findings of fact made by the commission shall be prima facie evidence of the matters therein stated. and said order shall be deemed prima facie reasonable, and if the court finds that the order appealed from is unjust, unreasonable and not supported by the evidence, it shall make such order to take the place of the order appealed from as is justified by the record before it. If the court finds from an examination of the record that the commission erroneously rejected evidence which should have been admitted, it shall remand the proceedings to the commission with instructions to receive such evidence so rejected and any rebutting evidence and make new findings and return the same to the court for further proceedings."[218]

"Either party" may appeal to the supreme court from the judgment of the district court.[219]

If no appeal is taken from an order of the commission, "then in all litigation thereafter arising between the state and any telephone company or between private parties and any telephone

[215]The commission placed the above limited interpretation on its own authority in its order dated July 21, 1931, In the Matter of the Application of the Tri-State Consolidated Telephone Co. and the Northwestern Bell Telephone Co. for consent to the transfer of certain stock of the Tri-State Tel. & Tel. Co.

[216]Mason's 1927 Minn. Stat., sec. 5307.

[217]Appeals are to be made as provided in secs. 1971-1972, Minn. Rev. L. 1905 as amended; see Mason's 1927 Minn. Stat., secs. 4650, 4651. The sections referred to govern the procedure generally in appeals from orders of the commission.

[218]Mason's 1927 Minn. Stat., sec. 5308.

[219]Ibid. sec. 5308.

company, the said order shall be deemed final and conclusive."[220]

"Any telephone company, and if it be a corporation, the officers thereof, violating any provisions" of the act are made guilty of a misdemeanor.[221]

In case of the failure of any telephone company to comply with any law of the state or order of the commission or order or judgment of a court on appeal it is made the duty of the attorney general to apply to the district court for a mandatory injunction or other appropriate writ to compel obedience, "and the district court shall punish any disobedience of its orders in such enforcement proceedings as for contempt of court."[222]

A law passed in 1921 makes extensive provisions for telephone lines to be owned and operated by townships. The control of the commission over these lines is specified in the act, and is not complete.[223] Why township lines should be less subject to commission control than municipally owned lines is not apparent.

It is striking that the above statutes providing for the regulation of telephones make no provision for commission control of security issues. It is true that the commission was given the same supervisory power over telephone companies as it had over railroad and express companies, but it apparently had no specific authority over the security issues of railroad and express companies. The Revised Laws of 1905[224] gave the commission authority to control increases of the capital stock of railroads, but the provision was held to be unconstitutional.[225] The same act which took from local communities powers of control over telephone companies in matters which might better have been left under their authority, and placed those powers in a state commission, failed to place in the commission control over security issues, a matter which might well be handled by a specialized body with statewide authority operating under uniform rules such as the commission.

A case decided by the supreme court of the state in 1920[226]

[220]Ibid. sec. 5309.

[221]Ibid. Sec. 5310.

[222]Ibid. sec. 5311.

[223]Ibid. sec. 5312-5319. See also an opinion of the attorney general in the Report of the Minn. Railroad and Warehouse Commission for 1923-24, page 246.

[224]Mason's 1927 Minn. Stat., sec. 7474, Minn. Rev. Laws 1905. sec. 2872.

[225]State v. Great Northern Ry. Co., (1907) 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N.S.) 250.

[226]State v. Tri-State Tel. & Tel. Co., (1920) 146 Minn. 247, 178 N. W. 603.

revealed another defect in the law. The Minnesota railroad and warehouse commission, on its own motion, made an order requiring the defendant telephone company to show cause why its rates should not be modified. It directed that copies of the order be mailed to every city and village where defendant company maintained an exchange. The city of St. Paul appeared and objected to the continuance of the existing rates. It took part in the hearing and cross-examined witnesses called by the company. An order was entered approving the existing rates as temporary rates. The city appealed from the order to the district court, which dismissed the appeal. The supreme court affirmed the order for dismissal.

The court pointed out that the law provides that any party to a proceeding before the commission or the attorney-general may appeal from an order of the commission.[227] The court decided that the city was not within the legal meaning of the word "party." It was not served as a party. The order was mailed to it for the purpose of inviting its co-operation and aid in ascertaining the facts.

The court left room for a contrary holding in cases where the commission enters a formal order joining the city as a party and permitting it to file a complaint.

It may be argued that the court in this case gave a narrow and technical construction to this statute. The court had before it not a lawsuit between the commission and the company, comparable to a suit between Jones and Smith for the possession of a cow, but instead a process, whereby the activities of a public utility are subjected to control on behalf of the people of the state. The representatives of a city affected are in a position to make that process more effective by reason of their acquaintance with local conditions. Since the suit brings before the court not a dispute between the commission and the company but a process for bringing about the protection of the public, there is no reason for excluding effective participants in that process by treating the litigation as an ordinary case between opposing parties. In short, the word "party" might well have been interpreted in the light of its context.

At any rate, the court decided that under the present law the municipalities affected are not parties to proceedings commenced

[227]Mason's 1927 Minn. Stat., sec. 5308.

by the commission on its own motion. This is a defect in the law which should be corrected by the legislature. It is not enough to say that the commission may permit a formal intervention by municipalities. They should be participants in the proceedings as of right, if their citizens are to be assured of the benefits flowing from their knowledge of local conditions and their interest in presenting evidence on behalf of the people of the municipalities. It is certain that every scrap of evidence favoring the utilities will be presented; provisions tending to produce an equally thorough presentation of the public's case should be favored.

There is no substance in the fact pointed out by the court that the city may begin proceedings not controlled by the result of the proceedings begun by the commission on its motion. The chances that the commission might reach a different conclusion in the city's proceedings from the one reached in their own proceedings on the same matter are, to say the least, much less than the chances of reaching the conclusion urged by the city in the absence of any prior action. Further, if the case goes to the courts in the commission's proceedings, the courts are not likely to reverse themselves if the same matter is shortly afterward presented in a proceeding begun by the city. Besides, there is no reason for two expensive actions in the same matter. The short remedy is to make affected municipalities necessary parties to all proceedings before the commission.

No attempt will be made herein to set forth an exhaustive review of the work of the commission in connection with the regulation of telephones. Most of the rate hearings before the commission down to the present time have arisen by reason of applications by the companies for increased rates. A great number of such increases have been allowed. This result may be ascribed to the high price level which prevailed from the time the commission was given control of telephones in 1915 until the recent depression. The effectiveness of the commission as an agency for the protection of the public must be measured during that period by its efficiency in restricting increases to such sums as would produce a fair return to the companies and no more. In that connection it is noteworthy that the one extensive valuation made by the commission of any telephone properties, namely the valuation of the properties of the Northwestern Telephone Exchange Co. and the Tri-State Telephone and Telegraph Co., each of which companies operated exchanges in many Minnesota

cities and villages, made as of December 31, 1920, was apparently made entirely on the basis of cost of reproduction.[228] In numerous cases, especially those involving smaller companies, no appraisal seems to have been made by the commission at the location of the property, but the companies' figures as to book cost and cost of reproduction seem to have been used as the basis for the commission's results.[229] Sometimes only the book cost was considered.[230] Where book cost is stressed, the commission commonly compares the book cost with a standard figure.[231] In the reports of some rate hearings no clue at all is given as to how the valuation is arrived at. Only the commission's conclusions appear.[232] The reports commonly fail to show a determination of all necessary data such as value, the percentage of this value which the company is to be allowed to earn, the probable operating expenses under new rates, and the new rates necessary to produce the allowed earnings above the operating expenses, and how each is determined.[233]

The critical test of the worth of the commission in affording the public the protection of fair rates will come in the immediate future, if price levels take a continuing downward trend. Plainly values, operating expenses, and reasonable rates of return will in

[228]Report of the Minnesota Railroad and Warehouse Comm. for 1921-1922, p. 310.

[229]See In re Application of the Northwestern Bell Tel. Co., Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for Biennium ending 1926, p. 41; In re Application of the Mankato Citizens Tel. Co., Report for biennium ending 1928, p. 28.

[230]See In re Application of the Blue Earth Valley Tel. Co., Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for biennium ending 1930, p. 63.

[231]See In re Application of the Lake Park Telephone Co., Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for biennium ending 1930, p. 74. The following language is used, "A careful consideration of the stated facts discloses that the company's claimed book value of $20,726.19 is not excessive for a property of its class, and that the operating expenses for the past several years have been well within an average figure." See also in re Application of the Hector Tel. Co., Ibid., p. 75.

[232]In re Application of the Grove City and Rosendale Tel. Exch. Co., Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for biennium ending 1930, p. 66. It is stated, "After careful consideration the commission finds the fair value of the Grove City property to be $20,000." Nothing is said as to what was given the careful consideration.

