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COMPETITIVE OPERATION OF MUNICIPALLY AND PRIVATELY OWNED UTILITIES

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I

COMPETITION V. MONOPOLY

PUBLIC utility services for cities are usually provided on the principle of regulated monopoly.[1] It has been found that by the very nature of the utility business, better service can be had and at cheaper rates by the use of one supplier rather than by the use of competing plants. This one plant having a monopoly of the business may be either privately or municipally owned. If the service is furnished by a privately owned utility, regulation is usually by a state commission, but in a few states regulation is still largely by the city in which the company operates. In the case of municipally owned utilities, regulation is usually provided indirectly by the electorate in their control over the city government; but in some states, the state commission has jurisdiction over municipally owned utilities, as well as over those which are privately owned.

In some cities competition has been substituted for the principle of monopoly in supplying utility services.[2] This is usually the result of the city's entering into competition with an established privately owned utility. Where a city is the first to enter the field its control over the streets is in most cases adequate to enable it to prevent a privately owned utility from setting up a competing plant.[3]

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[1] On control of competition in the public utility field see TROXEL, ECONOMICS OF PUBLIC UTILITIES, c. 9 (1947).

[2] ELECTRIC POWER AND GOVERNMENT POLICY, Twentieth Century Fund, "Duplication of Private Facilities by Municipal Systems," p. 395 (1948).

[3] For cases where certificates of convenience and necessity were granted by state commissions to privately owned utilities to compete with existing municipal utilities see Re Mackay Light and Power Co., (Idaho 1919) P.U.R., 1919E, 482; Re Pacific Greyhound Lines, (Colo. 1940) 35 P.U.R. (n.s.) 477.

II

PRIVATE UTILITIES' ARGUMENTS

A. Competition Termed Wasteful

Privately owned utilities furnishing service in cities have attempted to block the efforts of municipalities to construct new plants to enter into competition with them. They have attempted to convince the voters that regulated monopoly is the wise policy and that competition is wasteful and inefficient. They have fought hard in the courts to protect what they consider to be their legal rights. As will be pointed out later, they have in some states resorted to the legislature for statutory recognition of the principle of regulated monopoly, even as against invasion of the field by a municipally owned utility.

B. Franchise Claimed to Give Monopoly

Privately owned utilities have relied upon their franchise provisions to block efforts by cities to construct competing plants. The result depends upon the provisions of the franchise under which the utility is operating—upon what the city has bound itself to do or not to do during the period of the franchise.

A city may enter into competition with a privately owned utility where the latter is operating under a non-exclusive franchise or where its franchise has expired.[4] The courts have taken the position in interpreting franchises that public grants are to be strictly construed and that the grantee is to take nothing by inference. All doubts concerning the existence of an agreement by a city not to compete with a privately owned utility are resolved in favor of the public.[5] The question as to

[4] Lehigh Water Co. v. Easton, 121 U.S. 388, 7 S. Ct. 916 (1887); Skaneateles Water Works Co. v. Skaneateles, 184 U.S., 354, 22 S. Ct. 400 (1902); Bienville Water Supply Co. v. Mobile, 175 U.S. 109, 20 S. Ct. 40 (1889), 186 U.S. 212, 22 S. Ct. 820 (1902); Joplin v. Southwest Missouri Light Co., 191 U.S. 150, 24 S. Ct. 43 (1903); Helena Water Works Co. v. Helena, 195 U.S. 383, 25 S. Ct. 40 (1904); Knoxville Water Co. v. Knoxville, 200 U.S. 22, 26 S. Ct. 224 (1906); Madera Water Works v. Madera, 228 U.S. 454, 33 S. Ct. 571 (1913); Mayor, Meridian v. Farmers' Loan and Trust Co., (C.C.A. 5th, 1906) 143 F. 67; Glenwood Springs v. Glenwood Light and Water Co., (C.C.A. 8th, 1912) 202 F. 678; Kansas Gas and Electric Co. v. Independence, (C.C.A. 10th, 1935) 79 F. (2d) 32, rehearing den., (C.C.A. 10th, 1935) 79 F. (2d) 638; Kansas Power Co. v. Hoisington, (C.C.A. 10th, 1937) 89 F. (2d) 358.

[5] The principle that public grants are to be strictly construed goes back to Charles River Bridge v. Warren Bridge, 11 Pet. (36 U.S.) 420 (1837). Also see Hamilton Gas Light and Coke Co. v. Hamilton City, 146 U.S. 258, 13 S. Ct. 90 (1892); Syracuse Water Co. v. Syracuse, 116 N.Y. 167, 22 N.E. 381 (1889); North Michigan Water Co. v. Escanaba, 199 Mich. 286, 165 N.W. 847 (1917), cert. den., 248 U.S. 561, 39 S. Ct. 7 (1918); Missouri Utilities Co. v. City of California, (D.C. Mo. 1934) 8 F. Supp. 454; West Tennessee Power and Light Co. v. Jackson, (C.C.A. 6th, 1938) 97 F. (2d) 979; West Tennessee Power and Light Co. v. Jackson, (D.C. Tenn. 1937) 21 F. Supp. 57; Metropolitan-Edison Co. v. Ickes, (D.C. Colo. 1938) 22 F. Supp. 639.

