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*By appointment of Governor James F. Fielder, Mr. Treacy qualified April 14th, 1914, as the successor of Mr. Daniels, who resigned following his appointment as a member of the Interstate Commerce Commission.

REPORTS

OF THE

Board of Public Utility Commissioners

OF THE

STATE OF NEW JERSEY

VOLUME II.

June 9, 1913, to May 12, 1914.

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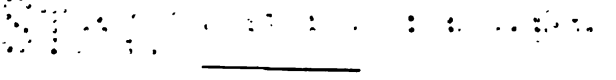

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This volume, containing Findings and Decisions of the Board of Public Utility Commissioners, is published in accordance with the provisions of Section 7 of "An Act Concerning Public Utilities; to Create a Board of Public Utility Commissioners and to Prescribe its Duties and Powers" (Chapter 195, Laws of 1911).

Only such Findings and Decisions are included as in the judgment of the Board come within the scope of Section 7.

This volume should not be confused with the report which, under Section 14 of the Act, the Board is required to make to the Governor annually.

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No. 111.

IN THE MATTER OF THE APPLICATION OF THE LEHIGH VALLEY RAILROAD COMPANY TO ABANDON STATIONS OF THE PENNSYLVANIA RAILROAD COMPANY AT MARKET STREET, NEWARK, AND JERSEY CITY, NEW JERSEY.

Opinion of the Board, stated at hearing held on February 14th, 1913, that change by the Lehigh Valley Railroad Company from terminal station of the Pennsylvania Railroad Company at Jersey City to the terminal of the Central Railroad Company was an eviction and not an abandonment, upheld on rehearing.

E. H. Boles and *R. W. Barrett,* for the applicant.

Alan H. Strong, for the Pennsylvania Railroad Company.

Jackson E. Reynolds, for the Central Railroad Company.

Thomas G. Haight and *Thomas J. Murphy,* for the city of Jersey City.

William C. Gebhardt, for various objectors from Hunterdon county.

On January 7th, 1913, the Board received from the Lehigh Valley Railroad Company an application to abandon the Pennsylvania Railroad stations at Jersey City, New Jersey, and at Market street, Newark, New Jersey, and to cease maintaining ticket agents for the sale of tickets at said stations.

The Lehigh Valley Railroad Company at that time had practically completed its own passenger station at Newark, and planned to use it instead of the Pennsylvania station at Market street, Newark.

The Lehigh Valley Railroad Company had also entered into an agreement with the Central Railroad Company of New Jersey for the use of the latter's terminal station at Jersey City, and planned to use said station instead of the Pennsylvania passenger station at Jersey City.

The application filed with the Board was supposedly in compliance with Chapter 195, III, 20, of the Laws of 1911. This section is as follows:

"No railroad company shall, without first obtaining the approval of the Board, abandon any railroad station, or stop the sale of passenger tickets, or cease to maintain an agent to receive and discharge freight at any station now or hereafter established in this State, at which passenger tickets are now or may hereafter be regularly sold, or at which such agent is now or may hereafter be maintained."

The application was originally set for hearing on January 17th, 1913, but was adjourned to January 31st, 1913, when testimony was taken. On this latter date, on application by W. C. Gebhardt and Thomas G. Haight, objectors, the Board decided that briefs upon the Board's power to make the Pennsylvania Railroad Company and the Central Railroad Company of New Jersey parties to the case might be filed within two weeks' time. On February 14th, 1913, the Pennsylvania Railroad Company, represented by Alan H. Strong, and the Central Railroad Company of New Jersey, represented by Jackson E. Reynolds, appeared and protested against their respective companies being made parties to the proceedings. A brief was filed on February 12th, 1913, by the Lehigh Valley Railroad Company, representing that its original application for station abandonment should be allowed.

At the hearing at Newark on February 14th, 1913, the objectors not appearing when the case was called, the Board announced that

"in its opinion the matter (of the change of stations) is practically an eviction and not an abandonment, and almost follows the ruling in the case of the discontinuance of service by the New York, Susquehanna and Western Railroad at the Pennsylvania station in Jersey City, and that the Board has no jurisdiction in the matter."

After the Board had rendered its opinion, W. C. Gebhardt appeared, and asked that the matter be reinstated on the Board's calendar, and be reopened and reheard.

Accordingly, February 28th, 1913, was fixed by the Board for hearing argument on the motion to reopen the case; and (provided that the motion was then allowed) to hear argument at the same time upon the original application and objections thereto.

On February 28th, 1913, at the Court House, in Newark, the case was reopened, and oral argument thereon was heard, Messrs. Gebhardt, Strong and Barrett representing their respective clients. Two weeks were allowed by the Board for the filing of briefs.

Under date of March 20th, 1913, W. C. Gebhardt addressed a communication to the Board, advising it of a decision rendered by the Interstate Commerce Commission in the case of the *St. Louis, Springfield and Peoria Railroad Company* v. *the Peoria and Pekin Union Railway Company.* This decision, it was contended, was pertinent to the case pending, and the writer requested permission to furnish a copy of the opinion to the Board, and asked that the Board withhold its decision in the pending case until a copy of the decision was furnished by him to the Board. He also requested that a written opinion in the pending case be rendered, so that either party, if it so desired, might seek a court review of the Board's findings.

Accordingly, a formal decision was withheld for the time, the Board receiving from W. C. Gebhardt, on May 22d, 1913, a copy of the opinion in question.

A study of the opinion in question (No. 2193) has not sufficed to alter the decision first announced by the Board on February 14th, 1913. This finding it hereby re-enunciates. The Board also makes its memorandum of November 29th, 1911, *In the matter of the discontinuance of use of the Pennsylvania Railroad Station in Jersey City by the New York, Susquehanna and Western Railroad Company,* part of the record in the present case.

The Board after an examination of opinion No. 2193 by the Interstate Commerce Commission is not moved to reverse or alter its original decision of February 14th, 1913, for the following reasons:

It appears from a study of opinion No. 2193, I. C. C., that the Peoria and Pekin Union Railway Company is essentially a belt railroad. "It was constructed with the express purpose of giving main-line railroads access to the various industries in and out Peoria." It had no main line, and in one sense has no terminals, inasmuch as it is practically all terminal. The opinion in this case amounts practically to deciding that a belt-line railroad, under allegation that it is a terminal, in the sense in which that term is used in Section 3 of the Interstate Commerce Act, may not refuse interchange of interstate traffic with a line having feasible physical connection with said belt line, and thus defeat the statutory requirement of through routing.

Section 3 of the Interstate Commerce Act in providing for "all reasonable, proper and equal facilities for the interchange of traffic" between connecting lines, expressly stipulates that the obligation thus laid upon railroads "*shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*"

So far as we are able to judge from I. C. C. opinion 2193. the defendant in that case is not engaged in "like business"

with the complainant, and does not afford "terminal facilities" in the sense in which that term is used in Section 3 of the Interstate Commerce Act. The Lehigh and the Pennsylvania do engage in "like business." The Pennsylvania does afford "terminal facilities" in the sense in which that term is used in Section 3 of the Interstate Commerce Act. It seems to us, therefore, that if the Interstate Commerce Act were to be construed with reference to Pennsylvania's terminating its contract with the Lehigh, and requiring the Lehigh to seek a new passenger terminal in Jersey City, the Pennsylvania might properly cite Section 3 aforesaid as its warrant in so acting. At all events, if the opinion cited would require, at the instance of complaining passengers traveling in interstate journeys, that the Pennsylvania allow the Lehigh, upon proper compensation, to continue to use the Pennsylvania's passenger station in Jersey City, there is nothing to prevent action being brought before the Interstate Commerce Commission, where a determination of the matter can be had.

In the case before this Commission two sections of Chapter 195 of the Laws of 1911 were cited by the objectors as giving this Board authority to deny the application of the Lehigh Valley Railroad Company, and to order a continued use by the said carrier of the Pennsylvania passenger stations at Jersey City and at Newark.

One of these sections is cited, *supra*. It concerns the requirement that the approval of this Board must be had before a railroad company may abandon any railroad station or stop the sale of tickets thereat (*P. L. 1911, Ch. 195, III, 20*). As this Board said in its memorandum of November 29th, 1911:

"The abandonment of a station, such as is contemplated by section 20, would seem to involve a wholly voluntary act, not an act taken even in part

at the instance of a party empowered to require under provisions of an agreement compliance with the suggested vacation thereof by the user. There is an essential difference btween abandonment and eviction, etc."

In this case the Lehigh Valley Railroad Company by an agreement with the Pennsylvania Railroad Company used the latter's stations at Market street, Newark, and at Jersey City. The annual payment for such use was named in the agreement. The ninth section of the agreement is as follows:

"This agreement to take effect January 1st, 1894, and continue in effect until January 1st, 1895, and thereafter until six months' written notice shall have been given by either party to discontinue the arrangement."

On January 16th, 1912, the Pennsylvania Railroad Company notified the Lehigh Valley Railroad Company that the arrangement would terminate August 1st, 1912. An extension of time until May 1st, 1913, was subsequently assented to by the Pennsylvania Railroad Company. The Lehigh Valley Railroad Company proceeded to make arrangements for the use of a passenger terminal in Jersey City with the Central Railroad Company of New Jersey. This new arrangement went into effect on May 1st, 1913; and on the same date the Lehigh Valley Railroad Company opened at Frelinghuysen avenue, Newark, its passenger station, and discontinued the use of the Market Street station at Newark of the Pennsylvania. The utilization of its own passenger station at Newark by the Lehigh Valley Railroad Company, and its entry upon and use of the Central's terminal at Communipaw, by reason of a forced cessation of use of the Pennsylvania stations at Newark and Jersey City, are not such an abandonment as the statute contemplates.

Another section of Chapter 195, Laws of 1911, which has been cited by the objecting parties as empowering this Board to require a continuance of the use of the former stations by the Lehigh Valley Railroad Company is found in I, 15:

"The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises, so far as may be necessary for the purpose of carrying out the provisions of this act."

This provision, it is contended, when taken in connection with the Board's power to require every public utility "to furnish safe, adequate and proper service and to keep its property and equipment in such condition as to enable it to do so" (II, 17 (b)), would empower the Board to deny the Lehigh's application and compel the continued use of the Pennsylvania's stations.