[233]Two considerations may be urged in defense of this practice: first that in some cases of minor importance exact determination of all necessary data would cost more than the sums involved would justify; secondly, that the commission lacks funds necessary for making such determinations.

that event all be lower. It remains to be seen whether utility charges will be lowered, and not only lowered, but lowered proportionately. It also remains to be seen whether cost of reproduction will be stressed to the advantage of utility users during the period of low prices to the extent that it was stressed to the disadvantage of utility users during the high price period.[234]

The commission has dealt with numerous cases involving service,[235] and has adjusted a great many complaints.

In the exercise of its control over the sale of telephone securities and property the commission has frequently authorized the sale of stock or properties by one company to another with the specific comment that the commission has given no consideration to the price paid.[236] In its recent order approving the purchase by the Northwestern Bell Telephone Co. of the common stock of the Tri-State Telephone and Telegraph Co. owned by the Tri-State Consolidated Telephone Co., the price paid was not even mentioned.[237] In view of the fact that the price paid for property by a utility is likely to be considered by the commission in fixing valuations of that property if utilities are to remain solvent, and are to continue to attract capital, the commission ought to exercise its authority in order to make certain that properties are not acquired at excessive prices.[238] After the Minnesota commission had approved the above purchase the Interstate Commerce Commission disapproved it for the express reason that the price to be paid was too high.[238a]

Section 7. Laws dealing with street railways.

The results of regulation of telephones by state commission led

[234]The writer is informed that recently actions have been commenced before the commission for reduced rates in some municipalities.

[235]See for example Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for biennium ending 1930, p. 10 and subsequent pages.

[236]Minn. Railroad and Warehouse Comm. Report for biennium ending 1930, pp. 90, 94, 95, 100.

[237]Order in re Application of the Tri-State Consolidated Telephone Co., dated July 21, 1931.

[238]To illustrate: Suppose X Co. buys the stock or property of Y Co. for $100,000. Suppose the stock or property is worth only $50,000. If the commission values the purchased utility at only $50,000 and allows a fair return thereon, it is obvious that X Co. will not earn a fair return on its investment of $100,000. Either the commission must allow a return on a larger value than $50,000 or investors in X Co. will not secure adequate returns, and X Co. will cease to attract needed capital.

[238a]Order of I. C. C., Div. 4, Finance Docket 8923, Tri-State Tel. & Tel. Co., Dated Dec. 30, 1931.

to strenuous opposition when it was proposed to extend such regulation to street railways. During the years immediately following the enactment of the law giving the railroad and warehouse commission control of telephones a growing number of applications for increased rates were made and allowed.[239] Bitterly contested rate disputes arose, were fought before the commission, and carried into the courts. On the whole the companies were successful in obtaining increases. It is entirely possible in view of the upward trend of prices that increases were justified, but the repeated litigation with the municipalities in the role of defeated litigants was not calculated to produce content with the system.[240] When the so-called Warner Bill under which the street railways would have been placed under the control of the railroad and warehouse commission was introduced into the legislature, the opposition was strong enough to defeat the proposal. The magazine of the League of Minnesota Municipalities carried an article under the head, "The Warner Bill is Dead! Long Live Home Rule!" The article contained an account of the defeat of the bill, and showed an attitude of healthy skepticism as to the efficacy of commission regulation. It was alleged that no evidence had been produced to show that commission control in those states having it had produced conditions better than those in Minnesota.[241] Another article showed that the League's committee on legislation had sent out circular letters to municipal officials asking opposition to the Warner Bill.[242] The report of the committee on legislation for the year indicates that the bill was defeated by representatives of municipalities.[243]

The intense opposition to commission control of street railways accounts for the fact that the law eventually enacted in the matter was in the form of a compromise between municipal and commission control. In 1921 an act was passed in which the two forms of regulation were blended.[244]

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[239]See Report of the Minn. Railroad and Warehouse Commission for 1916, pp. 79-82. For 1918, pp. 57-166.

[240]A resolution was adopted by a group of municipalities of Minnesota requesting the legislature to repeal the Minette Law, which is the act giving the commission control of telephones. (1921) 6 Minnesota Municipalities 58.

[241]The article was printed in (1919) 4 Minnesota Municipalities 31.

[242]Article headed Legislation, (1919) 4 Minnesota Municipalities 41.

[243]Report of the Committee on Legislation, (1919) 4 Minnesota Municipalities 132.

[244]Mason's 1927 Minn. Stat., secs. 4816-4830, which embody Minn. Laws 1921, ch. 278, known as the Brooks-Coleman Act.

The act begins with definitions of terms. "City" means any city or village within the state; "street railway" means "any association or corporation leasing, holding, owning, managing, operating or otherwise controlling any street railway line or street railway property wholly or partly within this state;" "council" means the body authorized to make ordinances for the government of a city; "indeterminate permit" means "every grant to any street railway to own, operate, manage or control any street railway property within the state for the transportation of passengers for hire," and "street railway property" means "the property of any street railway as an operating system which is used, useful and reasonably necessary for street railway purposes."[245]

The definition of "street railway" is important because it seems fairly to include holding companies. The definition of "indeterminate permit" is confusing and does not fit the rest of the act. For example, the next section provides that grants made by the state or any city may, by certain procedure, become indeterminate permits. But by the definition they were already included as such.

The act provides:

"Every grant that has been heretofore, or that shall be hereafter, made to a street railway by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become an indeterminate permit and consent that the terms of this Act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railway."

After certain procedure

"such grant subject to the provisions of this Act shall become an indeterminate permit to own, operate, manage and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been heretofore made by the state or any such city and be then in force; but all the terms, conditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the state of Minnesota as hereinafter provided."[246]

[245]Mason's 1927 Minn. Stat., sec. 4816.
[246]Ibid. sec. 4817.

This section contains two important provisions: first, the franchises granted by municipalities are to be effective except as modified by the act. The franchise contains all residuary provisions; where the act is silent the franchise controls. Second, this section coupled with a later one gives the legislature authority to end the indeterminate franchises. The future is not foreclosed; a way is specifically left open for changing the form of regulation.

The act provides for the acquisition of street railways by municipalities, and provides procedure.[247]

The law specifies:

"The exclusive right and authority is vested in the council of any city, in this state to grant a license, permit or franchise for the construction, maintenance and operation of street railway property within the limits of such city and on such terms and conditions as it may impose."

The council is given exclusive authority to designate the streets upon which street railway property may be constructed. The same body may require the construction of new lines and the extension, change or removal of existing lines. "The council shall have authority to prescribe reasonable requirements, standards and conditions of service and operation of any street railway property," and "shall have the right at all times and in all respects to exercise reasonable control over such service and operation and all things pertaining thereto, including" a number of specified matters; and, "such street railway shall furnish the council such information relating to such matters as it may from time to time require and shall operate at all times at least a sufficient number of cars to and shall fully comply with all schedules and routes required by the council." The act itself then sets up certain standards of service, and continues:

"The location of shops, car barns, waiting rooms and terminals and all other matters hereinbefore in this section specified shall be subject to the approval of the council. The action of the council of any city under this section shall be final and not subject to appeal by the street railway, except as specifically otherwise provided by this section."

The section makes no provision for appeals. The general section on appeals applies only to appeals from the commission. Apparently, then, the law specifies that there shall be no appeal from actions of the council. In view of the fact that the law requires street railways acquiring indeterminate permits to consent

[247]Mason's 1927 Minn. Stat., sec. 4818.

to the terms of the Act, this provision may be valid. However, it is hard to reconcile with the provisions that the council may prescribe "reasonable requirements, standards and conditions of service," and may exercise "reasonable control over such service." Suppose the council prescribes clearly unreasonable requirements? Plainly it has no authority to do so, and equally plainly the law specifies that its action under the section is final. The apparent means of reconciling the provisions is to hold that unreasonable requirements are not authorized hence not made under the section, and therefore may be questioned in the courts. But this interpretation leaves little substance in the provision that the actions of the council under the section are final. Perhaps the provision was put in as a sedative to the nerves of home rule advocates.

The section concludes by providing that any order, resolution, rule, regulation, or requirement imposed upon a street railway by a council as provided in the act may be enforced by mandamus, injunction or other appropriate proceeding.[248] As we shall see, in such proceedings the courts consider the question of the reasonableness of the council's actions, and pay no attention to the provision that such actions are final.

The next section of the act is a waif. It reads:

"The commission is hereby granted initial and exclusive power and authority upon hearing upon petition as provided by this Act, to fix and establish rates of fare and charges by a street railway for carrying passengers, subject to the powers of the district court in case of appeal thereto as hereinafter provided, which rates shall not yield to exceed a reasonable return on the fair value of the street railway property of any street railway."[249]

The following section continues: "Rates of fare and charges within any city shall be just, fair and reasonable and shall be sufficient to yield only a reasonable return on a fair value of the street railway property of the street railway within such city."[250]

Peeping out from behind the language of these two sections is a rich mass of information explaining why statutes are not always consistent, logical and thorough treatments of the problems with which they deal. The wording is obviously designed to appease the opponents of state control, who believed that the placing of control in the commission was a move to enable the companies to charge excessive rates. The first of the two sections says nothing

[248]Ibid. sec. 4819.

[249]Ibid. sec. 4820.