whether a franchise granted by a city is exclusive is avoided in some states by constitutional or statutory provisions prohibiting such grants.[6] Indiana specifically authorizes cities to construct municipal utilities "although there is operating in said municipality a public utility engaged in a similar service under a license, franchise or indeterminate permit." The statute further states that any existing permit, license or franchise interfering with the existence of a second utility is against public policy.[7]

An agreement by a city not to grant the same privileges of providing public utility services to another company has been held not to preclude the city itself from building a plant for this purpose. As stated by the Supreme Court this follows from the salutary doctrine that "special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers."[8]

Even in cases where the facts might be construed as an obligation not to construct a competing plant the courts have generally held there was no enforceable implied promise not to do so. The reservation by the city in granting a franchise of an option to purchase does not bind a city to buy the plant of the company furnishing service in preference to erecting its own.[9] Neither the lease[10] nor the sale[11] of a municipally owned plant to a private owner implies a promise on the part of the city not to construct a competing system. Where the city conveyed an electric distribution system by warranty deed the company contended that "the general warranty in the deed included one for quiet possession, and that the installation of another distribution system in the city will necessarily disturb the old one, and that the threatened competition will destroy the value of the franchise and take it for public use without just compensation and thus without due process of law." The court rejected this argument, saying that under a general warranty the city could not disturb the possession of what it sold but that more than one set of electric wires could be placed in the street without material

[6] Thrift v. Elizabeth City, 122 N.C. 31, 30 S.E. 349 (1898); Fairbanks Morse and Co. v. Texas Power and Light Co., (C.C.A. 5th, 1929) 32 F. (2d) 693; Alabama Power Co. v. Guntersville, 235 Ala. 136, 177 S. 332 (1937), 114 A.L.R. 181; Iowa Code (1946) §397.2.

[7] Ind. Stat. (Burns, 1933) §54-601.

[8] Knoxville Water Co. v. Knoxville, 200 U.S. 22 at 38, 26 S. Ct. 224 (1906). Also see Lehigh Water Company's Appeal, 102 Pa. St. 515 at 528 (1883), affd., 121 U.S. 388, 7 S. Ct. 916 (1887); Cf. Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 26 S. Ct. 660 (1906).

[9] Thomas v. Grand Junction, 13 Colo. App. 80, 56 P. 665 (1899).

[10] Western Public Service Co. v. Minatare, (C.C.A. 8th, 1938) 99 F. (2d) 844.

[11] Kentucky-Tennessee Light and Power Co. v. Paris, 173 Tenn. 123, 114 S. W. (2d) 815 (1938), 118 A.L.R. 1025.

interference.[12] The general warranty in the deed thus protected the company from physical or material interference but not economic loss. Also, the fact that a city in granting a franchise agrees to use the service of the company in lighting the streets or furnishing water for city purposes does not preclude the construction of a municipal plant.[13]

A city may, of course, unless specifically prohibited by the state, bind itself not to build a competing plant during the life of the franchise held by the privately owned utility. Such agreements are valid and will be enforced.[14]

While the courts follow the general principle that a city may construct a competing plant where a private company is operating under a non-exclusive franchise, such action must be pursuant to authority conferred upon it by the state. The unexpired franchise rights of a privately owned utility "constitute a property right within the protection of the Fourteenth Amendment, and . . . no person can lawfully engage in competition with it to its direct injury, without authority from the Legislature direct or derived."[15] Not only must the power be given but the proceedings must be in conformity with any procedural requirements of the constitution and statutes of the state.[16]

The municipal ownership movement received impetus when the national government began making grants and loans to cities to construct utilities. In many cases the loan or grant was used to construct a competing plant. The power to make loans and grants for this purpose was attacked in the courts, but was upheld as a proper exercise of the power conferred upon Congress.[17]

C. Tactics of Competitors Attacked

Privately owned utilities have questioned not only the power of cities to establish competing plants but in particular cases have attacked

[12] Mississippi Power Co. v. Aberdeen, (C.C.A. 5th, 1938) 95 F. (2d) 990 at 992. Also see Alabama Power Co. v. Guntersville, 235 Ala. 136, 177 S. 332 (1937), 114 A.L.R. 181.

[13] Bienville Water Supply Co. v. Bienville, 175 U.S. 109, 20 S. Ct. 40 (1899), 186 U.S. 212, 22 S. Ct. 820 (1902); Joplin v. Southwest Missouri Light Co., 191 U.S. 150, 24 S. Ct. 43 (1903); Humphrey v. Pratt, 93 Kan. 413, 144 P. 197 (1914).

[14] Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 S. Ct. 77 (1898); Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 26 S. Ct. 660 (1906), 231 U.S. 259, 34 S. Ct. 95 (1913); Westerly Waterworks v. Westerly, (C.C.D. R.I. 1896) 75 F. 181; White v. Meadville, 177 Pa. 643, 35 A. 695 (1896), 34 L.R.A. 567 (1896); Metzger v. Beaver Falls, 178 Pa. 1, 35 A. 1134 (1896).

[15] Colorado Central Power Co. v. Municipal Power Development Co., (D.C. Colo. 1932) 1 F. Supp. 961 at 963; Brooklyn City R. Co. v. Whalen, 191 App. Div. 737, 182 N.Y.S. 283, affd. in 229 N.Y. 570, 128 N.E. 215 (1920); Campbell v. Arkansas-Missouri Power Co. (C.C.A. 8th, 1932) 55 F. (2d) 560.