In the memorandum filed November 29th, 1911, in the matter of the Susquehanna's proposed discontinuance of use of the Pennsylvania station in Jersey City, the question is discussed how the Board might effectuate its disapproval of the proposed discontinuance of use of the station in question, if it determined it must disapprove such discontinuance of use. It is there said that:

"It does not appear to the Board that it could legally issue an order to the Pennsylvania Railroad Company to waive its rights under the agreement and to permit the New York, Susquehanna and Western Railroad Company, at the direction of the Board, to continue to use and occupy the tracks and station."

The same statement might be correctly made with reference to the present case, inasmuch as the Lehigh's tenancy of the station was on practically the same terms as the Susquehanna's.

In re Abandonment of Stations by Lehigh Valley R. R.

The General Railroad Act (Revision of 1903, as amended) in II, 13, provides that

"no company organized under this act shall be authorized to take, use or occupy, by condemnation, any franchise, lands or located route of any railroad or other corporation chartered for the purpose of facilitating transportation, except for the purpose of crossing such land or route, and except the land of such corporation not necessary for the purpose of its franchise; and no railroad under this act shall cross another railroad at grade at a less angle than twenty degrees; *provided,* that a railroad may be located under this act upon the surveyed route or location of any other railroad company with the consent of such company."

The inference from the section quoted is that it is the policy of the State to allow the use of the roadbed and tracks of one company by another only upon contractual terms, mutually assented to by the two companies in question.

Moreover, the right conveyed by Section 1, 3, I, to a railroad company "To locate and determine its route, etc.," and by Section 1, 3, II, "to acquire from time to time, and hold and use, all such real estate and other property as may in the judgment of its directors be necessary for terminal purposes, etc.," would seem to substantiate the view that inasmuch as opportunity is afforded for each railroad company to acquire the necessary right of way and terminal properties for its own proper use and behoof, it cannot require another railroad company to afford to it the use of that other railroad company's tracks or terminals.

If a railroad company is permitted to locate its own route, and to fix upon it its own terminal facilities; and if in connection with said route and said terminals it affords safe, adequate and proper service, and in all other respects complies with the legal obligations incumbent upon it, there seems no weighty warrant for the averment that at the instance of objectors who will be less conveniently served

than they would be under a continued use of the tracks and terminals of another company, the lessee and lessor companies can be compelled under the law to continue traffic arrangements such as prevailed under a contract that has legally been terminated.

The Board of Public Utility Commissioners in the memorandum of November 29th, 1911, went on record as follows:

"The possibility of creating in future another situation such as the present one, whereby a terminal long in use can be changed under terms of a lease, agreement or contract between the carriers in interest, without the possibility of effective intervention or control by representatives of the State or of the road's patrons affected thereby, should be effectually and forever barred out."

The state of the law, however, remains as it was, when this memorandum was issued.

The Board of Public Utility Commissioners, therefore, determines that it is without jurisdiction to approve of the application of the Lehigh Valley Railroad Company to abandon the use of the Pennsylvania passenger station in Jersey City and at Market street, Newark, and to discontinue the sale of tickets and the maintenance of agencies at said stations.

The Board of Public Utility Commissioners also, for reasons recited above, will DISMISS the complaints filed by the objectors in this case, and DISMISS the application made that the Board disapprove the proposed change of stations and order the continuance of service thereat by the Lehigh Valley Railroad Company. An order will be so entered.

Dated June 9th, 1913.

ORDER.

This application having been duly heard, and the Board having heard the complaints of the objectors in this case,

and having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, it is ORDERED that the application and the complaints filed in this case be and they are hereby dismissed.

Dated June 9th, 1913.

No. 112.

IN THE MATTER OF THE ACCIDENT AT LEONIA, WHERE THE TRACKS OF THE NORTHERN RAILROAD CROSS CENTRAL AVENUE.

This matter was brought to the Board's attention through an accident, which occurred at Central Avenue, Leonia, on May 21st, 1912, when a team of horses and a wagon to which they were attached were struck by a train on the Northern Railroad (one of the divisions of the Erie Railroad). As a result of this accident, the Chief Inspector for the Railroad Division of the Board recommended "that the crossing be protected by a flagman while express trains are passing over it."

Upon this recommendation a hearing was held by the Board, at which the Erie Railroad Company was represented by T. H. Burgess, Assistant Commerce Counsel of the company.

From the testimony given at the hearing it appears that the accident above referred to was due largely to the negligence of the driver, who failed to look in both directions as he approached the crossing. His attention was riveted upon a freight train standing near the crossing and although motioned to keep back, he continued to look in the direction

of the freight train and proceeded to cross, and was struck by a train coming in the opposite direction.

This crossing is protected at the present time by a bell, and according to the testimony there is a good view in either direction for at least a mile, within twenty-five feet of the crossing. From a census taken by the railroad company, at the request of the Commission, it does not appear that the traffic over this crossing is excessive. The recommendation of the Inspector is that this crossing be protected by a flagman, while express trains are passing over it, and he suggests that the helper to the station agent, who is located near the crossing, perform this work.

The Board is of the opinion that to order protection of this crossing, while certain trains are passing over it, by an employee who has other duties at the station would be a source of danger rather than protection, as persons accustomed to using the crossing would be led to believe that a flagman was stationed continuously upon said crossing, and would, in a measure depend upon him to warn them of danger. The recommendation is, therefore, not adopted.

Dated June 17th, 1913.

No. 113.

RESIDENTS OF HAMILTON AVENUE

VS.

TRENTON AND MERCER COUNTY TRACTION CORPORATION.

Judged from the standpoint of present need for service and present provision of service along East Hamilton Avenue, petition for requirement of additional service declined.

Hamilton Ave. Residents *vs.* Trenton & Mercer County Traction Corporation.

HELD—That double tracking at present is unnecessary to afford the service now required.

Recommended—That the Board of City Commissioners, the petitioner and the respondent confer with a view to having double track laid on East Hamilton Avenue within two years, upon condition that only temporary paving repairs be undertaken by the city until the work of double tracking is begun two years hence.

George W. Meredith, Carl F. Adams and *A. R. Chambers,* for the complainants.

Edward M. Hunt and *Rankin Johnson,* for the respondent company.

On April 14th, 1913, a petition signed by nine residents of Hamilton Avenue was filed with this Board, urging that the respondent be required forthwith to double track Hamilton Avenue between Chambers Street and Olden Avenue.

In support of this request, the petition alleged (1) that frequent complaints had been made of the inadequacy of the service upon the designated portion of Hamilton Avenue; (2) that an insufficient number of cars is operated thereon to accommodate the traveling public; (3) that the single track on East Hamilton Avenue prevents the company from increasing materially the number of cars now operated thereover; (4) that the prospective growth of the community adjacent to East Hamilton Avenue coupled with the present conditions of traffic, as above described, makes certain the necessity of double-tracking this stretch in the immediate future; and (5) finally that the intention of the City of Trenton in the near future to repave East Hamilton Avenue makes the immediate laying of double track by the company desirable from the standpoint of the company, the abutting property owners, and the users of the street generally.

The petition also alleged that the street or roadway, on this particular stretch of Hamilton Avenue is in a deplorable and, at times, an almost impassable condition.

The respondent company made answer to the complaint, and a hearing was held in the case on May 13th, 1913, at the State House, in the City of Trenton. Testimony was introduced by the petitioners. Question was raised whether in the absence of any franchise permitting the company to lay double tracks on East Hamilton Avenue, the Board could order the respondent company to install such double track, even if the evidence disclosed that such a change was desirable or necessary. It appeared to the Board that, if adequate service should be established by the evidence, there might be found a remedy not involving the laying of a double track and it was resolved to continue the hearings. It was also announced that the Board would order its Chief Inspector to investigate and report upon the actual conditions involved in the complaint. Accordingly a second hearing was set for June 3rd, 1913, which hearing was held. At this second hearing evidence was introduced by both parties to the case, and the Board's Inspector put in evidence his report to the Board upon the situation.

The present condition of the road or highway, on East Hamilton Avenue, does not appear material in deciding this case. Bad as the roadway is claimed to be between the company's tracks, that part of the street for which the respondent company is in no wise responsible is said by the complainants to be "equally bad, if not worse." Assuming that the city intends speedily to repave East Hamilton Avenue, this matter will be promptly remedied.

The question resolves itself into the query whether the service now afforded on East Hamilton Avenue by the respondent company is safe, adequate and proper. In decid-

ing this question it is right to take into consideration not only the current requirements of service, but also the prospective increase in the need for such service. This latter consideration the Board may entertain under its power to order extensions of the existing facilities of a company

"where, in the judgment of said board, such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same, and when the financial condition of the said public utility reasonably warrants the original expenditure required in making and operating such extensions." Laws of 1911, Chapter 195, II, 17 (e).

From the evidence it appears that the scheduled headway on East Hamilton Avenue is eight minutes, except in commission hours when it is six minutes, which headways appear to be the same over this entire line, even in the central and more populous parts of the city; that the actual headway, as found by the Board's inspector, is not so frequently or so materially different from the scheduled headway as to be a cause for complaint under the present conditions. (Transcript of Testimony of June 3rd, 1913, p. 5); that the interruption of street railway traffic by the canal and railroad crossing on State Street would preclude any guarantee of an uninterrupted uniform headway, even if East Hamilton Avenue were double tracked; that the passenger load upon cars running over the single track stretch of the line is ordinarily less than the car's seating capacity.

Judged therefore from the standpoint of present need for service and present provision of service along East Hamilton Avenue the petition would have to be declined.

There remains the question whether the prospective need of additional service along this section of the company's

line would warrant the imposing upon the company an order to double track East Hamilton Avenue, forthwith.

The section of the report of the Board's Inspector which refers to the question just raised is as follows:

"If this census (of traffic on East Hamilton Avenue) taken as it was at random so far as conditions were concerned is a criterion of the usual service, there could not be much cause for complaint under the present conditions, but the history of this section shows that it has been practically built in the last ten years, and at the rate that new houses are being erected another ten years will see this section as populous as any part of Trenton, and in this event this section would be considerably hampered by having its sole line of transportation single track."