[250]Ibid. sec. 4821.

about rates being such as to yield a reasonable return on the fair value of the street railway property; it merely reassures the public by saying, "Rates shall not yield *to exceed* a reasonable return on the fair value of the street railway property." The next section starts off bravely to say that rates "shall be just, fair and reasonable," but it hastens to add "and shall be sufficient to yield *only* a reasonable return on a fair value of the street railway property." What legal purpose these stray provisions could serve, when rate fixing is definitely and completely dealt with by later sections, is not apparent, especially since, if they stood alone, they would leave doubt as to the statutory duty of the commission to fix rates which would yield the companies a fair return, because the statutory language is directed not to securing such a return, but to forbidding any greater return. These stray clauses reflect the fact that this legislation was bitterly opposed by the advocates of municipal home rule; that it aroused deep resentment which continued long after its passage and which has inspired repeated attempts to repeal it; and that it was suspected of being purely a manoeuvre by the street car companies to escape local control of rates. The provisions are not law; they are propaganda.

The second of the two sections goes on to provide for uniform fares, and for free transfers and retransfers good for a continuous trip under such rules and regulations as the commission may prescribe. In all cases where cities are contiguous, continuous intercity passenger service is to be provided without change of cars. If different companies operate in such cities, mutual adjustment of fares and expense is to be made by the railways subject to control and regulation by the commission. The fare charged for transportation within either city on the portion of the interurban line located therein is not to exceed the fare on other lines in the city, and like transfers and retransfers are to be given as before provided.

The section concludes with an important provision which apparently applies generally and not merely in connection with preceding matters. The provision reads, "The costs and expenses incurred and paid by the street railway in performing its obligations shall be reasonable."[251]

Street railways may, upon order of the commission after a hearing and investigation, issue stocks, bonds, notes and other evidences of indebtedness payable at periods of more than twelve

[251]Mason's 1927 Minn. Stat., sec. 4821.

months after their dates, whenever necessary for the acquisition of property, or the construction, extension or improvement of facilities or for the discharge or lawful refunding of obligations. The city involved is made a necessary party to such hearing. The commission is to issue its order only when satisfied that the funds to be derived are essential for carrying out the above purposes, and that it is proper and reasonable under all the circumstances to make the issue. It is made the duty of the commission to authorize the issue of

"such bonds, notes or other evidences of indebtedness as may be required for the construction of any new line or lines, or the extension or change of any existing line or lines, or any construction or improvement in facilities, any of which shall have been ordered, required or approved by the council as provided by this act, subject, however, to the right of appeal to the district court of the county wherein such city is located from any such order or requirement upon the same terms and conditions as provided by this act in case of other appeals."

The proviso as to appeals plainly relates to constructions, extensions, and improvements ordered or required by the council, and is directly contrary to the provision already quoted making the action of the council final. Tacking such a proviso to a clause specifying when the commission must authorize security issues is barbarous draftsmanship. Apparently the proviso was tucked away in a lengthy section dealing with stocks, bonds and notes in order that it might escape notice.

The provision immediately following the one above quoted looks like another "joker." It reads:

"Any order of the commission made hereunder, shall contain a finding by the commission that the use of the capital or property to be secured by issue of such stocks, bonds, notes or other evidences of indebtedness is reasonably required for the purposes of such street railway and that such issue is reasonable and proper under all the circumstances."

Suppose the council requires constructions which the commission does not believe are "reasonably required for the purposes of such street railway." How can the commission make its order and findings authorizing the issue? What, then, becomes of municipal control over constructions and the requirement that the commission authorize security issues to pay for them?

Any street railway is authorized to issue notes for lawful purposes "payable at periods of not more than twelve months"

without authority from the commission. No such notes are to be refunded by stocks, bonds or evidences of indebtedness running for more than twelve months without the consent of the commission. The section concludes:

"The commission shall not permit the issue of and the street railway shall not issue, any notes, bonds or other evidence of indebtedness when the aggregate par value thereof, together with all other like evidences of indebtedness that shall then be outstanding, shall exceed 85% of the fair reasonable value of the property of the street railway."[252]

The wisdom of permitting the street railways to encumber themselves to the extent of 85% of their "fair reasonable value" is highly doubtful, especially if cost of reproduction is to be considered in arriving at that value. The effect of a falling price level on a company with such a capital structure has been suggested in Chapter I.

Any street railway or city may apply to the commission at any time to establish rates. It then becomes the duty of the commission to examine and appraise the street railway property and to hear evidence submitted on behalf of the street railway or the city, and to determine the fair value of the street railway property within the city and to fix rates of fare. The rates are to "yield to the street railway a reasonable return on the fair value of its street railway property within such city as an operating system." No additional value is to be allowed for any franchise of the street railway. The rates which the street railway is authorized to collect under existing franchises are to remain the lawful charge until a rate is fixed by the commission; provided that the commission on application of a city or street railway may establish after notice and hearing a temporary rate pending a valuation. The commission may at any time after notice and hearing cancel the emergency rate. "Thereafter" the commission may on its own initiative and shall upon the application of a city or street railway from time to time make such investigation as to change in property value or cost of service as may be reasonably necessary, and after a hearing confirm or change existing rates. "The commission or council shall have the right at all times to inspect by itself or by its representatives all the books, records and accounts and street railway property of any street railway in any city."[253]

[252]Mason's 1927 Minn. Stat., sec. 4822.
[253]Ibid. sec. 4823.

The next section provides that any city or street railway affected by a proceeding before the commission is a necessary party thereto. This provision meets a need left unfilled in the act providing for the regulation of telephones.

Procedure before the commission is provided for at some length in the same section. The attitude to which attention has previously been called reappears. It is specified:

"If the petition be to fix a rate of fare, the commission shall after hearing as herein provided fix a rate of fare to be charged by the street railway which will yield only a reasonable return on the fair value of the street railway property."

It is provided that whenever any proceeding is instituted before the commission or court on appeal for rate making purposes or for municipal purchase of the street railway property, before the same is heard, the city council shall cause the property to be examined and appraised and shall procure the services of a person or persons of recognized experience and qualifications in street railway appraisals and rate making to appraise the property, make investigations, and otherwise prepare to present the case; and the council shall employ such accountants, engineers and others to assist in the preparation of the city's case as the council deems advisable.

A highly important provision follows. All the expenses of the city in any such proceeding before the commission or court on appeal are to be borne by the street railway as an operating expense, provided the amount shall not exceed in any one year the sum of $150 per 1,000 of population of the city. The necessary expense incurred by the commission in such proceedings is also to be paid by the railway as an operating expense.[254]

It would be hard to exaggerate the importance of this provision. One of the inexcusable defects in regulation of public utilities has long been that the utility users have been obliged to pay unlimited sums for the presentation of the companies' cases against them, whereas the municipalities or other agencies in the presentation of the cases of the utility users have been handicapped by inadequate funds. Requiring the taxpayers to pay the expense of presenting the case for lower rates is a disadvantage to the utility consumers, for as a result the funds available for the purpose are usually insufficient, as has been shown in Chapter I. Consequently the case for lower rates may

[254]Ibid. sec. 4824.

be, and often is, inadequately presented, with the result that the consumer pays far more in excessive rates than he would pay for the presentation of his case. The operating expenses of utilities, theoretically at least, are passed on to the consumer bodily. Heretofore, the expense of presenting the case against him has been passed on to him, while his own case has often suffered from lack of funds. The above provision plus one limiting the expense of the utility as well as that of the municipality should be included in all legislation providing for utility rate regulation.

Appeals by a city or street railway to the district court are provided for. Each case is to be tried by the court without a jury in the same manner as though originally commenced therein, save that the findings and order of the commission are to be received in evidence, but the court is not to be bound by them. The district court is to try the whole matter in controversy including matters of fact as well as law. In any case involving rates or the value of street railway property the court is to determine the fair value of the property and also what is a reasonable rate of return thereon. The court shall affirm, modify or reverse any order or finding of the commission as may be required by law. Appeals to the supreme court are provided for [255]

An important difference between the above provisions for appeals and those made in the law dealing with telephone companies is that here appeals are to be heard by the court as though the cases were commenced therein, whereas by the telephone act appeals are to be determined upon the pleadings, evidence and exhibits introduced before the commission.

Oddly enough, although some matters relating entirely to street railways within a single city are placed under the control of the state commission, the relationships between city systems and suburban railways are left largely to the control of municipalities. The act provides: "The city hereby reserves the right to authorize any existing or future suburban railway company to jointly use tracks, poles, wires, appliances, power and electric current of said street railway, as now existing or hereafter constructed."[256] Such use is made subject to the rules and regula-

[255]Mason's 1927 Minn. Stat., sec. 4825.