[16] Oklahoma Utilities Co. v. Hominy, (D.C. Okla. 1933) 2 F. Supp. 849; Alabama Power Co. v. Fort Payne, 237 Ala. 459, 187 S. 632 (1939).

[17] Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S. Ct. 300 (1938); Duke Power Co. v. Greenwood County, 302 U.S. 485, 58 S. Ct. 306 (1938); Washington Water Power Co. v.

the methods or tactics used. A Texas city before establishing a competing municipal plant solicited customers of the privately owned utility to take service from the city. In upholding the practice the court said the only way the city could determine whether it could safely enter the field was to ascertain the market for its product; that could be done only by soliciting customers of the existing company. While the court accepted the principle that "generally speaking, it is tortious for one without justification to induce another to breach a contract," in the present case persons under valid contracts had not been maliciously induced to switch their business. Rather was it "a case of a planned and consummated monopoly established by a system of exclusive contracts, enlisting the aid of a court of equity to sanction and perpetuate it." If the city could not solicit customers for its proposed plant then the private company would have "obtained for itself in effect what the public policy of the state forbids towns to grant it, an exclusive franchise."[18]

Even though a city may establish a competing utility, it may not physically interfere with an existing plant.[19] Injunctive relief will be granted to the privately owned utility in case of such interference.

Privately owned utilities have attempted to block the construction of competing municipal plants by use of the provisions of the Fourteenth Amendment. This has met with no success. The courts recognize that a competing municipal plant "will render the property of the water company less valuable and, perhaps, unprofitable,"[20] and will result "in the impairment of the investments of those who furnished money to it in the belief that their investments would not be lost through unnecessary duplication."[21] Such losses are, however, as stated by the Supreme Court, "simply misfortunes which may excite our sympathies, but are not the subject of legal redress."[22]

Coeur d'Alene, (D.C. Idaho 1934) 9 F. Supp. 263, (D.C. Idaho 1938) 25 F. Supp. 795; Arkansas-Missouri Power Co. v. Kennett, (C.C.A. 8th, 1935) 78 F. (2d) 911; Southwestern Gas and Electric Co. v. Texarkana, (C.C.A. 5th, 1939) 104 F. (2d) 847; Central Illinois Public Service Co. v. Bushnell, (C.C.A. 7th, 1940) 109 F. (2d) 26.

[18] Fairbanks, Morse and Co. v. Texas Electric Service Co., (C.C.A. 5th, 1933) 63 F. (2d) 702 at 705.

[19] Los Angeles v. Los Angeles Gas and Electric Corp., 251 U.S. 32, 40 S. Ct. 76 (1919); Colorado Central Power Co. v. Municipal Power Development Co., (D.C. Colo. 1932) 1 F. Supp. 961; Oklahoma Utilities Co. v. Hominy, (D.C. Okla. 1933) 2 F. Supp. 849; Mississippi Power Co. v. Starkville, (D.C. Miss. 1932) 4 F. Supp. 833; Bell v. David City, 94 Neb. 157, 142 N.W. 523 (1913); Alabama Power Co. v. Guntersville, 236 Ala. 503, 183 S. 396 (1938), 119 A.L.R. 429.

[20] Helena Water Works Co. v. Helena, 195 U.S. 383 at 392, 25 S. Ct. 40 (1904).

[21] Arkansas-Missouri Power Co. v. City of Kennett, (C.C.A. 8th, 1935) 78 F. (2d) 911.

[22] Turnpike Co. v. The State, 3 Wall. (70 U.S.) 210 at 213 (1865); Skaneateles Water Works Co. v. Skaneateles, 184 U.S. 354, 22 S. Ct. 400 (1902); Hamilton Gas Light and Coke Co. v. Hamilton City, 146 U.S. 258, 13 S. Ct. 90 (1892); Carolina Power and Light

No legal wrong results from the lawful competition of a municipally owned utility with one that is privately owned. There can be no damage to something the private company "does not possess—namely, a right to be immune from lawful municipal competition."[23] Thus, "An appeal to the Fourteenth Amendment to protect property from a congenital defect must be vain."[24] The courts refuse to read into the Fourteenth Amendment a remedy for the error made by the privately owned utility in failing to secure a specific agreement on the part of the city not to set up a competing plant.

Appeals to the courts on grounds of ethics or of sound business practice have not met with success. In a case where the value of the property of a privately owned utility had been decreased by the competition of a subsequently constructed municipal plant, the Supreme Court held its property had not been "taken, as that term is understood in constitutional law. What the village ought to do in the moral aspect of the case is, of course, not a question for us to determine."[25] A privately owned utility which attempted to block the efforts of a Michigan city to set up a competing plant argued that a condition of affairs should not be permitted which would bring "loss to all concerned, without profit or advantage to the city or anybody else." The Supreme Court of Michigan answered that the certainty of loss to all concerned rested solely upon speculation and anyway the "electors are dealing with their own money, and, if they choose to invest it in losing enterprises, so long as they comply with the law, it is their own concern."[26]

III

SIGNIFICANT ASPECTS OF COMPETITION

A. Rate Wars

The operation of competing municipally and privately owned utilities frequently leads to rate wars. The question arises as to the weapons available to each party for either offense or defense in such a war. The problem of rate wars arises in three different settings: (1) states in which the city fixes rates for both municipally and privately owned

Co. v. South Carolina Public Service Authority, (C.C.A. 4th, 1938) 94 F. (2d) 520; Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 59 S. Ct. 366 (1939); People ex rel. Public Utilities Commission v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924).