"The paving which will be put down by the city will probably not be renewed under fifteen years, and for this reason it would seem advisable for the Traction Company to anticipate the future needs of this section, and double track this portion of Hamilton Avenue. From a purely economic standpoint, it would be an advantageous policy as a double track line would of course build up the section faster, and the more houses that are erected the more business would accrue to the company."

The Inspector, Mr. Ingham, on the stand was asked:

"As I understand your conclusion, it is that service as rendered at present is satisfactory, but that in view of the conditions, the location of this section of Trenton, it will probably grow during the next ten years to a point where a single track would not be sufficient to render satisfactory service?"

His answer was:

"That is the general conclusion."

It would not appear from this that the double tracking of East Hamilton Avenue at present is necessary to afford the service now required; nor that such double tracking if deferred for the immediate present would prevent the double tracking before such construction is rendered indispensable by the requirements of service commensurate with the demand therefor.

The company contends that the present cost of this reconstruction would be about $34,000; that last year it expended about $1,300 in welding and otherwise repairing joints on this stretch of track at the instance of the County Board of Chosen Freeholders and the Commissioners of the City of Trenton, and is therefore warranted in the reasonable expectation that the company would obtain some considerable use of track thus welded. The company, moreover, holds itself out to undertake to secure a franchise to double track this section of line within ten years. The company recites that since its incorporation it has spent nearly $600,000 in improvements and additions to its property in Mercer County, and contemplates similar expenditure this current year for over $100,000 for objects, in its judgment, more imperative than double-tracking East Hamilton Avenue.

In view of these facts the petition must be DISMISSED.

We nevertheless RECOMMEND in view of the proffer contained in the statement submitted by the respondent to this Board under date of June 9th, 1913, that the Board of City Commissioners, the petitioners and the respondent confer with a view to reaching an arrangement which seems to us to involve double tracking of East Hamilton Avenue within two years, upon condition that only temporary paving repairs be undertaken by the city until the work of double tracking is begun two years hence.

The proffer from the company is as follows:

"We are willing to begin negotiations with the city for a franchise permitting the construction of double track along the line in question, with possible additional trackage that should be related to that which is now under discussion, such negotiation to be begun in time, allowing usual delays in such matters, for construction in two years. * * * We make this suggestion that we shall thus apply for such new franchise on the supposition that the present paving program should be carried over from this year."

Dated June 17th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ORDERED that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated June 17th, 1913.

No. 114.

G. A. CURTIS
VS.
TINTERN MANOR WATER COMPANY.

ORDER.

The Board of Public Utility Commissioners after hearing upon notice in the above entitled proceeding hereby, on this twenty-third day of June, 1913, finds and determines that rule eight (8) of the rules and regulations of the Tintern Manor Water Company, which is as follows: "When water is introduced into a property, a charge will be made for all purposes for which it may be used, no allowance being made for wells or other sources of supply," is an unjust and unreasonable regulation, and fixes as a just and reasonable regulation to be hereafter imposed, observed and followed by said company in substitution for the regulation so found

and determined to be unjust and unreasonable the following:

"In the case of persons having a private supply of water upon their properties, and where no water whatsoever is used for stock or automobiles from the mains of the Tintern Manor Water Company, no charge will be made for stock or automobiles."

This order shall become effective July 14th, 1913.
Dated, June 23rd, 1913.

No. 115.

IN THE MATTER OF THE PETITION OF THE MILLVILLE GAS LIGHT COMPANY FOR THE APPROVAL OF AN ORDINANCE PASSED BY BUENA VISTA TOWNSHIP.

Approval of ordinance withheld. In case ordinance should be amended by the Township Committee of Buena Vista so as to provide that nothing contained in the ordinance shall be construed as in any way to limit or affect the powers and duties now or hereafter vested by law in the Public Utility Commission, or any body succeeding to its powers and duties, the ordinance would be approved.

J. H. Gaskill and *H. C. Bartlett,* for the petitioners.

T. J. Grayson and *Norman Grey,* for the New Jersey Gas Company.

By petition dated March 18th, 1913, the Millville Gas Light Company asked this Board's approval of an ordinance passed by the township committee of Buena Vista township on November 16th, 1912, granting permission to

the aforesaid company to lay and maintain pipe lines and mains on certain designated streets, roads, highways and other public places within said township for the purpose of supplying gas in said township as well as for the general distribution of gas through the said pipe lines and mains.

The New Jersey Gas Company objected before this Board to the approval by this Board of the ordinance in question. Accordingly on March 25th, 1913, at the State House, in Trenton, a public hearing was held at which the petitioner and the objector were heard, and at which testimony was submitted.

The objections urged were directed against the possibility of the petitioner's supplying said township with gas at a profit at the rate specified in the ordinance, one dollar per thousand cubic feet. The objector also contended that the real object of the petition was to debar and prevent the objector from obtaining an ordinance from the same township at a really profitable rate for gas, and also to prevent the objector from securing the Board's approval of an ordinance obtained by the objector to supply gas in Weymouth township.

Mr. Franklin, superintendent of the Millville Gas Light Company, testified that he believed his company could profitably supply Buena Vista township with gas at a price of one dollar per thousand cubic feet. Mr. Franklin's estimate of the cost of the extension will be found in the Transcript of Testimony, p. 20 sq. It will be found that the estimate of the Millville Gas Light Company for the cost of this extension is less than that presented by Mr. Hoy, superintendent of the New Jersey Gas Company. The two estimates are: Mr. Franklin's, from $16,000 to $20,000; Mr. Hoy's, $23,000. Mr. Franklin counts on about 220 customers (p. 20); Mr. Hoy on from 200 to 240 customers in Buena Vista township (p. 24). Mr. Franklin testifies that in

Landis township gas is sold by his company at a dollar per thousand with a reasonable profit.

In this situation there is, we think, some considerable presumption in favor of the petitioner's contention that gas in Buena Vista township can be supplied by the petitioner at a dollar a thousand at a reasonable profit.

The ordinance submitted by the petitioner seems to have been properly passed in accordance with the provisions of the "Franchise Act."

The Board would therefore approve said ordinance were it not for several features of the ordinance which seem to delimit the authority and responsibility vested in this Board by Chapter 195, Laws of 1911.

Section 2 of the ordinance, referring to the maximum rate to be charged for gas, properly provides that said section

"shall in no way interfere with the powers of the Board of Public Utility Commissioners of the State of New Jersey to regulate charges and rates for gas."

Section 11½ provides:

"And at no time shall the price of gas sold in said township of Buena Vista be in excess of the price charged consumers in Millville and Vineland; *provided, however,* that this clause shall not apply in case of a competitive gas war between rival companies."

The implication of this section might seem to delimit under certain circumstances the powers over rates vested in this Board.

Similarly, sections 13, 14 and 15, prescribing for the installation of services, the exclusion of minimum charges for meters in unoccupied houses, and the type of apparatus used in connection with service pipe and its location, seem

to imply a possible exclusion of the Board's exercise of powers vested by law in the Board over said matters.

In a general way, the sections above cited (13, 14 and 15) seem proper, but should circumstances arise requiring their modification, the ordinance would seem to narrow the power of the Board to require a public utility:

"to furnish safe, adequate and proper service, and to keep and maintain its property and equipment in such condition as to enable it to do so."

The above-cited sections might also infringe the Board's powers,

"after hearing, by order in writing, to fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed thereafter by any public utility as herein defined."

In case the ordinance should be amended by the township committee of Buena Vista so as to provide that nothing contained in the ordinance shall be construed as in any way to limit or affect the powers and duties now or hereafter vested by law in the Public Utility Commission or any body succeeding to its powers and duties, the ordinance would be approved.

Until such amendment, the Board will defer for the present acting upon the petition for approval; but in case the Board is not apprised of such amendment within a reasonable length of time, the Board will take final action in disapproval.

Dated June 23d, 1913.

No. 116.

IN THE MATTER OF THE PETITION OF THE NEW JERSEY GAS COMPANY FOR APPROVAL OF AN ORDINANCE PASSED BY THE TOWNSHIP COMMITTEE OF WEYMOUTH TOWNSHIP, ATLANTIC COUNTY.

Approval of petition withheld, without prejudice to petitioner's right to again ask approval in case the Buena Vista ordinance, offered by the Millville Gas Company, within a reasonable time is not so cured by amendment as to carry this Board's approval thereof; or in case the New Jersey Gas Company, by securing an ordinance granting the requisite permits from Buena Vista Township, or by devising some other feasible plan for connecting Weymouth township with its generating plant, desires the Board's approval of the present ordinance passed by the township committee of Weymouth township.

Theodore J. Grayson, for the New Jersey Gas Company.

By petition, filed with this Board under date of January 28th, 1913, approval was asked of an ordinance passed September 21st, 1912, by the township committee of the township of Weymouth. The ordinance in question granted the New Jersey Gas Company permission to pipe the streets, roads, highways and other public places in said township, for the purpose of supplying gas. In form and content the ordinance seems unexceptionable, and the procedure seems to have followed the requirements of the "Limited Franchise Act." Approval, after hearing, would have followed as a matter of course had it not transpired that its approval involved negative action upon a similar pending petition filed by the Millville Gas Light Company to pipe the adjoining township of Buena Vista. In consequence of this situation, a hearing was called and held

on March 25th, 1913, at the State House, in Trenton, upon the petition asking approval of the Millville Gas Light Company's ordinance for Buena Vista township. At this hearing the petitioner for the approval of the Weymouth ordinance, the New Jersey Gas Company, appeared by counsel, T. J. Grayson, and objected to the Board's granting approval to the Buena Vista ordinance submitted for approval by the Millville Gas Light Company.

The Board's action in the matter of the Buena Vista township ordinance is set forth in the report filed on June 23d, 1913, to which reference is hereby made. It will be found by reference to said report that approval in the case of the Buena Vista ordinance is withheld until certain defects in the ordinance are cured by amendatory resolution. Such amendment must, however, be made and certified to the Board within a reasonable time; otherwise a final dismissal of the Millville Gas Light Company's petition for the approval of the Buena Vista ordinance will be entered by the Board.