[256]This is strange language. Its tenor is that of a city making an agreement. It will be noted also that the statute reads, "the city," whereas no particular city has been under consideration; further, the law specifies "said" street railway, although no one railway has been mentioned in preceding provisions. The conclusion is fairly obvious that the language has

tions, routing and schedules which may be fixed by mutual agreement between the street railway and the suburban railway, subject to the approval of the council and subject to determination by the council if the parties cannot agree. The compensation to be paid by the suburban company to the street railway company is to be fixed by agreement, subject to approval of the council, and in case the parties cannot agree, the council is to fix the compensation, subject to appeal to the district court. The compensation is to be "just, fair and reasonable compensation for the facilities furnished, representing a sum not less than the reasonable value of the power furnished by the company and a fair share of the cost of maintenance of the tracks and equipment, taking into account the advantages and disadvantages of the entry of said line into the city."[257]

No license, permit or franchise to operate a street railway in any city where a street railway is already operating is to be granted by the city unless a certificate of convenience and necessity is first obtained from the commission after a hearing.[258]

The commission is authorized upon its own motion "to make investigation, prescribe uniform systems of accounting, and prescribe depreciation, . . . with the right in such city to appeal to the district court," etc. The commission is granted authority to control the disposition and use of any moneys in the depreciation fund. It may "do or perform any act which may in its opinion be necessary or expedient to carry out the provisions of this Act." Street railways are required to file with the commission annually full reports and information of their income and expenditures in such form as the commission may require, and the commission may require any and all other reports, financial or otherwise, that it may deem necessary.[260]

The act reserves to the state the right to modify, amend or repeal the act or any part of it, or to cancel or modify any indeterminate permit, or any grant, permit or franchise theretofore or thereafter granted by the state or any city, without compensation or damages to the street railway. Nothing in the act is to

been taken bodily from some agreement between a particular city and a company, and probably inserted in the law under pressure from a city or cities. Oddities such as these may have no bearing on what the law is, but they do reveal why the law is as it is.

[257]Mason's 1927 Minn. Stat., sec. 4826. This section probably repeals as inconsistent parts of secs. 4813-4815.

[258]Ibid. sec. 4827.

[260]Ibid. sec. 4828.

limit the police power of the state. Street railways are to be subject to all the duties, restrictions or liabilities then or thereafter contained in the general laws of the state. Indeterminate permits are to be granted only to Minnesota corporations, and to be transferred only to Minnesota corporations.[261]

The above act, as has been noted, grants to the councils of all cities and villages in the state authority in the first instance to grant franchises to street railways. Here is one conspicuous instance in which the legislature granted to all municipalities the same measure of control over a utility. The act providing for the regulation of street cars performed the service of putting in one compact law all the provisions for such regulation. The act in some respects is more of a political triumph than a solution of a legal problem, but in other respects it marks progress in utility regulation in the state.

The remark was made by the then chief justice of the supreme court of the state in a dissenting opinion, "The outstanding purpose of the act was to transfer to the State Railroad and Warehouse Commission the entire control and supervision of the street railway companies affected,[262] thus to bring to an end almost constant and continuous disputes and controversies in respect to street car regulations arising from local conditions in the cities of St. Paul, Minneapolis, and Duluth," etc.[263]

If this was the purpose of the act, the results have been a disappointment. Since its passage street railway controversies have still been "almost continuous."[264]

A case which set limits on the right of a municipality under the act to investigate the records of a company was decided in 1923.[265] The Minneapolis Street Railway Company operated a street railway system in Minneapolis; the St. Paul City Railway Company in St. Paul; the systems were joined together by several interurban lines running through both cities; the Twin City Rapid Transit Company was a holding company which owned all

[261]Mason's 1927 Minn. Stat., sec. 4829.

[262]This statement is, of course, inaccurate. We have seen that much of such control remains in the municipalities.

[263]Anderson v. St. Paul City R. Co., (1922) 152 Minn. 213, 188 N. W. 286.

[264]For summaries of litigation up to that time involving the street railways in the three largest cities, see Report of the Minn. Railroad and Warehouse Commission for 1925-26, pages 304, 317 and 384.

[265]City of Minneapolis v. Minneapolis Street Ry. Co., (1923) 154 Minn. 401, 191 N. W. 1004.

the stock of the other two except a few shares necessary to qualify directors. On June 21, 1921, pursuant to the above act, the Minneapolis Street Railway Co. applied to the railroad and warehouse commission to have its property valued and fares fixed. While the application was pending, the city filed a petition in district court for a writ of mandamus commanding all three of the above companies to permit the city to examine and inspect all the books, records, accounts, documents and other data of the companies, to enable the city to prepare for the hearing before the commission. The companies stipulated that a writ might be issued granting the relief demanded in the petition. The writ was issued. Thereafter demand was made for letters from the transit company to the American Exchange National Bank of New York and the Commercial Trust Co. of New Jersey instructing the bank and trust company to give the attorney and utility expert for the city access to their records pertaining to any account of the transit company since 1918, and to all vouchers and records pertaining to the deposit and expenditure of money in such accounts. Demand was also made for an inspection of the stock books of the transit company since February 28, 1917. The court ordered the transit company and individual officers and directors to comply with the demand. This is an appeal from the order.

The court took the position that the right to inspect the books, etc. of the street railway granted by section 8 of the act[266] is limited by section 9[267] "to the ascertainment of facts material to the issues." "Only in so far as books and papers contain information relevant and material to an inquiry pending before the commission are they open to inspection."

It is hard to follow the logic of the court, since section 9 in no way refers to section 8, and section 8 specifies that the council "shall have the right *at all times*" to inspect the books. It is not specified that the right is limited to times when there are controversies to raise issues to which facts may be material. If it be argued that the provision of section 8 concerning inspection of books is contained in a section dealing with rate fixing and hence should be construed as relating to rate controversies, it is sufficient to say that there are plenty of instances in the act where unrelated matters are placed together in the same section.

At all events the case establishes the fact that the municipality

[266]Mason's 1927 Minn. Stat., sec. 4823.
[267]Ibid. sec. 4824.

has no continuing right to keep in touch with all the affairs of the utility by inspecting its books, but may only look into matters material to inquiries pending before the commission.

The court stated that the transit company's bank account records would ordinarily be material, since the relations between the transit company (the holding company) and the street railway company (the operating company) were such that an inference is warranted that a portion of the money deposited came from the earnings of the street railway company. If the net earnings of the street railway had been reduced by expenditures having no legitimate relation to the maintenance, equipment, operation or extension of the company's lines, or improvements, it was proper to make proof of this fact before the commission. But in this case the companies had stipulated that the expenditures here involved did not have any bearing upon the application to the commission; that is, they would not be asserted as expenditures to be considered; hence there was no need for the city to obtain information designed to defeat such an assertion. Accordingly, the order appealed from was modified.

The court sustained the order in so far as it concerned the stock books of the transit company. It was pointed out that the transit company's stockholders virtually owned the property of the street railway company. If the usual practice was followed, those who owned stock in the street railway exchanged it for transit company stock. Ascertainment of the names of the transit company stockholders and the amount of their holdings would enable the city to elicit information concerning stock issues of the street railway company. The amount and market value of stocks and bonds is an element of valuation.[268] In rate making proceedings,

"the modern tendency is to receive evidence of every pertinent fact or circumstance which might influence or aid an administrative board in arriving at a valuation of the property of a public service company. In pursuit of information which will serve legitimate ends, the commission and the city should have considerable latitude."

The case is of importance since it permits extensive investigation by the city of holding company records in order to ascertain facts material to the fixing of the rates of an operating company.

[268]The practice of the Minn. Railroad and Warehouse Comm. is to give weight to actual physical property in place, and practically to disregard stock issues. Report of the Supervisor of Telephones to the Minn. Railroad and Warehouse Comm. for Biennium ending Nov. 30, 1924, p. 87.

In a recent case [269] an extension of a street railway was ordered by a city council, and a mandamus action was brought to compel the railway to make the extension. The court found the order requiring the extension to be unreasonable and invalid. No mention was made of the provision of the act[270] to the effect that the action of the council in the matter was to be final.

In another mandamus action brought by a city to compel a street railway company to make an extension ordered by the city the court held that the lower court erred in excluding evidence offered by the company tending to show the value of its property and the earnings thereon.[271] This case is highly enlightening. Under the act the city apparently retains control over street railway service and extensions. But the value of the property of the company is determined by the commission. In determining that value cost of reproduction must be considered.[272] That value so determined is a matter to be considered in determining whether the company may reasonably be required by the city to make extensions. By analogy it is probably also material in passing on the reasonableness of other orders made by the city, for example as to service. Thus the vesting of control in the state commission impairs the control ostensibly in the municipalities. Cost of reproduction and all its monstrosities arises to confound the municipalities in the exercise of their apparent authority.

Concerning the actual operation of commission regulation of street car rates it may be said that rates have steadily mounted under such control. Nothing else could have been expected, since the street railways generally have experienced a decline in traffic due to the competition of substitute service.[273] However, as bearing upon the general question of the advisability of commission regulation of rates under requirements of reasonableness, some illuminating facts appear in a rate case taken to the federal courts

[269]State ex rel. City of Duluth v. Duluth St. Ry. Co., (1930) 179 Minn. 548, 229 N. W. 883.