[23] Alabama Power Co. v. Ickes, 302 U.S. 464 at 480, 58 S. Ct. 300 (1938).

[24] Madera Water Works Co. v. Madera, 228 U.S. 454 at 456, 33 S. Ct. 571 (1913).

[25] Skaneateles Water Works Co. v. Skaneateles, 184 U.S. 354 at 367, 22 S. Ct. 400 (1902).

[26] Muskegon Traction and Lighting Co. v. Muskegon, 167 Mich. 331 at 340, 132 N.W. 1060 (1911).

utilities, (2) states in which a state commission fixes rates for privately owned utilities and the city for municipal utilities, and (3) states in which a state commission fixes rates for both municipally and privately owned utilities. In the case of competing utilities, may rate cutting be restricted by the fixing of minimum rates, or is there a constitutional right of ruthless, destructive competition?

In those states where power to fix rates for privately owned utilities is vested in the city this is generally held to mean the power to establish minimum rates. This means in effect that one of the participants has the power to call a halt in a rate war. As stated by the privately owned utilities, it means that the city is "using its governmental robes as a cover for the protection of its proprietary interests."[27]

The experience in a Texas city may be cited as illustrative of rate wars. The city constructed a competing plant, fixed its rates ten per cent below those of the privately owned utility, and took over half of its customers. The company, in the words of a United States circuit court of appeals, then "resolutely advanced upon the municipal plant to join battle with it on its own terms. Meeting reduction with reduction, it put into effect rates ten per cent lower than its rival had inaugurated."[28] The city then enacted a minimum rate ordinance, fixing rates ten per cent above the retaliatory rates the private company had put into effect. The company argued that the power conferred upon the city to fix rates was to protect consumers from overcharges and that it did not include power to fix minimum rates. Since there were not sufficient customers to support two plants, the company maintained that it could not under the Fourteenth Amendment be denied the effective weapon of rate cutting in the competitive struggle for existence.

The Court upheld the ordinance on the ground that the purpose of rate regulation is to supplant wasteful competition.

> "Viewing the matter in this light, we think it cannot be gainsaid that it was not only the right, but the duty of the council to put a stop to the contest before its ruthlessness had ruined one or both of the plants. We think too, that in doing so, on the basis of fixing the same rate for each plant, it acted justly and well within its powers."[29]

The view that a grant of power to fix rates includes both minimum

[27] Mapleton v. Iowa Public Service Co., 209 Iowa 400, 223 N.W. 476 (1929), 68 A.L.R. 993.

[28] Seymour v. Texas Electric Service Co., (C.C.A. 5th, 1933) 66 F. (2d) 814 at 815, reversing (D.C. Texas 1931) 54 F. (2d) 97, cert. den. 290 U.S. 685, 54 S. Ct. 121 (1933).

[29] Id., at 816.

and maximum rates is generally accepted.[30] To construe the word "regulate" as limiting the power granted to establishing maximum rates would open the way for abuse by way of favoritism and discrimination within that limit.[31] Privately owned utilities have advanced the argument that a rate fixed by a city is "presumptively reasonable as a maximum rate" and obviously any rate below would be "necessarily reasonable." This view was rejected by the Supreme Court of Iowa with the statement that, "A public utility, operating under a franchise, has no constitutional right of competition."[32] If monopoly is desirable in the public utility field "then it should be created and protected by constituted authority, and not by financial power through the process of ruthless, destructive competition."[33]

The view that there is a constitutional right of competition has been followed in two cases by lower federal courts, but it has since been rejected by the Supreme Court. In a case where the Montana Public Service Commission fixed minimum rates for two competing public utilities the lower court held the order was unreasonable in view of the circumstances—namely, that there was not sufficient business to support two utilities. It would be reasonable to fix minimum rates "when the field affords room for their application with resultant fair returns to all occupying it. . . . But when the field is limited, at [and?] reasonable rates will afford fair returns to but one, and two seek to occupy it, the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity; and any minimum rate and order which would prevent the struggle and condemn the rivals to the ordeal of slow starvation is unreasonable and void."[34] A similar line of reasoning was followed in a Texas case where a municipality was enjoined from enforcing a minimum rate ordinance against a competing utility where the effect would be to divert patronage from the private utility to the municipal utility. Consumers of the private plant had testified they were its customers because its rates were lower, and that they would cease to be such customers if its rates were made equal to that of

[30] See Economic Gas Co. v. Los Angeles, 168 Cal. 448, 143 P. 717 (1914); Community Natural Gas Co. v. Natural Gas and Fuel Co., (Tex. Civ. App. 1930) 34 S. W. (2d) 900; In re Estate of Ransom, 219 Iowa 284, 258 N.W. 78 (1934).