At the hearing upon the Buena Vista ordinance it was admitted by the representative of the New Jersey Gas Company that the company would never have applied for the Weymouth ordinance if it had not expected to obtain a franchise by ordinance from Buena Vista township. (Transcript of Testimony, p. 4.) Buena Vista township lies between Weymouth township and the territory reached and served by the New Jersey Gas Company. As the New Jersey Gas Company did not succeed in obtaining an ordinance from Buena Vista township, the company's extension into Weymouth township would seem to be precluded unless the company carried supply pipes through territory already supplied by another company, or unless a very circuitous and expensive route were adopted, or unless gas were brought into Weymouth township from some other gen-

erating plant than the central generating plant of the New Jersey Gas Company at Glassboro. Traversing a territory already supplied by another company is out of the question. Such construction, affording no local patronage, would be unduly expensive. It is not certain that the legal permits for such a circuitous pipe line are obtainable, or would be approved by this Board if they could be secured. There is nothing in the record to show that the New Jersey Gas Company proposes or desires to establish a new generating plant for the purpose of supplying Weymouth township, or intend ordinarily to distribute gas from any other center than Glassboro.

Under these conditions approval of the pending petition is withheld, without prejudice, however, to the petitioner's right again to ask the approval of said ordinance passed by the township committee of Weymouth township, in case the Buena Vista ordinance offered by the Millville Gas Light Company, within a reasonable time, is not so cured by amendment as to carry this Board's approval thereof, or in case the New Jersey Gas Company, by securing an ordinance granting the requisite permits from Buena Vista township, or by devising some other feasible plan for connecting Weymouth township with its generating plant, desires the Board's approval of the present ordinance passed by the township committee of Weymouth township.

Dated June 23d, 1913.

No. 117.

IN THE MATTER OF THE APPLICATION OF THE PHILLIPSBURG HORSE CAR RAILROAD COMPANY TO ORDER SAID COMPANY TO CONSTRUCT A SECOND CROSSING OVER TRACKS OF THE PENNSYLVANIA RAILROAD COMPANY AT UNION SQUARE, IN PHILLIPSBURG.

The provision of the statute giving the Board power to require a public utility to furnish safe, adequate and proper service might be taken to imply that where the rendition of such service necessarily involved some co-operation on the part of another public utility, whose property or equipment or operation might undergo some change by reason of the requirement laid on one public utility, the Board is not wholly devoid of authority to require such co-operation on the part of the other public utility providing always that the legal rights of such other public utility are not thereby infringed or violated. The Board's power in such circumstances could hardly be exercised if safe, proper and adequate service could be feasibly furnished by the one public utility without co-operation on the part of the other public utility affected.

Petition DISMISSED with recommendation that the Pennsylvania Railroad Company assent to the laying of a parallel crossing track over its rails at Union Square, Phillipsburg, by the Phillipsburg Horse Car Railroad Company, under conditions as specified.

W. H. Walters, for the petitioner.

Alex. P. Gest, for the Pennsylvania Railroad Company.

On April 2d, 1912, this Board issued a certificate permitting the Phillipsburg Horse Car Railroad Company to construct a second crossing at grade over the tracks of the Pennsylvania Railroad Company at Union Square, in Phillipsburg, on condition that derails be placed in all tracks connected with signals on the Pennsylvania Railroad,

operated by a man in the tower, under the supervision of the Pennsylvania Railroad Company.

The track whose construction was thus permitted was designed to parallel the track already existing at Union Square and crossing the tracks of the Pennsylvania Railroad Company. The Board was satisfied that the parallel track would measurably facilitate the handling of traffic by the street car company, and issued the permit accordingly.

The Board's permit was necessary under the Laws of 1911, Chapter 195, III, 21, which reads as follows:

"No highway shall be constructed across the tracks of any railroad company at grade, nor shall the tracks of any railroad company, street railway or traction company, be laid across any highway so as to make a new crossing at grade, nor shall the tracks of any railroad or street railway or traction company be laid across the tracks of any other railroad company or street railway or traction company without first obtaining therefor permission from the Board; *provided, however,* that this section shall not apply to the replacement of lawfully existing tracks."

The apparent purpose of this clause of the statute was to guard against the unnecessary multiplication of railroad crossings at grade, to guard against the aggravation of a menace whose elimination has taxed the ingenuity of Legislatures in various States. There is nothing to warrant the contention that the Board's permit alone is all-sufficient to create a new crossing at grade. Where a municipal consent is requisite for a location of a crossing at grade, such a consent is required, no less than the Board's permission, to warrant such a crossing. In other words, the Board's authority in the premises is of the nature of a veto, to be exercised, when justified, in the interest of the public generally.

By petition, filed with this Board on December 17th, 1912, the Phillipsburg Horse Car Railroad Company asked that

a new certificate issue, changing the *permission* granted in the certificate of April 2d, 1912, to an *order* directing the petitioner to construct a second parallel crossing, as aforesaid, across the tracks of the Pennsylvania Railroad Company at grade, at Union Square, Phillipsburg.

On December 31st, 1912, at the State House, in Trenton, after hearing, the application was denied, and the Board announced that a formal finding and report would be entered later.

Cases have previously come before this Board wherein a public utility, having failed to obtain from a municipality the requisite permit for a location of track, has applied to this Board for an order directed against itself, the result of which order would issue in the location or relocation of track desired by the moving party. The Board in this connection refers to its report *In the Matter of Public Service Railway Company* v. *Township of Acquackanonk,* dated April 29th, 1913. In that case it was not necessary to decide whether the Board had power to issue such an order in the case of a municipality refusing a permit where the result of such refusal was to create a situation inconsistent with safe, adequate and proper service. In that case the existing situation was decided not to be one where safe, proper and adequate service was impossible. In the case at bar the permit desired is refused, not by a municipality, but by another public utility, whose property is affected. In this case, also, the Board is not satisfied that the refusal creates a situation wherein safe, proper and adequate service cannot be rendered by the petitioner with the single crossing now in use.

It is true that the statute confers on this Board the power to require of a public utility that the public utility shall render safe, adequate and proper service, and shall keep the utility's property and equipment in such condition as shall enable the public utility so to do.

The evident intention of this provision of the statute might perhaps be taken to imply that where the rendition of such service necessarily involved some co-operation on the part of another public utility whose property or equipment or operation might undergo some change by reason of the requirement laid on one public utility, the Board is not wholly devoid of authority to require such co-operation on the part of the other public utility, providing always that the legal rights of such other public utility are not thereby infringed or violated. But it is equally evident that the Board's power in such circumstances could hardly be exercised if safe, proper and adequate service could be feasibly furnished by the one public utility without co-operation on the part of the other public utility affected.

There is a valid line of demarcation between service that is safe, adequate and proper, and service which, in addition to being safe, adequate and proper, affords a maximum of convenience. Where the service contemplated is essentially one that merely augments the convenience of the carrier or the patron, in circumstances where the existing service may fairly be said to be "safe, adequate and proper," it does not appear that the Board may order the installation of additional equipment which would necessarily involve a change in the equipment of another public utility. The Board's original permit in this case was based on its conviction that the parallel crossing would afford added convenience in the handling of street car traffic, not on the belief that without the parallel crossing track at Union Square the Phillipsburg Horse Car Railroad Company could not render service that was safe, adequate and proper.

In the pending proceedings it appears that the Phillipsburg Horse Car Railroad Company has not succeeded in obtaining the assent or permission of the Pennsylvania Railroad Company to lay over the tracks and right of way

of the last-mentioned company the parallel track of the street railroad; nor has the petitioner secured an agreement that the employe of the Pennsylvania Railroad Company who is stationed in the tower of Union Square, Phillipsburg, shall operate the signals intended to be connected with the parallel street railroad track and to control the derails to be placed in such street railroad tracks.

Under these circumstances the Board will recommend that the Pennsylvania Railroad Company assent to the laying of the parallel crossing track over its rails at Union Square, Phillipsburg, upon the conditions specified in the Board's original permit, and upon the added condition that the Phillipsburg Horse Car Railroad Company agree to pay a reasonable amount for changes to be made in the interlocking switches at the crossing and a reasonable amount for their operation by the Pennsylvania operative in the tower at or near said crossing. The petitioner's application that the Board issue an order against the petitioner requiring the laying of the aforesaid parallel tracks will be dismissed, and an order so entered.

Dated June 24th, 1913.

ORDER.

This application having been duly heard, and the Board having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

It is ORDERED that the petition in this proceeding be and it is hereby DISMISSED.

Dated June 24, 1913.

No. 118.

EAST RUTHERFORD

vs.

ERIE RAILROAD COMPANY.

The Borough of East Rutherford, a municipal corporation within the County of Bergen, filed its petition with the Board of Public Utility Commissioners, alleging, among other things, that the Erie Railroad Company operates, maintains and controls a certain steam railroad for public use running through the territories of the petitioner and of other municipalities in the Counties of Passaic, Bergen and Hudson; that said public railroad extending from the Passaic River, southeastwardly, divides the territory of the Borough of East Rutherford from that of the Borough of Rutherford, and consists of four (4) main tracks, all of which are continuously used both night and day for the frequent passage of passenger and freight trains running at high speed; that the Rutherford station of the railroad is located on the Rutherford side of said four (4) tracks and that the public highway known as Park Avenue crosses said railroad at grade, at or near said station, from Rutherford to and into the Borough of East Rutherford, and from East Rutherford to and into the Borough of Rutherford; that the inhabitants of the Borough and of other adjoining municipalities to the northeast, large numbers of whom are obliged daily to use the trains of the Erie Railroad Company and to take the same at the Rutherford station, have no means of so doing except by crossing over said four (4) tracks at grade, and that large numbers of them are so obliged daily to do at great inconvenience and peril of their safety and life; that it frequently happens that persons

desiring to take a train at said Rutherford station are prevented from so doing and greatly delayed by being entirely cut off, by passing trains, from being able to cross said tracks in time to get the train they desire, and that passengers leaving a train at said station and desiring to get to East Rutherford are frequently delayed by passing trains.