[270]Mason's 1927 Minn. Stat., sec. 4819.

[271]State ex rel. City of St. Paul v. St. Paul City R. Co., (1930) 180 Minn. 329, 230 N. W. 809.

[272]Duluth St. R. Co. v. Railroad and Warehouse Commission of Minn., (D.C. Minn. 1924) 4 F. (2d) 543.

[273]The two largest cities of the state had themselves authorized increases in rates before the act took effect. See Report of the Minn. Railroad and Warehouse Commission for 1925-1926, pages 317 and 384.

by a street railway company.[274] From the figures adopted by the court it may readily be shown that the court allowed the company as a fair return on the fair value of its property an amount which would produce its stockholders annual dividends of 20.8%. The explanation of this extraordinary result is the capital structure of the company taken in connection with the cost of reproduction requirement, as explained in Chapter I. The case is replete with conflicts in the figures arrived at by the commission, a special master, and the court, and contains the usual amount of guess work and inexpert treatment of technical matters. For example, in calculating the amount to be allowed by reason of the advance in prices the court referred to a decision made in 1923 by a federal court in which it was said in justification of a 50% increase over pre-war prices that there had been no marked recession of prices since 1920. The court in the principal case added, "Since that time there have been, in my judgment indications of a reduction in general prices to some extent; but I think in the instant case at least a 40 per cent increase should have been used on that part of the inventory basis figures which represent pre-war items."

Practically the decision had little direct effect on the pockets of the car riders. The case had been taken to the federal court on the ground that rates set by the commission were confiscatory; it was appealed to the United States Supreme Court; and before the decision of the latter court was rendered the commission itself raised the rates even higher than they had been fixed by the Federal court largely on the ground that meanwhile further decreases in traffic had warranted the increase in rates.[275]

Section 8. Summary

Telephones are now almost entirely under control of the state commission by virtue of the act set forth in section 6 of this chapter. All municipalities have been given authority in the first instance to grant street railway franchises, and the measure of control to be exercised by the state commission and the municipalities has been fixed by the act set forth in section 7. Waterworks are almost entirely municipally owned. Of the five utilities herein considered gas and electricity still remain subject to a great variety of miscellaneous provisions. In the first place, the authority of

[274]Duluth St. R. Co. v. Railroad and Warehouse Commission of Minn. (D.C. Minn. 1924) 4 F. (2d) 543.

[275]Report of the Minn. Railroad and Warehouse Commission for 1925-1926, page 304, 316.

each municipality over these utilities must be looked for in the original law whereunder the municipality is incorporated. There are also a number of acts applicable to different municipalities which have been set forth in this chapter. Certain general statutes concerning utilities, as has been indicated in section 2, contain strong implications of municipal authority to grant franchises.

CHAPTER IV. MUNICIPAL REGULATION.

Section 1. Authority to Regulate. Charters.

As previously shown in Chapter II, the incorporation laws under which Minnesota municipalities operate and from which they derive much of their authority to regulate public utilities are many, and the extent of the authority conferred is varied. The most important source of municipal authority is now to be found in home rule charters. In 1926 there were more cities in Minnesota incorporated under home rule charters than in any other state. Sixty-eight Minnesota cities, including all those having over 5000 population with three exceptions, had adopted and were operating under such charters.[276]

Home rule charters "may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of section 33, article 4 of the constitution."[277] The section of the constitution referred to is the one prohibiting special legislation.

"Such proposed charter may provide for regulating and controlling the exercise of privileges and franchises in or upon the streets and other public places of the city, whether granted by the city or village, by the legislature, or by any other authority; but no perpetual franchise or privilege shall ever be created, nor shall any exclusive franchise or privilege be granted, unless the proposed grant be first submitted to the voters of the city or village, and be approved by a majority of those voting thereon, nor in such case for a period of more than twenty-five years."[278]

The supreme court on several occasions has indicated the extent of the powers with which cities may provide themselves

[276]Anderson, The Advantages of Municipal Home Rule (headnote), (1926) 11 Minn. Municipalities 404.

[277]Mason's 1927 Minn. Stat., sec. 1271; Minn. Rev. L. 1905, sec. 751. The home rule charter legislation is enacted pursuant to section 36, article 4 of the Minnesota constitution. The nature of this constitutional provision was outlined in Chapter II, Sec. 5 of this article.

[278]Mason's 1927 Minn. Stat., sec. 1283; Minn. Rev. L. 1905, sec. 753.

under home rule charters. In a case involving the validity of rates authorized by an ordinance of St. Paul, a home rule city, the court said:

"There can be no doubt of the authority of the city of St. Paul to regulate the rates of public service corporations, the same as might have been done by the legislature prior to the constitutional amendment prohibiting special legislation. The charter provision is of the same force as a statute upon the subject."[279]

In a case not involving utilities the court said:

"Charters adopted under this constitutional provision have been before this court frequently, and it has uniformly been held that such charters 'may embrace all appropriate subjects of municipal legislation, and constitute an effective municipal code, of equal force as a charter granted by a direct act of the Legislature.' . . . . It has also uniformly been held that the provisions of such charters relating to municipal matters supersede prior general laws relating to such matters unless it clearly appears that the legislature intended that such laws should still apply thereto."[280]

The charters which cities have adopted under their broad authority show the greatest diversity.[281] Provisions relating to public utilities are no exception. The charter of the city of Minneapolis, adopted in 1920, strongly recalls some of the charters granted by the legislature in the days of special legislation. In it, under the powers of the council, we again encounter the familiar language:

"Eleventh—To make and establish public pounds, pumps, wells, cisterns, hydrants and reservoirs, and to erect lamps and to provide for lighting of the city, and contract for the erection of gas works for lighting the streets and public grounds and public buildings, and to create, alter and extend lamp districts."[282]

Here we once more find pounds keeping company with utilities in the same provision for the reason that it was so in the beginning. The rest of the sub-section is equally obsolete. Other familiar provisions concerning utilities appear in other parts of the charter.

Although provisions for the control of most utilities are

[279]St. Paul Book & S. Co. v. St. Paul Gaslight Co., (1915) 130 Minn. 71, 76, 153 N. W. 262, L. R. A. 1918A 384, Ann. Cas. 1916B 286.

[280]State ex rel. Smith v. City of International Falls, (1916) 132 Minn. 298, 156 N. W. 249. See also, State ex rel. Hilton v. Essling, (1923) 157 Minn. 15, 20, 195 N. W. 539.

[281]Anderson, City Charter Making in Minnesota 35.

[282]The Charter of the City of Minneapolis, pub. 1920, ch. IV, sec. 5, sub-sec. 11.

meager, a whole chapter is devoted to the granting of street railway franchises.[283] The reason is that the chapter incorporates bodily a state act dealing with the granting of such franchises by the city.[284]

The charter supplements its provisions by the incorporation by reference of numerous state laws, and by a provision that existing rights, powers, duties, functions, privileges and immunities of the city and its several boards and departments shall continue.[285] Accordingly, to ascertain the powers of the city in any given matter is a formidable task.

In contrast to the scattered and haphazard provisions of the Minneapolis charter is the chapter of the St. Paul charter dealing with the granting of franchises and the control of utilities.[286] The chapter contains general provisions relating to all franchises and franchise holders, instead of an assortment of different and incomplete measures relating to each different kind of utility. All of the provisions are not in accord with sound principles of utility regulation; the sections establishing a license fee of five per cent of the gross earnings of each franchise holder,[287] and calling for pavement by street railways of so much of the streets as lies between the rails of each railway track and between the lines of double track and for a space of two feet outside of such track,[288] and requiring other free services to the city[289] are particularly obnoxious, since they amount to shifting the burdens which ought to be borne by taxpayers to the shoulders of utility users.[290] Nevertheless the treatment of utility control is unusually comprehensive and thorough.

The charter provisions of the cities for utility regulation as above indicated vary widely; some are relatively extensive, others are incomplete and inadequate. The important fact is that home rule cities may carve out their own powers of local utility control save in those cases where the municipalities have been deprived of

[283]Ibid. ch. XII. Much of the chapter has been rendered obsolete by ch. 278, Minn. Laws 1921, providing for the regulation of street railways, treated in Chap. III, sec. 7 of this article.

[284]The act is Minn. Laws 1915, ch. 124.

[285]The Charter of the City of Minneapolis as published in 1920, ch. XX.

[286]The Charter of the City of St. Paul, as published in 1925, ch. X.

[287]Ibid. sec. 155.

[288]Ibid. sec. 161.

[289]Ibid. sec. 165 and 166.

[290]For vigorous condemnation of such practices, see Report of the Minnesota Railroad and Warehouse Commission 1921-22, pp. 208, 213, 214.

the power of regulating utilities and such power has been transferred to the state commission.