[31] Pinney and Boyle Co. v. Los Angeles Gas and Electric Corp., 168 Cal. 12, 141 P. 620 (1914).

[32] Mapleton v. Iowa Public Service Co., 209 Iowa 400, 223 N.W. 476 (1929), 68 A.L.R. 993.

[33] Coleman Gas and Oil Co. v. Santa Anna Gas Co., (Tex. Civ. App. 1933) 58 S. W. (2d) 540 at 543, reversed on other grounds, (Tex. Comm. App. 1933) 67 S. W. (2d) 241.

[34] Great Northern Utilities Co. v. Public Service Commission, (D.C. Mont. 1931) 52 F. (2d) 802 at 804, (D.C. Mont. 1932) 1 F. Supp. 328, reversed, 289 U.S. 130, 53 S. Ct. 546 (1933).

the municipal plant. The fact that some customers had already left the private plant and that others would do so if the minimum rates were enforced was the important factor. The Court felt whether in fact customers would leave the private plant was more important than their reasons for leaving, such as patriotic feeling or other consideration. There was "no escape from the conclusion that the fixing of such minimum rate would be, within the terms of the law, confiscatory."[35]

The Supreme Court of the United States has rejected this view and held there is no constitutional right of unrestrained cutting of rates to destroy a competitor. Minimum rates do not deny a utility just compensation or deprive it of its property without due process of law.[36]

In upholding the fixing of minimum rates, the courts have considered the purpose and probable results of rate wars. The purpose is to destroy the competitor, drive him out of business and secure a monopoly. As stated by the Texas Court of Civil Appeals, "these are the natural and inevitable consequences of the cut-throat competition inaugurated by it. The presumption is indulged that a person intends to accomplish the natural consequences of his acts."[37] It would appear to be a reasonable exercise of the police power to prevent cut-throat competition. The fixing of minimum rates is a means of accomplishing this purpose.

B. Advantages and Disadvantages of Municipalities

The city may be at a disadvantage in a rate war since the state laws frequently make it mandatory that cities fix rates for municipally owned utilities to cover certain enumerated items, such as operating, maintenance, depreciation, replacement and interest charges, and debt retirement. After stating the items to be covered by rates of municipal utilities, the Indiana statute states that, "Any rate too low to meet the foregoing requirements shall be unlawful."[38] In Massachusetts a city may not fix the price of gas and electricity supplied by a municipal plant at less than the cost of production without consent of the Department of Public Utilities.[39] Such statutes limit the power of a municipality to meet the privately owned utility in a rate war.

[35] Texas Electric Service Co. v. City of Seymour, (D.C. Texas, 1931), 54 F. (2d) 97 at 99, reversed, (C.C.A. 5th, 1933), 66 F. (2d) 814.

[36] Public Service Commission v. Great Northern Utilities Co., 289 U.S. 130, 53 S. Ct. 546 (1933), reversing (D.C. Mont. 1931) 52 F. (2d) 802.

[37] City of Farmersville v. Texas-Louisiana Power Co., (Tex. Civ. App. 1932) 55 S.W. (2d) 195 at 202, reversed on other grounds (Tex. Comm. App. 1933), 67 S.W. (2d) 235.

[38] Ind. Stat. (Burns 1933) §54-609.

[39] Mass. Ann. Laws (1933) §164-58.

The other side of the picture is presented when a city seeks to sell its service at a lower rate than is charged by a privately owned utility. The city plant has certain advantages, such as tax-exemption, which should enable it to sell at a lower rate. May the private plant meet this rate even though it will not give it a fair return on its investment? Or if the statutes of the state do not require the rate of the municipally owned utility to cover any enumerated items, such as operating expenses, depreciation, interest, debt retirement, etc., may the city operate its plant at a loss?

In considering these questions the Supreme Court of Utah has held that the state commission could not establish rates for a privately owned utility that would give it a fair return and then require a municipal plant to charge the same.

> "If taxpayers and citizens of a town or city desire through their municipality to own and operate their own plant for their own use and for the use of the municipality at cost, they ought not to be denied the right or privilege, because a competitive and privately owned utility, operating a plant for gain and profit at the same place, may not be able profitably to furnish the product at a rate or charge lower than its standard rate, or at a rate proposed by the municipality. To say a municipality, its taxpayers and citizens, have the right to own and operate a utility, but may not be permitted to operate it at a rate less than a privately owned utility may supply the product at a reasonable profit, is, in effect, to deny to a municipality whatever advantage or ability it may have, if any, to furnish and supply the product at a rate or charge lower than that of a privately owned utility for gain and profit."[40]

The Supreme Court of the United States has held that "the city is not bound to conduct the business at a profit."[41] The result in this case is competition but not cut-throat competition. If the city has economic advantages in the operation of a utility, it should be able to pass them on to the consumers.

In a state where a state commission fixes the rates of privately owned utilities but municipally owned plants are not under its jurisdiction, will the state commission take into consideration the rates being charged by the municipal plant in fixing rates for the private plant? The Georgia Public Service Commission permitted a company serving several cities under a uniform rate to reduce its rates in one city to meet the competition of a municipal plant over which the commission had

[40] Logan City v. Public Utilities Commission, 72 Utah 536 at 558, 271 P. 961 (1928).