The petition alleged further that ingress to and egress from the station at Rutherford for a long time has been obstructed by the tracks, trains and engines of the Erie Railroad Company in such a way as to endanger the travelling public.

The petition asked that the Board

"investigate the matter complained of and order the construction and erection of a subway and of such other protective devices as shall afford safe ingress and egress from such railroad station, and that you will do all and singular such other matters and things in the premises pursuant to the statute in such case made and provided as the nature of the case may require and as shall appear to you reasonable."

Notice of the complaint made by this petition was given to the Erie Railroad Company and notice of a hearing thereon subsequently set was likewise given to said company. Hearings were accordingly held at which testimony was taken, both the petitioner and the company being represented.

On consideration of the testimony so taken, the Board of Public Utility Commissioners now hereby finds and determines that Park Avenue referred to in said petition is a public highway; that said public highway and the railroad of the Erie Railroad Company cross one another at grade near the Rutherford Station on said railroad; that the conditions at such grade crossing make it necessary that the provisions hereafter ordered and directed should be adopted

for the protection of the travelling public at such grade crossing, and that such provisions are reasonable.

And the said Board of Public Utility Commissioners hereby ORDERS and directs said Erie Railroad Company within sixty days from the date of entry hereof to erect and maintain a tower at some point in reasonable proximity to the point near the Rutherford station on said railroad of the said Erie Railroad Company, at which Park Avenue, the public highway aforesaid, and said railroad cross one another at grade, and to install and maintin in connection with said tower, signals on all of its tracks to govern the movements of all trains over said crossing at grade; and to operate said signals by a man stationed in said tower; and further to permit no train to be operated on its said railroad over said grade crossing while a train is standing at the said Rutherford Station on said railroad receiving or discharging passengers.

And the said Board HEREBY FURTHER ORDERS and directs that the said Erie Railroad Company continue to maintain the protection now afforded at said grade crossing. The requirement of this order and direction being for protection in addition and supplemental to that now afforded.

This order shall become effective July 28th, 1913.

Dated July 8th, 1913.

At a meeting of the Board held September 19, 1913, application was made for re-opening which was granted and the following was ordered entered:

"That the order referred to be rescinded in so far as the effective date thereof was set in said order, until a finding has been arrived at and the case re-submitted to conference, and on the understanding that until such finding is issued two men at the crossing will be maintained."

On September 23rd, 1913, the Board initiated proceedings for the elimination of this crossing.

No. 119.

IN THE MATTER OF THE PETITION OF THE NEW YORK AND NEW JERSEY WATER COMPANY FOR APPROVAL OF THE ISSUE OF BONDS AND COLLATERAL TRUST NOTES.

The disparity in the amount of securities to issue and property to be acquired precludes this Board from approving the proposed security issues to acquire either the pipe line or the stock of the Essex Pumping Company. The purpose for which these securities are to issue, in so far as they contemplate the acquisition of stock of the Essex Pumping Company, is specifically disapproved.

HELD—That such purpose and the issue of securities in pursuance thereof are not required in the interest of the petitioner nor of the public.

Fort & Fort, for the petitioner.

Turner A. Beall, in opposition.

The petitioner, by letter received on February 28th, 1913, made request for this Board's approval of certain securities to be issued. Said securities embraced one hundred and twenty-five thousand dollars (par value) four per cent. consolidated mortgage bonds, and two hundred and twenty-five thousand dollars (par value) five per cent. collateral trust notes, junior in lien to the bonds. The petition involved approval of an additional sixty-five thousand dollars (par value) of said consolidated mortgage bonds to be employed as part of the collateral securing the notes aforementioned.

The purposes of said proposed issue were: (1) To acquire ownership to a certain thirty-inch pipe line in the city of Bayonne; (2) the entire capital stock of an incompleted pumping plant in the town of Belleville, said stock having a face value of $300,000.

The proposed security issues were to be made to Suburban Water Company, the present owner of said pipe line and pumping plant. Said Suburban Water Company is also owner of fifty-seven per cent. of the stock of the petitioning company.

It would appear also that aforesaid security issues were intended to secure to the petitioner the right, title and interest in a certain ordinance granted by the common council of the city of Bayonne, June 24th, 1904, to a predecessor in title of the Suburban Water Company, so far as right, title and interest therein or thereto had been acquired by said Suburban Water Company as assignee.

The supplemental agreement filed by the petitioner with this Board February 23d, 1913, and purporting to recite the reciprocal conveyances resulting by reason of the proposed issue of securities, states that the Suburban Water Company "gives, grants and assigns to the party of the first part" (the petitioner herein) "all its right, title and interest in and to the said thirty-inch steel water pipe line, etc."

As no separate reference in this granting clause is made to the franchise, doubt might arise whether said franchise would be actually conveyed to the petitioner.

Moreover, an examination of the original assignment of the franchise, dated November 30th, 1904, shows that the petitioner herein reserved "the right to use said mains for the transportation of water to fulfill in every respect its contract obligations with the city of Bayonne under said ordinance."

It seems, therefore, upon consideration, doubtful whether the franchise, even if actually conveyed along with the pipe line to the petitioner by Suburban Water Company, confers any right of value to the petitioner that may not, without such conveyance, be demanded and exacted by the petitioner from Suburban Water Company.

Essentially, then, the security issues, for whose approval the petitioner asks, will secure for the petitioner the physical pipe line and the stock in the Belleville pumping plant.

What are the reasonable values of these two properties?

From a comparison of actual costs and careful estimates of reproduction costs of the pipe line, we have the following figures:

Beall's (from actual costs, less 20 per cent. for eight years' depreciation), ...	$92,185 00
Vermeule's (without depreciation), ...	124,390 00
Viele, Blackwell & Bucks' (without depreciation), ...	140,000 00

If depreciation at 20 per cent. be allowed on the figures of the last two, Vermeule's figure becomes, roughly, $100,000, and Viele, Blackwell & Bucks' becomes $112,000.

We find and determine that one hundred thousand dollars approximately represents the fair present value of the aforesaid pipe line. So far as concerns the contention that paving over said pipe line augments the cost of its reproduction, and justifies an allowance in excess of its cost, we content ourselves with reference to the position taken by this Board in an analogous case, "*In the matter of hearing as to whether the existing schedule of rates of the Public Service Gas Company for gas is just and reasonable,*" (No. 82, p. 433, Vol. I.)

The three estimates of the value of the Belleville pumping plant are roughly as follows:

Vermeule's, ...	$121,561 66
Viele, Blackwell & Bucks' (after deducting for the river crossing, not included in other estimates), ...	125,500 00
Beall's (from cost figures, viz., $74,950, to which we add $8,000 for the mortgaged property and $23,000 for the pump, etc.), ..	105,950 00

The latter's figures, if increased by $5,500 for value of land purchased, and by $10,000, the settlement apparently accepted by certain contractors, said to be actually less than their bill rendered, would amount to 121,450 00

The value new in all cases, if figured on the same basis, lies between $121,000 and $125,500. If we deduct 2½ per cent. annual depreciation for two years, from the mean or $123,250, we obtain practically $117,000 as the present value of the pumping plant. We accordingly find and determine the fair present value of the pumping plant and associated apparatus to be $117,000.

By the proposed issue of securities the petitioner would secure physical property having a present value, based on construction costs or estimates thereof of, ... $112,000 00

and all the stock in a company whose physical plant and associated property amounts to, ... 117,000 00

Total, ... $229,000 00

If the proposed bond issues of $125,000 are estimated at 80, the lowest price at which they may sell under the statute, their value would be $100,000.

If the proposed note issue of $225,000 were similarly estimated, its value would be $180,000. Thus securities estimated at $280,000 would issue to secure property valued at $229,000, a disparity too great to warrant this Board's approval of the proposed issue of securities asked for.

It must be observed that the security issue prayed for includes also the attaching of $65,000 additional bonds, as collateral security to the $225,000 of notes.

We incline to the opinion that such issue of bonds as collateral must be regarded as the issue, sale and delivery of securities to which the statute refers. If this be so, the disparity in values previously noted of securities given and assets obtained is increased to over $100,000.

It was argued before this Board that the acquisition of the pipe line would result in a net profit to the acquiring company. The net profit to accrue would, it is contended, be derived from the cessation of the rent payment for the use of the pipe line. This is said to be about $7,300 per annum, and will increase. On the other hand, it must be remembered that while the company would cease to pay rent for the pipe line, the company would begin to pay interest on the bonds to be issued for the purchase of the pipe line. We find nothing in the petition to this Board, nor in the agreement entered into between the vendor and vendee, to designate what portion of the total security issue goes to pay for the pipe line to be acquired. Assuming that of the $16,250 fixed charges which the total security issue will carry annually, approximately half is interest upon the purchase price of the pipe line, no profit would immediately accrue to the purchasing company. Even the increased rental, which the company in future may have to pay for the use of the pipe line (as the rent depends on the quantity passed through the pipe line) will be offset in part by the necessity of amortizing the discount at which the bonds in payment therefor issue.

We find no particular force in the contention that allowance should be made for the attached business which a going concern, such as the New York and New Jersey Water Company possesses. If we were making a valuation for rate-fixing purposes that contention might be germane. Here the question is simply one of the acquisition of property and of paying therefor in securities of equivalent

value. The contract to supply the city of Bayonne with water does not in any way hinge upon the acquisition of the fee of this pipe line by the petitioner. The whole matter resolves itself into paying a proper price in securities to issue for a given piece of property, and the price suggested for such acquisition is too high. It would put an unnecessarily heavy burden on the company. If, in another petition, the New York and New Jersey Water Company should ask approval of securities wherewith to acquire the title to said pipe line, this Board, as at present advised, would grant such approval, provided always due and proper relation between the securities to issue and the value of the property is maintained.

The advisability of purchasing the pumping plant in Belleville by the issue of securities of this petitioner is dubious. This plant is not finished. Some of the property, such as the Worthington pumping apparatus therein, does not belong to the Essex Pumping Company. It is apparently heavily over-capitalized. At least we can not otherwise explain why a plant whose actual cost several years ago is stated to have been not far from $100,000 should now stand capitalized at three times that sum. There is at present available no large customer for the Essex Pumping Company, and its prospects are at least uncertain. Why the New York and New Jersey Water Company with a seemingly assured net income should issue securities, and assume the annual fixed charges thereon, not to obtain ownership of a physical source of water supply, but ownership of the $300,000 capital stock of the Essex Pumping Company, does not seem obvious to this Board.