Section 2. Franchises

It has already been pointed out that telephones are now almost entirely under the control of the state commission, and that the municipalities no longer have authority to grant franchises to telephone companies; that by the Brooks-Coleman Act all municipalities are given authority in the first instance to grant street railway franchises; and that waterworks are now almost entirely municipally owned. The practical problem with regard to the legal authority of Minnesota municipalities to grant franchises to the five types of utilities dealt with herein is accordingly narrowed to two utilities, gas plants and electric plants. The sources of municipal authority are many, and the provisions granting it are varied, but it is likely that all the municipalities of the state have authority to grant gas and electric franchises. As has been demonstrated,[291] a strong implication of such authority in all municipalities of the state is contained in the general laws. Home rule charter cities either have or may provide themselves with such authority. In most if not all of the laws under which municipalities other than home rule charter cities are operating are provisions which may be construed to include such authority. Especially is this true in view of the fact that the courts do not examine such provisions minutely in order to find if the exact power exercised is specifically granted, but instead look to the effect of the provisions as a whole.[292]

The franchises actually granted by the municipalities of the state present the widest variety. Some of them are little more than licences to use the streets given by the municipality to the utility, substantially without terms or provisions for regulation of the business of the utility. Others are elaborate and detailed contracts.

A great variety of means of handling different problems in regulation have been adopted. Probably the commonest methods of dealing with rates are either to fix definite specified maximum rates in the franchise,[293] or to provide that the council may

[291]Chap. III, Sec. 2, this article.

[292]See Reed v. City of Anoka, (1902) 85 Minn. 294, 88 N. W. 981; St. Cloud Pub. Serv. Co. v. St. Cloud, (1924) 265 U. S. 352, 44 Sup. Ct. 492, 68 L. Ed. 1050.

[293]See section 2, Ordinance No. 1974 of the City of St. Paul, approved March 24, 1898, Comp. of Ord. of St. Paul (1922) sec. 4339, granting a

regulate rates under some prescribed standard of reasonableness.[294] The disadvantage of the latter method is that it leaves open to judicial review the fixing of rates by the municipality, and introduces into the matter the same uncertainties, guess work, and legal requirements of doubtful merit which encumber the process of rate making by commissions. A case which involved rates fixed by the city of Minneapolis will serve to illustrate.[295] The plaintiff, a gas company, had a franchise under which the rates fixed by the council were to be "just and reasonable," and were not to fail to afford a fair and reasonable return on the company's capital investment. The term "capital investment" was defined as the fair and reasonable value of the plant as a going concern, etc. The city set about to fix rates. The company and the city each hired an expert with a corps of assistants to determine the "capital investment," and the rates necessary in order to afford a fair and reasonable return thereon. The result tends to show that the rival experts were faithful employees. The company's expert found a total "capital investment" of $9,990,867. The city's expert set the figure at $4,318,178.93, a sum substantially less than half that set by his opponent! Both experts proceeded upon the "so-called reproduction method." The company's expert estimated that a rate of 96 cents per thousand cubic feet was necessary to afford a 6% return on the "capital investment." The city's expert countered with a figure of 67.8 cents. The council enacted an ordinance providing for a rate to the city of 65 cents, and to private consumers of 70 cents. Before the ordinance was published the company brought action to have it adjudged void as unreasonable, and moved for a temporary injunction restraining defendants during the pendency of the action from publishing or enforcing it. The lower court denied the motion for the temporary injunction, and on appeal the order was affirmed. The court pointed out that the company based its motion upon the complaint and upon affidavits summarizing the testimony of its experts before the council. The city based its opposition upon its answer and affidavits summarizing the testimony of its experts. The evidence, according to the supreme court, was conflicting and

franchise to the Mississippi Valley Tel. Co.

[294]See sec. 9, Ordinance No. 2645, of the City of St. Paul, passed Dec. 20, 1906, Comp. of Ord. of St. Paul (1922) sec. 1741, granting an electric franchise to the Northern Heating & Elec. Co.

[295]Minneapolis Gaslight Co. v. City of Minneapolis, (1913) 123 Minn. 231, 143 N. W. 728.

nearly balanced, hence the denial of the injunction was allowed to stand.

The case demonstrates the evils attendant upon rate fixing under provisions which call for the allowance of a fair return on the fair value of the company's property, or which prescribe "reasonable" rates, which the courts will interpret to require such a return.

Numerous other provisions more obviously objectionable are to be found in franchises granted by Minnesota municipalities. One of the commonest faults is the insertion of requirements for free service to the city. Other errors are not hard to find. At one time the city of St. Paul went so far as to require the grantee of a telephone franchise to "do all its current banking in connection with its business in the City of St. Paul, with banks located in said city; and so far as practical employ residents of St. Paul; likewise as far as practical, quality and cost being equal, purchase the necessary material used in the construction, maintenance and repair of said telephone system from St. Paul parties."[296]

The failure of many of the smaller municipalities to make comprehensive and sound franchise contracts has been due in large measure to lack of knowledge on the part of the local officials. Information obtained by the League of Minnesota Municipalities indicates that it is common for utility companies to draw proposals and submit them to the governing bodies of the municipalities for acceptance.[297] However honest utility officials may be, such a method of framing franchises is not well calculated to serve the interests of the public. In order to acquaint municipal officers with the provisions which franchises should contain the League drew a model electric franchise which it made available to all member municipalities and published in its magazine.[298] The franchise may readily be adapted for use in the case of other utilities.

Section 3. The Worth of Municipal Control

The actual worth of municipal control of utilities is difficult

[296]Sec. 10, Ordinance No. 1974, City of St. Paul, approved March 24, 1898, Comp of Ord. of St. Paul (1922) sec. 4347, granting a franchise to the Mississippi Valley Tel. Co. An almost identical provision appears in sec. 10, Ordinance No. 2051, City of St. Paul, approved May 24, 1899, granting a franchise to the Am. Tel. & Tel. Co. of Minnesota.

[297]Fuller, Some Aspects of the Franchise Problem, (1930) 15 Minn. Municipalities 415.

[298](1930) 15 Minnesota Municipalities 418. The writer is informed that a model gas franchise has been drawn by the League. See (1931) 16

to measure. It will not do to say that in most states municipal control has been replaced by commission regulation, and that the former must necessarily have been inferior or it would not have been superseded. In the first place, many of the causes which impaired the success of municipal regulation were not inherent in such regulation, and might have been eliminated without changing the form of control. For example, it was commonly assumed that franchises were self-executory, and no proper agency or official was charged with the duty of seeing that the provisions were carried out.[299] This fault is not inherent; it may be remedied by proper measures imposing such a duty on a designated municipal officer or agency, and by making provisions designed to secure ability and effectiveness in the officer or agency.

It is doubtless true that under municipal control of utilities there was a considerable amount of corruption,[300] and that this fact contributed to the disfavor into which such control fell. However, it is plain that no system which may be perfected for the regulation of public utilities will work unless the men who operate it are substantially honest. Of course, it is likewise true that in view of the fact that we have with us always a certain amount of dishonesty, systems should be so devised as to curb and check that quality so far as possible. If it were demonstrated that the nature of city government is such that municipal officials controlling utilities are inherently more corrupt than state officials, then proof would have been made that in this respect municipal control of utilities is bad. The evidence is that instead of corruption being inherent in municipal governments, the personnel of such governments has in fact been greatly improved, partly by reason of the growth of agencies interested in municipal problems.

Municipal control likewise had the handicap that it was in effect during the promotional period of the existence of some types of utilities. We have seen that in Minnesota electrical utilities and telephones had their origin and growth under municipal regulation. Other utilities had eras of great expansion during the same period. The prevalent public desire was to obtain utilities willing to enter the field. Under such circumstances in-

Minn. Mun. 498.

[299]King, Regulation of Municipal Utilities 24.

[300]See Wilcox, Principles of Efficient Management in the Operation of Municipal Utilities, (1919) 4 Minn. Municipalities 138.

ducement rather than regulation was the order of the day. Later came the realization that a heavy price was being paid as a result of the era of promotion, and with it a reaction against the municipal control under which the evils of promotion were experienced.

The fact that municipal officials in the past have not possessed the knowledge or experience necessary to deal with such a problem as utility control has also counted against municipal regulation. "The experienced and competent personnel together with knowledge of the facts, was largely on the side of the companies."[301] This condition is rapidly being eliminated, as will be demonstrated more fully below.

Perhaps enough has been said to indicate that the eclipse of municipal control has not been entirely due to its inherent inferiority to control by state commission. More study is necessary before the relative worth of the two forms may be passed upon. One basis for an appraisal of the value of municipal control as compared with other forms would be a comparative study of rates and service in states having municipal control and in states having other forms of control, particularly regulation by state commission. As far as Minnesota is concerned the foundation for such a study has recently been laid by the League of Minnesota Municipalities and other agencies cooperating under the direction of Professor Morris B. Lambie of the University of Minnesota. Tables have been compiled showing, among other data, the monthly bill for electricity for residence lighting in the various municipalities of the state grouped according to population for twenty kilowatt hours, forty, sixty, eighty and one hundred kilowatt hours; and the monthly bill for gas for 500 cubic feet, 1,000, 2,000, 3,000, 4,000, and 5,000 cubic feet.[302] Of course, it will not

[301]Glaeser, Outlines of Public Utility Economics 218.