[41] Puget Sound Power and Light Co. v. Seattle, 291 U.S. 619 at 625, 54 S. Ct. 542 (1934), rehearing den., 292 U.S. 603, 54 S. Ct. 712 (1934).

no control. The commission stated it did not constitute unjust discrimination against the customers of the company in other cities. It is unjust to charge different rates under "precisely the same circumstances and conditions surrounding the service to all customers." If a public utility were not permitted to charge such rates as were necessary to meet competition "it would often happen that property would be threatened if not destroyed, where competition without regulation is permitted to conduct its affairs in such manner as to take all the business away from a given company."[42] The Illinois Commerce Commission in authorizing a company serving 127 cities to reduce rates in one city to meet the competition of a municipal plant said:

> "It is well settled that one of the elements to be taken into consideration in fixing the rates or charges of public utilities is that of competition, and companies engaged in the utility business may, within reason and with the consent and approval of regulatory bodies, meet the rates and charges of municipally owned competitors."[43]

The commission believed that justice and fair play compelled it to permit the company to meet the municipal plant rates, but it refused to approve rates which were "slightly lower" than those charged by the city.[44]

States and cities have in some cases favored municipal utilities over competing private plants by their tax policies. The exemption of municipally owned utilities from the general property tax is a step in this direction.[45] In some cases a more direct use has been made of the taxing power to favor a municipal plant. Seattle imposed a tax upon the gross receipts of a private corporation engaged in the business of furnishing electric light and power to consumers but it was not applicable to the competing municipal plant. In upholding the tax, the Supreme Court held it was based on a reasonable classification, and that "equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts

[42] Re Georgia Power Co., (Ga. 1931) P.U.R. 1931E, 449 at 453; Georgia Public Service Commission v. Georgia Power Co., 172 Ga. 31, 157 S.E. 98 (1931).

[43] Re Illinois Northern Utilities Co., (Ill. 1933) 1 P.U.R. (n.s.) 449 at 452. The Utah Public Service Commission has allowed a privately owned utility to reduce rates to meet the competition of a municipal plant. Logan City v. Utah Power and Light Co., (Idaho 1928) P.U.R., 1928E, 57.

[44] Re Illinois Northern Utilities Co., (Ill. 1933) 1 P.U.R. (n.s.) 454.

[45] On the constitutionality of a statute subjecting property of municipally owned light plants beyond the corporate boundaries to taxation and exempting that part within, see Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159 (1925), 39 A.L.R. 1222 (1925).

a like business."[46] The court followed the view that municipally and privately owned utilities may be classified for purposes of legislation and "that the equal protection clause does not forbid discrimination with respect to things that are different."[47] On the same principle, a state statute imposing a tax on the production and sale of electric power does not deny equal protection because it exempts municipalities generating electricity for the use of their customers.[48] A discriminatory tax levied upon property owners not using water from a municipal system has been held to be invalid.[49] Even the most ardent advocate of municipal ownership would have difficulty in upholding such a classification.

IV

PROTECTION OF THE PUBLIC

A. Certificate of Convenience and Necessity

"Legislation may protect from the consequences of competition, but the Constitution does not."[50] The legislatures of several states have followed that principle and by statute regulated competition by utilities. The most generally used method to protect public utilities from the consequences of competition is to require a certificate of convenience and necessity for municipal plants as well as for those which are privately owned.[51] Four states now require a certificate of convenience and necessity for municipally owned utilities operating within the corporate limits of the city. Twelve states make such a certificate a requirement for operation beyond the corporate boundaries.

This limits, and in actual practice largely eliminates, competing utilities. The commissions may, of course, see fit to grant certificates to competing utilities but in practice seldom do so.[52] They believe that

[46] Puget Sound Power and Light Co. v. Seattle, 291 U.S. 619 at 624, 54 S. Ct. 542 (1934), rehearing den., 292 U.S. 603, 54 S. Ct. 712 (1934).

[47] Also see Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935); Moran v. Seattle, 179 Wash. 555, 38 P. (2d) 391 (1934).

[48] South Carolina Power Co. v. South Carolina Tax Commission, (D.C. S.C., 1931) 52 F. (2d) 515, affd. 286 U.S. 525, 52 S. Ct. 494 (1932).

[49] Warsaw Water Works Co. v. Warsaw, 161 N.Y. 176, 55 N.E. 486 (1899).

[50] Puget Sound Power and Light Co. v. Seattle, 291 U.S. 619 at 625, 54 S. Ct. 542 (1934).

[51] On the question as to whether the erection of a new light plant to replace an old one requires a certificate of convenience and necessity, see Hagerstown v. Littleton, 143 Md. 591, 123 A. 140 (1923); Littleton v. Hagerstown, 150 Md. 163, 132 A. 773 (1926); West v. Byron, 153 Md. 464, 138 A. 404 (1927); Re Mayor and Council of Hagerstown, (Md. 1926) P.U.R. 1927A, 336.