The position of majority and minority stockholders in the New York and New Jersey Water Company must not be overlooked. The Suburban Water Company owns all the stock of the Essex Pumping Company. The Suburban

Water Company owns but fifty-seven per cent. of the stock of the New York and New Jersey Water Company. If the New York and New Jersey Water Company should pay a price which experience should prove was unwarrantedly high for the stock of the pumping plant, the entire loss would practically fall on the minority stockholders of the New York and New Jersey Water Company. What the majority stockholders of the New York and New Jersey might lose in their capacity as majority stockholders, they would recoup in their capacity as shareholders of the Suburban Water Company. The latter company as vendor of the shares in the Essex Pumping Company would profit by any price received therefor which experience might prove was in excess of the real value of the Essex Pumping Company's stock.

The disparity in the amount of securities to issue and property to be acquired precludes this Board from approving the proposed security issues to acquire either the pipe line or the stock of the Essex Pumping Company.

And the purpose for which these securities are to issue, in so far as they contemplate the acquisition of the stock of the Essex Pumping Company, is specifically disapproved. Said purpose and the issue of securities in pursuance thereof we find and determine not to be required in the interest of the petitioner nor of the public.

The Board also puts on record its opinion that the arrangement between the various parties in interest in this proceeding, in so far as it related to the agreement equally to divide the net profits of the New Jersey Suburban Water Company, might appropriately have been included in the information submitted to the Board by the petitioners. If such equal division was a moving consideration in arranging the plan embodied in the petition, it should have been

included, in order to assist the Board in coming to a decision.

The Board of Public Utility Commissioners hereby withholds its approval from the issue of securities asked for in the present petition, and accordingly dismisses the petition. An order will so enter.

Dated July 8th, 1913.

ORDER.

This petition having been duly heard and submitted and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ORDERED that the petition in this proceeding be, and it is HEREBY DISMISSED.

Dated July 8th, 1913.

No. 120.

IN THE MATTER OF THE PETITION OF THE TRENTON TERMINAL RAILROAD COMPANY FOR APPROVAL OF PROPOSED INCREASES IN RATES FOR THE SHIPMENT OF MILK.

L. D. H. Gilmour, for the company.

E. R. Collins, of the State Board of Agriculture, and *D. H. Hankonson,* for the objectors.

By petition filed with this Board on May 28th, 1913, the Trenton Terminal Railroad Company asked approval of a

new schedule of rates for the transportation of milk from various points on its railroad to Trenton, New Jersey.

The milk tariff in force at the time of the petition was as follows:

For a 20-quart can,	.....	5 cents
" " 30 " "	.....	7½ "
" " 40 " "	.....	10 "

These rates included the return of the empty cans.

The proposed tariff is as follows:

For a 20-quart can,	.....	7½ cents
" " 30 " "	.....	11½ "
" " 40 " "	.....	15 "
Minimum charge—one can of any size,		15 "

These rates also include the return of the empty cans. The rates in both tariffs are irrespective of distance, the maximum haul being about twenty miles.

The petition was originally heard at the State House, in Trenton, on June 3d, 1913. Adjourned hearings were held at the State House, in Trenton, on June 17th, 1913, and on June 24th, 1913. On June 6th, 1913, a complete list of milk shippers on this road was obtained from the superintendent of the company, and on June 9th, 1913, the Secretary of this Board notified such shippers of the hearing on June 17th, 1913. A number of them appeared and testified at that hearing. On June 24th, 1913, Alfred S. Cook, of the New Jersey Agriculture Experiment Station appeared, and testified as to the cost of producing milk. On the same date the Board's Inspector, James Maybury, Jr., testified as to milk tariffs in force upon other roads.

From the testimony the Board finds and determines that the proposed milk tariff is, generally, not in excess of other

milk tariffs existing under comparable conditions and circumstances. Most pertinent, by way of comparison, is the milk tariff of the New Jersey and Pennsylvania Traction Company. The branches of this line do not exceed sixteen miles. Milk is shipped over said line into Trenton as follows:

For a	20-quart	can,	.....	12	cents
"	"30	"	"	.....	15	"
"	"40	"	"	.....	20	"

Minima for single cans of 20, 30 and 40 quarts are 12, 15 and 20 cents, respectively.

Even with the provision of a station in Trenton for the receipt of milk by the New Jersey and Pennsylvania Traction Company, and the absence of such special provision by the Trenton Terminal Railroad Company, there seems no very essential disparity in the actual rates in force on the first-mentioned road and the proposed tariff of the Trenton Terminal Railroad Company. The longest shipment on the latter road is from Dayton, about 19½ miles, which is in excess of the maximum length of the branches of the New Jersey and Pennsylvania Traction Company.

The tariff of the Utica and Mohawk Valley Railroad of New York, for a haul of about fourteen miles, was cited by the objectors. But it would appear that on 20-quart cans, the size generally used on the petitioner's road, the proposed rate is 2½ cents less than the rate for milk on the New York road in question.

When comparison is made with milk tariffs on roads operated by steam, allowance must be made for iced shipments. But the evidence shows that on the Pennsylvania Railroad the charge of 8.7 cents within the 30-mile zone is made on a 20-quart can not iced, as against a charge of 7.5 cents proposed on such a can by the petitioner herein. The

milk rates upon the Delaware, Lackawanna and Western, the Central Railroad of New Jersey and the Erie, which were cited in evidence, are largely those for iced shipments, and are not strictly comparable with the rates in question.

The proposed advances seem to be fairly in line with comparable charges on similar lines for comparable service. The Trenton Terminal Railroad Company has not been affording revenue adequate to cover its current expenses, the deficit in 1912 being over $4,000, and in 1911 over $2,000. As indicated by this Board's approval of certain advances in passenger fares upon the petitioner's road, we feel that the company is fairly entitled to additional revenue, and there seems fair warrant for allowing it to obtain for milk traffic the same relative revenue which carriers similarly circumstanced are obtaining.

This Board, however, is unable to assent to the proposed minimum charge of 15 cents upon a single can of any size. That such a minimum is employed on other lines may be granted, but the effect would seem to be to subject the smallest shipper to an undue burden. If a car will stop at any station to take on or put off a single passenger without extra charge, it would seem to be able to do the same for a single can of milk. We, therefore, withhold approval of the schedule as submitted, but should a new schedule be submitted, identical with the one at present submitted, omitting only the minimum charge of 15 cents for a single can of any size, such amended schedule will be approved.

Dated July 15th, 1913.

No. 121.

IN THE MATTER OF THE APPLICATION OF THE WEST JERSEY AND SEASHORE RAILROAD COMPANY FOR APPROVAL OF A LEASE OF ITS RAILROAD PROPERTY AND SECONDARY FRANCHISES TO THE PENNSYLVANIA RAILROAD COMPANY FOR NINE HUNDRED AND NINETY-NINE YEARS.

A lease for a term of years so extended as nine hundred and ninety-nine years requires the most careful scrutiny. Such a lease is tantamount to a conveyance in fee.

A lessee commonly expects and is ordinarily entitled to expect that earnings in excess of a guaranteed rental shall be forthcoming from the proper management of a leased property. The Board invited the prospective lessee to give some written assurance that the plea of the guaranteed rental would not be urged in bar of a determination of just and reasonable rates should such a question arise for adjudication. This the prospective lessee declined to do.

HELD—That the approval of the pending lease is not necessary and proper.

Alan H. Strong and *Charles E. Gummere,* for the Company.

By petition filed with this Board May 3d, 1913, the West Jersey and Seashore Railroad Company, a corporation of this State, asked approval of a lease of its railroad, property and secondary franchises for a period of nine hundred and ninety-nine years to the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania. Said lease is intended to become operative July 1st, 1913.

The West Jersey and Seashore was formed by an agreement of consolidation and merger made February 28th, 1896. The companies merged and consolidated comprised (1) the West Jersey Railroad Company, (2) the Alloway and Quinton Railroad Company, (3) the West Jersey and

Atlantic Railroad Company, (4) the Camden and Atlantic Railroad Company, (5) the Chelsea Branch Railroad Company, and (6) the Philadelphia, Marlton and Medford Railroad Company.

The consolidated company owns and operates over three hundred and fifty-five (355) miles of railroad, all in this State, the two longest branches being from Camden to Atlantic City (58.78 miles) and from Camden to Cape May (81.62 miles). It operates its road under its corporate organization "in harmony and in connection with the railroad system" of the Pennsylvania. It connects with the latter by means of roads leased to the Pennsylvania and uses the latter's terminal at Camden. It also has a joint train service with the latter, using the Pennsylvania's terminal facilities in Philadelphia.

Fifty-one and one-half per cent. of the stock of the West Jersey and Seashore Railroad Company is owned by the Pennsylvania Railroad Company.

In support of its petition the West Jersey and Seashore avers that such a lease would tend to insure the maintenance of the petitioner's facilities at its present high standard of efficiency and also to promote the enlargement, improvement and development of the same when and as necessary to accommodate the public needs.

The proposed lease was approved by more than two-thirds of the holders of the applicant's capital stock.

The lease demises all and singular the railroads and property of the lessor, situate in the State of New Jersey,

"together with all sidings, extensions and branches thereof and therefrom now existing or that may hereafter at any time during the continuance of this lease be constructed or otherwise acquired as part of, or for use in connection with, the railroads hereinbefore mentioned, and all stations, depots, yards, buildings, wharves, structures, power houses, sub-stations, motive power, rolling and floating stock and equipment, appurtenances and property of whatsoever kind and wheresoever situate now owned by the said lessor,

or which may hereafter at any time during the continuance of this lease be constructed or acquired, and which may be appurtenant to or for use in connection with the said railroads, and also all corporate rights, franchises and privileges of the said lessor necessary to be enjoyed and exercised by the said lessee for the proper maintenance, use, operation and management of the said railroads and property hereby demised, including the right to fix and establish from time to time, and to collect, receive and appropriate to the lessee's own use, all tolls, rates and charges for the transportation of persons, property and mails not inconsistent with the requirement of such existing or hereafter enacted legislation, Federal or State, as may be legally enforceable; also all revenues, rents and income from stocks, bonds or other investments, contracts, property, trackage rights or other grants, or from leases or privileges now made or existing, and from any extensions or renewals thereof, and from any and all other sources; provided always, however, that nothing herein contained shall operate as a grant or demise, or be construed to include the franchise to be a corporation possessed by the said lessor, or any other right, privilege or franchise which is or may be necessary to fully preserve the corporate existence or organization of the said lessor, and of the said franchise to be a corporation; and all the rights, privileges and franchises requisite for the preservation of the corporate existence or organization of the lessor are hereby expressly reserved and excepted from these presents.