[302](1931) 16 Minn. Municipalities 58. Other tables have been compiled showing the monthly bills in municipalities grouped according to population for current furnished by municipal generating plants, by municipal distributing systems, and by each of the various private companies operating in the state, for twenty, forty, sixty and eighty kilowatt hours. (1931) 16 Minn. Municipalities 152. These and other tables make possible a comparison of rates from municipality to municipality within the state, and a comparison of rates under public ownership with those under private ownership, as well as of rates offered by the different private companies. The tables are founded upon a proper standard, namely, the bill paid for specified quantities of electricity or gas. Under the different rate structures in force the rate per unit would offer no basis for comparison. In cases in which the monthly bill varies according to some factor such as number of rooms in a house, some of the tables specify the size of house considered, etc.

do to take the figures from such tables, compare them with the figures for municipalities of like size in other states, and conclude that municipal control is good or bad according to whether the figures are higher or lower than those of other states having commission control. The source of supply, quality of service, density of consumers, engineering features such as topography, and many other factors, including even such broad matters as variations in economic conditions and wage and price scales, must all be considered. However, such tables lay the foundation for an appraisal of the results of municipal control.

Finally, the condition of municipal control two decades and more ago, at the time it was replaced in many states by commission regulation, must not be used as a criterion of the value of municipal control today. It has been suggested previously herein that there are agencies at work which have improved the quality and effectiveness of municipal government. An excellent example of such agencies is the League of Minnesota Municipalities.

The League was organized in 1913. It received official recognition from the state when, in 1923, the legislature passed an act authorizing any city, village or borough to pay dues to the League and to pay the expenses of delegates to its meetings.[303] It numbers in its membership 358 municipalities, including all the larger cities and villages of the state.[304] It is affiliated with the University of Minnesota, where it has its offices.

Its executive secretary is a professor of Political Science at the university, and its secretary-treasurer has for many years been head of the university extension division. Its staff assistants include graduate students and other advanced students. The other officers of the League and committee members are municipal officials from member municipalities.

The services having a bearing upon utility control offered by the League to its members are many. It answers all manner of inquiries; drafts ordinances; publishes and sends to municipal officials a magazine, "Minnesota Municipalities," containing articles covering a wide range of subjects pertaining to municipal government; issues a large number of publications on special subjects of research; holds an annual convention of municipal officials where municipal problems are discussed; calls

[303]Mason's 1927 Minn. Stat., sec. 1933-4.

[304]The figure is as of June 1, 1930. See Report of the Executive Secretary, (1930) 15 Minn. Municipalities 325.

numerous special gatherings to take up particular problems; maintains about thirty committees composed of municipal officials working on special problems; holds a legislative conference at the beginning of each session of the state legislature to discuss and recommend to the legislature measures affecting municipalities, and furthers municipal measures before the legislature.

The above is not a full statement of the activities of the League, but it will serve to show the ways in which League activity is calculated to make municipal control of public utilities in Minnesota more effective. The usefulness of such an organization is not contained within the limits of its functions. It opens the resources of the university, particularly library facilities, the accumulated results of research, and the services of highly trained specialists, to aid in the solution of municipal problems. It has likewise secured the assistance and cooperation of departments of the state government, and has established friendly contacts with private enterprises, including utilities, which have relations with municipal governments. Moreover, it has opened to municipalities and municipal officials the knowledge and experience of each other.

The work of the League is set forth not so much for its intrinsic importance as to illustrate forces which are at work today. In twenty-eight states there is some form of municipal league.[305] There is likewise a national municipal league; and there are multitudes of other agencies, public and private, all designed to promote better local government. Objections to municipal control founded upon the character and the restricted resources and information of municipal officials are being rendered increasingly less forceful.

CHAPTER V. THE SOLUTION OF THE PROBLEM OF UTILITY CONTROL

"It cannot be gainsaid that many aspects of rate and service regulation have both a state and a municipal setting. They require detailed knowledge of local conditions as well as cooperation between state and municipal officers. It is thus proper to question whether the existing distribution of power and responsibility is a final settlement of the problem."[306]

The problem of the proper distribution of functions between

[305]Aumann, Ohio Revives its Municipal League, (1930) 19 Nat. Mun. Rev. 591.

[306]Glaeser, Outlines of Public Utility Economics 291.

state, municipal, and perhaps regional bodies will doubtless continue to be a troublesome one for many years to come. The first step toward its solution is to recognize that the problem exists.

It is not intended to set forth here any detailed scheme for the division of functions among state and local bodies, but rather to put forward certain propositions deduced from the above study which should be considered in the framing of such a scheme.

The basis of control of utilities of the types herein considered should be franchise contracts between the utilities and the municipalities, as is the case in the Minnesota act for the regulation of street railways. In the absence of contrary statutory provisions, the terms of such franchises should govern. In such franchises the value of the company's property should be fixed at a specific sum. This sum should be arrived at by ascertaining as nearly as possible the amount prudently invested in the property. The franchise should provide that additions, extensions, and replacements are to be valued according to the amount authorized by the state commission to be invested in them. It should be provided that replacements are to be valued only to the extent that they cost more than did the replaced property, and that the rest of their cost is to be charged to depreciation.

The legal validity of franchises each embodying a specified value of the property of the utility concerned, such value having been derived from the amount prudently invested in the utility property, is fairly clear. A provision in a franchise calling for a definite rate base is analogous to a provision fixing definite rates. When definite rates are fixed by a franchise contract those rates are valid, provided the municipality has authority to make the franchise, even though the rates do not afford the company a fair return on the fair value of its property. The question of reasonableness does not enter in. The company has made its bargain and must keep it.[307]

Fixing the rate base by ordinance contract would eliminate one of the most serious objections to utility regulation as it now exists under state commissions, to which attention has been called in Chapter I, namely, that cost of reproduction must be considered in determining the rate base.

[307]Columbus Ry. & Power Co. v. Columbus, (1919) 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669; St. Cloud Pub. Serv. Co. v. St. Cloud, (1924) 265 U. S. 352, 44 Sup. Ct. 492, 68 L. Ed. 1050. See also Mpls. Gas Lt. Co. v. City of Minneapolis, (1918) 140 Minn. 400, 168 N. W. 588.

Besides the problem of the rate base, there is the problem of the rate of return to be allowed on that base. There is much merit in the proposal that the rate of return be made to depend upon the cost of the capital at the time it was contributed; i. e., if in order to obtain money on bonds it is necessary to pay five per cent on the money paid in for such bonds, and if in order to sell stock a return of eight per cent per annum must be in prospect, then the rate of return should be such as to bring in enough to pay five per cent on the money obtained from bonds and eight per cent on that obtained from stock. In short, the rate should depend on the cost of money to the utility. In order to escape the doctrine of the United States Supreme Court that a "fair" rate of return must be allowed, with all that the doctrine implies,[308] the franchises should contain an agreement for a rate of return based upon the cost of money.

The franchises should likewise contain the provision that all contracts made by the grantee utility company are to be subject to disapproval by the municipality. Thus, by franchise contract would be eliminated another major objection to present utility regulation, namely, that it does not reach contracts made by the operating companies with holding companies. There would arise the question of the reasonableness of the exercise by the municipality of its contract power to disapprove agreements made by the grantee utility company. Hence the franchise provision should specifically include contracts involving the functions of management, so that the courts could not hold, at least as a matter of construction of the franchise, that the requirement of approval did not reasonably include such contracts.

The franchises should be of indefinite duration, rather than for specified periods, and should be made subject to modification or termination either by act of the legislature or by the municipality. The act embodying the system of regulation should reserve to the state the right to modify, amend, repeal, or add to the act without compensation or damages to the utility. Thus the way would be left open for future changes in the form of control. It would be vanity of a high order to believe that any form or regulation now adopted is the final solution of the problem. No needless obstacles should be placed in the way of change.

Service, constructions and extensions should be made subject

[308]See United Rys. & Elec. Co. of Baltimore v. West, (1930) 280 U. S. 234, 50 Sup. Ct. 123, 74 L. Ed. 390.

to municipal control. These are matters which ought to be responsive to local needs and conditions. For example, city planning may have a direct bearing upon extensions. Zoning may affect the location of plants. Service required varies from municipality to municipality and from community to community within the municipality.

Some designated municipal official or body should be charged with the function of seeing to it that requirements made by the municipality are carried out.

Since under the franchise provisions above specified the proper rates would become a matter capable of being ascertained mechanically, and would present a purely technical problem, the fixing of rates should by the act setting up the scheme of regulation be placed in the hands of the state commission, which is a specialized body and can handle this technical problem in the same manner wherever it arises in the state. In order to provide a safeguard against possible dishonesty or incompetence on the part of the state commission, the municipalities should have the right at any time to make complaints regarding rates and to present evidence before the commission and to appeal to the courts, where the question should be whether the commission carried out accurately the franchise method of rate fixing.