[52] For cases where cities were granted a certificate of convenience and necessity even though it meant competition with an existing company, see Re Village of McCammon, (Idaho 1916) P.U.R., 1916D, 500; In Re Gallitzin, (Pa. 1915) P.U.R. 1915A, 779; Allegheny Valley Water Co. v. Tarentum, (Pa. 1915) P.U.R. 1915C, 174; Re City of Lamar, (Colo.

better results can be obtained by applying a principle of regulated monopoly and refuse to grant a certificate to a city to construct a plant to compete with an existing privately owned utility.[53] As stated by the Pennsylvania Commission the noncompetitive policy "has proven itself economically sound and one which we would hesitate to abandon without compelling reasons therefor. Inadequacy of service or unreasonableness of rates are not alone sufficient, since we are empowered in such cases to apply corrective measures directly against offending public service companies, in proper proceedings."[54] In a later case the commission did grant a certificate for a competing plant and was reversed by the superior court on the grounds that it had acted arbitrarily and capriciously. The court found that the commission had changed from a policy of regulated monopoly to one of "regulated competition by municipalities." The evidence was held to be insufficient to warrant the grant of a certificate of public convenience to the city for the construction of a competing plant.[55]

Some commissions have been inclined to abandon the noncompetitive policy where the past record of the private company is bad. The New York Commission in authorizing a municipality to furnish service outside its borders in territory already served by a privately owned utility stated that "unless a utility is willing fully to meet its obligations in every direction, it could not expect to have its territory protected against invasion."[56] The utility here involved was "generally known to be litigious" so it was considered better policy to permit the municipality to furnish competing service rather than to rely upon a suit to compel the private company to meet its obligations. The Colorado Commission in approving the construction of a competing plant quoted with approval the California Railroad Commission as follows:

1919) P.U.R., 1919C, 309; Farmers Electric and Power Co. v. Ault, (Colo. 1920) P.U.R., 1920D, 214; Re Town of Franklin, (W. Va. 1920) P.U.R., 1922E, 432; Re Village of Hustisford, (Wis. 1934) 2 P.U.R. (n.s.) 485; Re Town of Matoaka, (W. Va. 1934) 4 P.U.R. (n.s.) 198; People ex rel Public Utilities Commission v. Loveland, 76 Colo. 188, 230 P. 399 (1924). Some states by statute prohibit the granting of a certificate where service is already being rendered by a public utility. See S.C. Code (1942) §8555-2 (22); Ky. Rev. Stat. (1948) §§96, 186.

[53] Re Borough of Bath, (Pa. 1916) P.U.R., 1916E, 692; Re Catasauqua, (Pa. 1919) P.U.R., 1919C, 48; ibid. 50; Re City of Benwood, (W. Va. 1934), 5 P.U.R. (n.s.) 429; Re Mayor and Council of Hagerstown, (Md. 1923) P.U.R., 1924B, 211; Public Service Co. v. Loveland, (Colo. 1924) P.U.R. 1924E, 516, 538; Re Niagara, Lockport and Ontario Power Co., (N.Y. 1931) P.U.R., 1932A, 92; Re Village of Schenevus, (N.Y. 1919) P.U.R., 1919E, 735; Re Borough of Kittanning, (Pa. 1919) P.U.R., 1919F, 182; Re Bayles, (Utah, 1925) P.U.R., 1926A, 731; Barnes Laundry Co. v. Pittsburgh, 266 Pa. 24, 109 A. 535 (1920).

[54] Re Borough of Brookville, (Pa. 1929) P.U.R., 1929D, 483.

[55] Metropolitan Edison Co. v. Public Service Commission, 127 Pa. Super. Ct. 11, 191 A. 678 (1937). Also see Re Borough of Myerstown, (Pa. 1936) 12 P.U.R. (n.s.) 39.

[56] Re Village of Little Valley, (N.Y. 1938) 22 P.U.R. (n.s.) 63 at 64.

". . . if we should, in the very first important contested application for a certificate of public convenience and necessity, announce the rule that where the major portion of a territory is served, though inefficiently and at high rates, the result of such application will be merely to put the existing utility upon its good behavior, then we would, in effect, be saying to all the offending utilities of this state, if there be any: 'You may proceed with your present methods until competition knocks at the door of your territory, and only then will you be compelled to do justice,'—and we would be saying to every new public utility: 'You will knock in vain at the door of any field now served by a utility.' The result would be that old utilities would keep their territory unspurred by the fear of competition, knowing always that only when it was imminent need they prepare to do justice to their patrons. . . ."[57]

The policy of regulated monopoly is generally a wise one, and the certificate of convenience and necessity an effective means of carrying it out. The real spirit of the policy, however, should be to protect the public and not the public utility which is performing the service.[58] The attitude of the New York and Colorado commissions in the cases discussed above can be commended as in furtherance of that spirit.

Where efforts on the part of the public authorities to force utilities to give reasonable rates and adequate service have met with long-continued litigation and obstructionist tactics, a competing plant may be the solution. If local governments want to try that approach in such a situation they are entitled to a sympathetic hearing by the state commission in passing on their application for a certificate of public convenience and necessity.

B. Use of Existing Facilities

Some states avoid the construction of competing municipal plants by requiring the city either to purchase or to attempt to purchase an existing plant at a fair and reasonable price.[59] If the city and the com-

[57] Re City of Lamar, (Colo. 1919) P.U.R. 1919C, 309 at 318. For the view that a municipality should not be permitted to construct a competing plant until the existing utility had been given "due notice and opportunity to comply with its proper duty" see Re Borough of Kittanning (Pa. 1919) P.U.R., 1919F, 182. Even though the Commission found that the company "has not either appreciated nor performed its duty as a water company exclusively serving a community," and that "it has not made reasonable efforts to correct the erformance of its duties" it refused to grant a certificate to the city. It did so on the grounds that, "The theory that the public are best served by two competing companies striving to outdo each other by flying at each other's throats has long been exploded."