"Also all the rights, privileges and interest by the said lessor under all contracts or other arrangements to operate or avail of trackage rights over any other lines of railroad, or rights covering the use of ferries, subject to all the terms and conditions pertaining to and governing in each case."

The capitalization of West Jersey and Seashore Railroad Company appears to be conservative. The valuation made by the State Board of Assessors of road and equipment amounted to $19,959,865. The book value, taken from the company's annual report for the year ending June 30, 1912, for road and equipment, is $19,776,416.88, when the depreciation reserve of $284,734.81 is deducted. The face value of outstanding securities taken from the same report is $17,830,000., of which $9,745,600., represent stock, and $8,084,000., represent bonds. The operating income for the same year was $6,351,118.15, and the operating expenses $5,016,043.45, making the net operating revenue $1,335,074.73. Two semi-annual dividends of 2½ per cent. each

were paid for the year in question as well as interest on the company's funded debt.

The guaranteed rental of 6 per cent. upon the stock of the West Jersey and Seashore Railroad Company is in excess of the dividend which that road is now paying. From October 5th, 1896, to March 15th, 1905, the company declared and paid dividends at the annual rate of 5 per cent. From the last mentioned date until March 16th, 1908, it paid dividends at the annual rate of 6 per cent. For a year and a half thereafter it paid dividends at the annual rate of 4 per cent. Since October 1st, 1909, up to the present, it has paid dividends at the annual rate of 5 per cent. At the hearing on July 16th, 1913, however, the president of the company asserted that it is now earning over 9 per cent.

A public hearing on the application was held at the State House in Trenton on May 20th, 1913, and again at the Court House in the City of Camden, July 16th, 1913.

A lease for a term of years so extended as nine hundred and ninety-nine years requires the most careful scrutiny. Such a lease is tantamount to a conveyance of the fee. As the Court of Errors of this State has said in *Black* v. *Delaware and Raritan Canal Co., 24 N. J. Eq., 456*—

"Equity looks at the substance of things and not mere names. For all substantial practical purposes a lease for 999 years is a conveyance in fee."

The public interest, therefore, in such a conveyance, which is made for practically all time, ought in every way to be explicitly safeguarded; and this Board, being trustee for the public of this State in so far as the statute casts upon the Board the duty of scrutinizing and approving such leases, is under obligation to make certain that the public interest shall not be jeopardized, even by serious uncertainty as to the operation of such an arrangement.

In at least one important rate case decided by this Board, the Paterson-Passaic gas case, it was strenuously urged by the respondent that a lease lawfully consummated is conclusive in determining a part of the base upon which just and reasonable rates could be fixed by this Board's order. We cannot be certain that a similar plea might not be set up in future rate cases. Nor is it a conclusive rejoinder to say that the rates of the lessor company in the pending proceedings are not at present subject to attack. The very terms of the lease require us to take a long look ahead. We cannot predict that at no time in future will the rates upon the West Jersey and Seashore be unassailed. In such a contingency we must make as certain as we can that an attempt to fix and determine reasonable rates shall not be obstructed by the plea that a rental guaranteed in a lease formally approved by this Board is not open to question.

A lessee commonly expects and is ordinarily entitled to expect that earnings in excess of a guaranteed rental shall be forthcoming from the proper management of a leased property. If a guaranteed rental over and above all present or future taxes is to be paid in perpetuity, the return from the leased property due to management would have to be superadded to the rental aforesaid. Thus a claim for a return could be made to cover rental and management.

On June 30th, 1913, the Board invited the prospective lessee to give some written assurance that the plea of the guaranteed rental would not be urged in bar of a determination of just and reasonable rates should such a question arise for adjudication. The prospective lessee did not find such an assurance compatible with its interests and declined, and still declines, to make such assurance.

At the hearing on July 16th, 1913, it was suggested that the Board, coincidently with its issuance of its certificate of approval might issue a memorandum applicable to all

similar cases. Such a memorandum, it was suggested, might recite that in approving of leases the Board would have it understood that such approval did not carry with it any implication that rates necessary to afford the guaranteed rental are unassailable in rate cases. The action of the Maryland Commission to this effect was cited as a precedent.

A declaration of the Commission's understanding, however, in approving a lease might prove wholly ineffectual, whereas a written stipulation to the effect indicated above would be a sort of contractural obligation between the lessee and the State.

It was urged upon this Board that the proposed lease being legal in form and substance required in common fairness that the Board should approve it.

We do not so interpret our obligation in the premises. Chapter 195 of the Laws of 1911, III, 18 h., provides that no public utility shall

"Without the approval of the Board, sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof," etc.

Under this section we understand that approval is discretionary upon our part, and we hold that where the maximum safeguards can not be thrown around the public interests it is both our right and our duty to withhold approval.

The same section of the act (III, 18 e.) provides that no public utility shall

"hereafter issue any stock, stock certificates, bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the Board for such proposed issue. It shall be the duty of the Board, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when

satisfied that the same is to be made in accordance with the law and the purpose of such issue be approved by said Board."

The final clause—" and the purpose of such issue be approved by the Board"—has already received judicial construction in *Interstate Telegraph and Telephone Co.* v. *Board of Public Utility Commissioners, 86 Atlantic Reporter, 363.*

The citation of the Board's discretionary power over security issues is particularly pertinent to the pending case, inasmuch as the proposed lease in Articles Third and Sixth contemplates and provides for future security issues to be made in conformity with the terms of the lease.

It follows incontestably in our judgment that the approval of such leases as the pending one is discretionary with the Board, and we are equally satisfied that our duty requires of us nothing less than obtaining the maximum of certainty as to its operation as well as the maximum of legitimate advantage to the public.

Even if there could be any serious doubt of the Board's power in the premises it lies open to the petitioner by mandamus or otherwise to bring the matter to legal test, and to have settled, by judicial interpretation, the respective rights of the companies and this Board in this matter.

There are additional reasons which warrant the Board in declining prematurely to ratify this lease. The terms of the lease make doubtful whether certain powers now entrusted to this Board in the public interest, would not be impaired or lessened or made impossible of administration.

By the terms of the Public Utility Act recited above proposed issues of securities by public utilities of this State must first be accorded the approval of the Board. Articles Third and Sixth of the lease under consideration provide that under certain conditions, the indebtedness of the lessor

to the lessee, in case there is not available cash for the discharge of such indebtedness,

"shall be paid and discharged by the delivery to the lessee of either bonds or capital stock, or both, of the lessor, as the lessee shall at the time elect and designate in writing * * * and the lessor agrees that it will, when and as often as required by the terms hereof so to do, issue and deliver to the lessee all bonds and stocks properly demanded by it hereunder which it can lawfully execute and issue. Or, by agreement between lessor and lessee, such bonds or stocks, or both, may be executed, issued and sold by the lessor, and the proceeds of such sale shall be paid by the lessor to the lessee for the purpose of discharging such indebtedness theretofore, or to be thereafter, incurred."

The second alternative is clearly at the option of the lessee.

Under the first, the lessee is entitled by the lease to demand the issuance and the delivery to the lessee of all such additional securities. This clearly contravenes the well-established rule of law that in case of additional issues of stock, the shareholders of record are entitled to participate *pro rata*. *Way et al.* v. *the American Grease Co. et al., 70 N. J. Eq. 263; Wall* v. *Utah Copper Co. et al., 70 N. J. Eq. 17.*

The requirement that the lessor must deliver to the lessee all bonds and stocks, is a clear invasion of the rights of the minority stockholders.

In another respect the terms of the proposed lease would possibly impair the control now vested by law in this Board over the incumbrancing of the property of a public utility such as the West Jersey and Seashore road. No incumbrance may at present be placed on the property of a public utility of this State without the Board's prior knowledge and consent. The attempt, however, by the Pennsylvania Railroad Company to subject to mortgage incumbrance its leasehold estate in the road proposed to be leased might raise serious question as to the necessity of obtaining the prior approval of this Board. It would nevertheless be

virtually tantamount to subjecting the property of the West Jersey and Seashore to an incumbrance.

Moreover, the General Railroad Act (Compiled Statutes, 4221, section 6) limits the power of a railroad company to issue its bonds secured by mortgage of its road and franchises to an amount "not to exceed in the whole its paid-up capital stock," and makes departure from the rule laid down a misdemeanor. This provision applies to the West Jersey and Seashore, but there may be reason to doubt whether it is applicable to the Pennsylvania, a Pennsylvania corporation, in an issue of bonds secured by a mortgage including the leasehold rights to be acquired under the proposed lease. Thus there is a possibility that through this lease the Pennsylvania's leasehold estate in the West Jersey and Seashore might be subjected to bonded indebtedness secured by mortgage where the amount of the indebtedness shall not bear the prescribed statutory relation to the paid-up capital stock of the leased company. If it should happen that the lessee subjected to the lien of a mortgage not only its leasehold estate in the West Jersey and Seashore, but its miscellaneous other property as well. it might well become impossible for the Board to administer that part of the statute which makes the Board's approval of proposed security issues necessary.

When the Board's approval is asked for a proposed bond issue secured by mortgage, the Board attempts, *inter alia,* to ascertain the prospective ability of the petitioning company to pay the stipulated interest and the principal sum at maturity. If the prospective lessee in the present case should in future ask approval of a mortgage secured in part upon the property and franchises of the West Jersey and Seashore, and in part upon the property and franchises of other properties, perhaps in other and distant jurisdictions, equally subject to the same mortgage, the Board would be confronted with the necessity of ascertaining the prospec-

tive ability of such other properties to meet the terms of the bond issue proposed. This might well prove an impossible task; yet unless it were performed, the West Jersey and Seashore property would be subjected to the hazard of inadequate earnings on the properties jointly responsible to pay the fixed charges on the bond issue whose approval is asked.