Depreciation is likewise largely a technical matter capable of being solved according to accepted methods, and should be left to the commission with similar safeguards.

The commission should also have control of the financial structure and security issues of the companies, with the qualification that securities to the extent necessary to finance extensions, replacements, and constructions authorized or required by the municipalities must be approved by the commission.

Security issues of foreign holding companies founded upon the security issues of companies operating within the state probably cannot be effectively controlled by any one state or local government acting independently.

Where the same utility system supplies service both within and without a particular municipality, the apportionment of the investment, operating expense, return, etc., to the municipal service and to the outside service should be made by the state commission.

Besides the matter of rates there is the problem of rate

structures. That is to say, after the rate of return to the company has been settled, and the amount it is to earn is known, there is still the question of how much each consumer is to pay toward that amount. In the case of electricity there is a widespread conviction that the amount paid per kilowatt hour by the small user is out of all proportion to the amount charged the large consumer who uses great quantities of current for power purposes.[309]

There are many other problems in connection with rate structures. Should a minimum charge be made to pay the cost to the company of carrying a customer, and if so, what is that cost? What is the best form of rate, a flat rate, step rate, block rate, or some more complicated form? The question of rate structures presents a problem warranting more thorough study than commissions now harassed by rate fixing controversies have been able to give it.

The matter of rate structure should be left to the state commission, under statutory provisions calling for cooperation with other state commissions to the end that uniformity may be secured. One of the greatest objections to present rate structures is that there is such a variety of them. The upshot is that the public knows little or nothing about rates in one state or locality as compared with those in another. For example, suppose a householder in one state pays an average of 50 cents a month for gas. He moves to a city in another state and there uses about the same

[309]See article edited by Bauer, (1929) 18 Nat. Mun. Rev. 188. Some reduction in rates for large quantities is justifiable; also an argument can be made for a promotional rate, that is, a low rate to the user of power who, but for the low rate, would use coal or some other source of power, with the result that the utility would lose his business and with it whatever that business paid above the added cost of serving him, which would mean that the small consumer would have to pay more to make up the amount of return to be earned by the company. Granting the validity of these propositions, there is still a conviction on the part of men familiar with the situation that electricity for residence lighting and the like costs altogether too much as compared with electricity sold in large quantities. Bauer points out the great technological advances in the electric industry which have placed that industry in a position to compete for the business of furnishing power. As a result, prices of current for power purposes have been reduced so as to attract customers, whereas high rates have been retained where there would be no promotional effect, i. e., in domestic rates. "Domestic rates have not been reduced to a level consistent with other rates, or in proportion to the decline in unit costs of rendering service." Article edited by Bauer, (1930) 19 Nat. Mun. Rev. 56. This indicates that commissions should make a greater study of rate structures. It further indicates that despite commission regulation the conduct of the electrical utility companies bears a striking resemblance to that of unregulated monopolies.

amount of gas but finds that it costs him $1.00 per month. He is likely to assume that gas costs twice as much in the second city as in the first. The fact may be that in the second city there is a high initial charge, in the first none at all. It is quite possible that in the second city gas as a whole costs less than in the first, but the burden is differently distributed to the consumers. The above situation is a simple one; when the complicated rate structures actually used by different companies are considered, it is easy to understand why the average man does not know the reason he must pay more for gas or electricity in town X than he does in town Y. He either takes the attitude that "these things are too wonderful for me," or that "there's something mighty funny about the whole business." Neither ignorance nor suspicion on the part of the public makes for sound conditions. If uniform rate structures can be perfected the charges of utilities will be made subject to two great regulating agencies—visibility and comparability.

In all matters brought before the commission or courts on appeal the municipalities involved should be participants as of right.

Books, accounts, records and reports of the utilities, for the sake of uniformity, should be under the control of the commission, but in order to enable the municipality to perform its functions in the event of an apathetic or hostile commission the municipality should be authorized to prescribe additional records, reports, etc. Both the commission and designated municipal officials should have complete access to all utility books, records, accounts and property for any purpose or for no purpose. It is hard to conceive of any aspect of a public utility enterprise which should be kept secret.

A state official operating in connection with the commission should be designated to advise municipalities in all matters involving utility control, and, upon the request of municipalities, to represent them in any controversies. Such a provision would be particularly helpful to small municipalities.

In all litigation in which municipalities represent the utility users, the expense of the municipalities should be borne by the utilities and included as an operating expense. The amount to be expended either by any municipality or by a utility in rate litigation should be limited.

All proceedings connected with utility regulation should be public and should be preserved in public records. This does not mean that every word in purely routine and informal proceedings should be recorded; it does mean that the results of the proceedings should be recorded and that there should be no secrecy in regulatory proceedings.

All rules and regulations of the utility should be subject to approval by the municipality, or the commission, depending on the subject involved, and all rules, regulations, rates, classifications, schedules, etc., should be filed with the commission.

The above suggestions are all made subject to the reservation that in the case of some utilities a regional problem is presented which should be handled by a regional body. That is to say, the utility involved may operate in only a portion of the state, but that portion may not be confined within the limits of any one municipality. In such a case it might be advisable to set up a special municipal corporation for the purpose of controlling the utility, or for that purpose to provide for the formation of a special public corporation by the local governments of the region.[310] In general, the functions above suggested as belonging to the municipality should be given to the special corporation.

Of course, provision might well be made for cooperation between the various agencies, state, municipal, and regional, and between these and the agencies of other states and the federal government.

Regulation should be supplemented by provisions authorizing municipal ownership of any utility by any municipality. Securities issued by municipalities in furtherance of such ownership should be liens on the utility plant only, and the full faith and credit of the municipality should not be pledged. The securities and returns on them should be payable only from the proceeds of the utility. The utility should pay the usual taxes to the municipality. Surplus proceeds should go toward reduction of rates, not the payment of other municipal expenses. In short, the utility should stand on its own feet unsupported by the taxpayers, and on the other hand should not be used to relieve the taxpayers of burdens properly borne by them. By keeping the utility a

[310]For possible models for such regional provisions, see ch. 411, sec. 12, Minn. Laws 1921; ch. 136, Minn. Laws 1923; ch. 229, Minn. Laws 1923; ch. 181, Minn. Laws 1927; ch. 141, Minn. Laws 1911; ch. 13, Minn. Laws Ex. Sess. 1919.

separate enterprise a basis for comparison of the results of municipal ownership with those of private ownership will be preserved. At present it is difficult to make such comparisons. Some municipal utilities which offer lower rates than private utilities in similar circumstances do so because in fact they are subsidized by the taxpayers, either by the lending of the credit of the taxpayers or in some other way. On the other hand, some municipal utilities charging comparatively high rates do so because the proceeds are used to pay municipal expenses which should be borne by the taxpayer. Comparability of municipal plants with private plants is highly desirable, for when comparison of the two is possible municipal ownership serves as a standard of measurement of the results of private ownership and thus as a powerful regulatory force. It is possible that such forces are at least as effective in operation as such artificial agencies as commissions and councils.[311]

Municipal ownership should be strengthened by thorough and general provisions authorizing the extension of municipal systems beyond municipal boundaries, and authorizing the creation of regional bodies for the operation of utilities.

The above suggestions do not purport to be a complete basis for the framing of a public utility statute. They are intended to indicate the principles along the lines of which such a statute should be drawn.

The suggestions herein made assume the necessity for framing a new scheme of utility control. It is true that a uniform public utilities act has already been drafted and is available. However, this act is not an attempt to arrive at a better solution of the whole problem; it is a standardization of the law now already most common. It may be argued that it is well to standardize the present law, and then proceed with changes as necessity dictates. If the above study shows anything, it shows that there is altogether too much of that sort of law making now. It is better to devise a thorough and systematic scheme of control, forestalling all foreseeable objections, than to proceed piecemeal under the spur of necessity. The process of waiting until abuses

[311]An interesting device now gaining ground in Europe might prove valuable. Municipalities are allowed to purchase a certain fraction of the stock of public utilities serving them, and to be represented on the boards of directors in proportion to holdings. Thus the municipalities are kept in constant touch with the actual operation of the utilities. Dimock, Les Entreprises Mixtes, (1931) 20 Nat. Mun. Rev. 638. The authorization of this device would be a valuable supplement to utility control.

become intolerable and then remedying the specific evils is all too common. The great objection is that the process accepts abuses as part of the mechanism of change. Abuses while they exist produce waste, injustice, and other evils; otherwise they would not be abuses. Legal reasoning gains in dignity and deserved respect when it assumes the task of foreseeing abuses and preventing them by provisions made in advance. Of course, no system of control can be devised which will be so thorough that experience will disclose no imperfections to be remedied and no omissions to be bridged. But excellence is not reproached bebecause perfection is impossible. The work of drafting and putting in force an act providing a thorough system for the control of public utilities, taking account of experience to date and all foreseeable contingencies, would be worth while. Certainly in Minnesota a system thus devised would be preferable to the present accretion of miscellaneous provisions.