[58] State ex rel. Electric Co. v. Atkinson, 275 Mo. 325, 204 S.W. 897 (1918).

[59] In Montana such a provision has been held unconstitutional under the constitution of that state. Helena Consolidated Water Co. v. Steele, 20 Mont. 1, 49 P. 382 (1897). Also see Carlson v. City of Helena, 39 Mont. 82, 102 P. 39 (1909); State ex rel. Gerry v. Edwards, 42 Mont. 135, 148, 111 P. 734 (1910). Cf. White v. Meadville, 177 Pa. St. 643, 35 A. 695 (1896); Metzger v. Beaver Falls, 178 Pa. St. 1, 35 A. 1134 (1896).

pany cannot agree upon the price, then a procedure is provided for the determination of fair value. This may be by the state public utilities commission, by arbitrators or by the courts.[60] The statutes usually state the factors or items to be considered in arriving at a fair value. In Connecticut and Florida the fair market value must include as an element of value the earning capacity of the plant, based upon the actual earning being derived from the plant.[61]

In some states the statutory requirement is met if the city attempts to purchase an existing plant at a fair and reasonable price. If the company does not accept the price as found by the state commission or arbitrators, then the city may proceed to construct a plant. If the city refuses to proceed with the purchase after the price has been fixed it is estopped from building a competing plant but must again follow the statutory procedure for valuation and acquisition. A time limit, such as two years, is usually fixed before the city may again institute purchase proceedings. Minnesota has a novel provision to limit the construction of duplicating plants. While a municipality may construct or purchase a telephone exchange on approval of a majority of the voters voting on the proposition, the favorable vote must be 65 per cent of those voting thereon where an exchange already exists.[62]

A less stringent type of statute which may reduce the number of competing plants is that permitting but not requiring the city to acquire an existing private plant. This is the case in states making use of the indeterminate permit where a utility is by law deemed to consent to its purchase by a municipality.[63] In states where private utilities may be acquired by cities by the use of eminent domain, the necessity of setting up a competing plant is avoided. In such cases, however, the policy is left to the final determination of the city. Competing plants are still possible but less probable.

V

CONCLUSION

The principle of regulated monopoly for public utility services is a sound one and the use of competition is unwise. As in the case of most

[60] Ala. Code (1940) §48-344, 345; Ariz. Code (1939) §27-901 to 27-921, §16-604; Ky. Rev. Stat., (1948) §96.580; Wis. Stat. (1947) §196.50(4); Re City of Yuma, (Ariz. 1933) 2 P.U.R. (n.s.) 9.

[61] Conn. Gen. Stat., Rev. (1930), §43-522; Fla. Stat. (1941) §172.09.

[62] Minn. Stat. (1945) §237.19.

[63] As illustrative see Colo. Stat. Ann. (1935) §137-36.

principles, however, there are exceptional cases.[64] Where regulation of a privately owned utility has not been successful, and the people feel that under regulated monopoly they are unable to secure adequate service at fair rates, they have resorted to the device of a competing plant.[65] The frequently resulting rate wars have usually resulted disastrously to either the private or municipal plant.[66] Acquisition of an existing plant would in most cases be preferable to the construction of a new competing plant. This may mean, however, that the city will be forced to take over a run-down obsolescent plant when it believes that good policy is to construct a new modern one.

While the principle of requiring a certificate of convenience and necessity for a municipal plant when the territory is already served by a private plant appears sound, cities may feel that it results in a policy opposed to the extension of municipal ownership. If the commission grants a certificate of convenience and necessity for a competing plant it is in a sense a confession that regulated monopoly has not worked. The agency which grants the certificate is the one responsible for making the principle work; thus, in a sense, it is a recognition of its own failure. The threat of a competing plant may have a salutary effect on the attitude of the privately owned utility in the service it renders and the charges it makes. The competing plant is a gun behind the door policy—to be seldom used but well to have if needed—and one that should not be too severely limited by state laws.

[64] For considerations which may justify setting up a competing municipal plant, see WILCOX, THE ADMINISTRATION OF MUNICIPALLY OWNED UTILITIES 20 (1931).

[65] It was stated in the Final Report of the Joint Legislative Committee to Investigate Public Utilities (N.Y.), Legis. Doc., no. 78, p. 86: ". . . the Committee believes that where regulation is not successful in bringing about reasonable rates, then the community suffering from such unreasonable rates has no recourse other than a municipal plant or a so-called 'municipal yardstick.'"

[66] The New York Commission considered this in refusing to approve the construction of a competing electric plant by a village of 537 population, saying: "In determining to plunge into this adventure without any real consideration of construction costs and without any consideration at all of operating costs, it is evident that the village was swayed by its temper rather than by its judgment. The Commission is therefore called on to protect the village against itself. Public convenience and necessity do not require a village to embark on a disastrous business enterprise." Re Village of Schenevus, (N.Y. 1919), P.U.R., 1919E, 735 at 737.