Still another doubt is raised by the proposed lease as to whether, by the terms thereof, the Board's jurisdiction over the sales of the property of a public utility "not in the ordinary course of business" may not be impaired. Article Eighth of the lease provides:

"Such real and personal property of the lessor as shall not, in the opinion of the lessee, be necessary for the then present or prospective use of the lessor's railroads, or for the protection of the interests of the said lessor therein, may, with the consent of the lessor and in accordance with the provisions of any mortgage or mortgages covering same, be sold from time to time by the lessee, and the lessor shall, upon the request of the lessee, execute and deliver proper conveyances and assurances of such property so sold as may be necessary to effectuate such sales. The proceeds of all such sales shall enure and be paid to the lessee, and shall be applied, at the option of the lessee, either to the reduction of the funded debt of the said lessor, or to betterments and improvements upon or additions to the railroads and property hereby demised."

The terms of the lease quoted above might be construed as an approval by this Board in advance of such sales and so seem to make the lessee sole arbiter of such sales, and thus divest the Board of the authority thereover which the law casts upon the Board under Chapter 195, III, 18 (h) Laws of 1911.

All of these uncertainties might be resolved by an explicit written assurance, stipulating that the rights and interests of the public as indicated herein shall not be challenged or infringed by any future action of the companies concerned. But such explicit assurance the direc-

torates are unwilling to give, on the ground that such assurance might bind their successors in the directorates. In other words, they expressly reserve their liberty of future action in the premises.

In view of this situation, it will not do to say that these objections, or some of them, are far-fetched and violently improbable contingencies. An arrangement to subsist for a thousand years challenges the production of just such contingencies, and there doubtless are others which time will disclose. An arrangement which will subsist by its terms for nine hundred and ninety-nine years, and which during that term may affect the public interests, as well as the relations of lessor and lessee, may well be analyzed with circumspection and care. Any evidence bearing thereon ought to be carefully analyzed and sifted. If there are doubts as to its wholly beneficial effect upon the public, these doubts must all be resolved. If there is question of its exact legal purport, intent and operation, such question ought to be answered before affirmative action is taken by an administrative body of the State.

For these reasons, above recited, the Board of Public Utility Commissioners finds and determines that the approval of the pending lease is not necessary and proper, withholds its assent therefrom, and will DISMISS the petition therefor.

An Order will be so entered.

Dated July 19th, 1913.

ORDER.

This application having been duly heard and the Board having, on the nineteenth day of July, one thousand nine hundred and thirteen, made and filed a report containing its findings of fact and conclusions thereon, which said

report is hereby referred to and made a part hereof, the Board's approval of this petition is withheld, and

It is ORDERED that the petition be and the same is hereby DISMISSED.

Dated July 22nd, 1913.

An appeal was taken from the above order; the decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT.
NOVEMBER TERM, 1913.

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Relator,
vs.
BOARD OF PUBLIC UTILITY COMMISSIONERS,
Respondent.

Submitted December 4th, 1913; decided February 21st, 1914.

SYLLABUS.

1. The writ of mandamus will not issue except where the act to be done is purely ministerial, and the legal obligation to perform it is clear.

2. The writ of mandamus will not issue to compel the Board of Public Utility Commissioners to approve a lease made by one railroad company to another, which, while adhering to the form of a lease, involves the powers to sell and mortgage the property of the lessor and to issue its capital stock and bonds from time to time in the future, but in nowise recognizes the necessity of obtaining the approval of the Board with respect to the exercise of such powers.

3. It is within the power of the Legislature by the Public Utility Act (P. L. 1911, p. 374) to attach to the exercise of privileges and powers granted by the Legislature the condition that, in the exercise of such powers and privileges, the determination of the Board of Public Utility Commissioners that the limitations and restrictions to which such privileges and powers are subject have not been exceeded, shall first be had; and is within the

power, and is also the duty of such Board to require that the instrument by which such privileges and powers are proposed to be exercised shall be so framed as to put it beyond reasonable doubt that such limitations and restrictions have not been exceeded.

On application for mandamus.

Before Justices GARRISON, TRENCHARD and MINTURN.

Alan H. Strong, for the relator.

Frank H. Sommer, for the respondent.

The opinion of the court was delivered by
TRENCHARD, *J.*

This is an application for a writ of mandamus to be directed to the Board of Public Utility Commissioners requiring them to approve a lease proposed to be made by the West Jersey and Seashore Railroad Company, a corporation of this State, to the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania.

The proposed lease is dated March 18th, 1913, and demises all and singular the railroads and property of the lessor, situate in the State of New Jersey, "together with all sidings, extensions and branches thereof and therefrom now existing or that may hereafter at any time during the continuance of this lease be constructed or otherwise acquired as part of, or for use in connection with, the railroads hereinbefore mentioned, and all stations, depots, yards, buildings, wharves, structures, power houses, sub-stations, motive power, rolling and floating stock and equipment, appurtenances and property of whatsoever kind and wheresoever situate now owned by the said lessor, or which may hereafter at any time during the continuance of this lease be constructed or acquired, and which may be appurtenant to or for use in connection with the said railroads, and also all corporate rights, franchises and privileges of the said lessor necessary to be enjoyed and exercised by the said lessee for the proper maintenance, use, operation and management of the said railroads and property hereby demised, including the right to fix and establish from time to time, and to collect, receive and appropriate to the lessee's own use, all tolls, rates and charges for the transportation of persons, property and mails not inconsistent with the requirement of such existing or hereafter enacted legislation, Federal or State, as may be legally enforceable; also all revenues, rents and income from stocks, bonds or other investments, contracts, property, trackage rights or other grants, or from leases or privileges now made or existing, and from any extensions or renewals thereof, and from any and all other sources; provided always, however, that nothing herein contained shall

operate as a grant or demise, or be construed to include the franchise to be a corporation possessed by the said lessor, or any other right, privilege or franchise which is or may be necessary to fully preserve the corporate existence or organization of the said lessor, and of the said franchise to be a corporation; and all the rights, privileges and franchises requisite for the preservation of the corporate existence or organization of the lessor are hereby expressly reserved and excepted from these presents. Also all the rights, privileges and interest by the said lessor under all contracts or other arrangements to operate or avail of trackage rights over any other lines of railroad, or rights covering the use of ferries, subject to all the terms and conditions pertaining to and governing in each case."

The proposed demise is for the term of 999 years from and including July 1st, 1913.

Application was made to the Board for approval of the proposed lease.

On July 19th, 1913, the Board filed its report withholding its approval, and entered an order to that effect and dismissing the application.

We are of opinion that the application for mandamus must be denied.

The writ of mandamus will not issue except where the act to be done is purely ministerial, and the legal obligation to perform it is clear.

Mooney vs. *Edwards, 22 Vr. 479.*
Hugg vs. *Ivins, 80 Vr. 139.*
Mathis vs. *Voorhees, 52 Vr. 26.*

In the circumstances of the present case we think the function of the Board in approving or disapproving of the lease was not simply ministerial, nor was the legal obligation to approve the lease clear.

It is conceded that the authority to make the lease is to be found in Section 64 of the General Railroad act (*3 G. S., p. 4248*) which provides, among other things, as follows:

"Any railroad company of this State may *lease its road, or any part thereof, to any other railroad company, of this or any other State, or may take a lease of the road, or any part thereof, of any other railroad company of this or any other State,* or may unite and consolidate as well as merge its stock, property, franchises and road with those of any other company or companies of this or any other State, or may do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road may use and operate said road and their own road, and collect fares and freights as provided in the case of companies organized under this act, but not in excess of the charges on the line of any of the consolidated companies, and shall not exceed the rates limited by any special act incorporating such company"; &c.

Now an examination of the lease in question seems to justify the following observations:

The proposed instrument, while adhering to the form of a lease, does not merely create a leasehold estate. It involves the exercise of the power of sale. By "article third" the lessor "agrees to assign, transfer and deliver to the lessee all the cash and other assets, excluding real estate, road and equipment, and the securities owned by the lessor" as shown by a general balance sheet statement of June 30, 1913. By "article eighth" a right is conferred upon the lessee on any thirtieth day of June "to purchase the motive power, rolling and floating stock, shop tools and machinery" of the lessor. And by the same article it is provided that "such real and personal property of the lessor as shall not, in the opinion of the lessee, be necessary for the then present or prospective use of the lessor's railroads, or for the protection of the interests of the lessor therein, may with the consent of the lessor (a majority of whose capital stock is owned by the lessee) and in accordance with the provisions of any mortgage or mortgages covering the same, be sold from time to time by the lessee."

The proposed instrument also involves an undertaking on the part of the lessor, under "article sixth," to deliver to the lessee bonds or capital stock, or both, of the lessor, "as the lessee shall at the time elect and designate in writing," in payment of improvements, betterments and additions, which shall be equal, at the par value thereof, to the cost of such improvements, betterments and additions. The article further provides that, when bonds are issued, they "shall be secured by mortgage upon the railroads, property and franchises of the lessor when required by the lessee."

Moreover the proposed instrument, though it involves the powers to sell and mortgage property of the lessor, and to issue its capital stock and bonds from time to time in the future, in nowise recognizes the necessity of obtaining the approval of the Board with respect to the exercise of such powers.

Now the Public Utility Act (*P. L. 1911, p. 374*) by section 18 (h) provides that no public utility shall "without the approval of the board, sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof," except a sale, lease or other disposition in the ordinary course of business; and by section 18 (e) provides that no public utility shall "hereafter issue any stocks, stock certificates, bonds or other evidence of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the board for such proposed issue."

The foregoing considerations, among others, led the Board to conclude that an unqualified approval of the proposed instrument would render the due administration of the Public Utility Act impossible or at least difficult and hence it withheld its approval.

It will serve no useful purpose to examine into the other reasons assigned by the Board for withholding its approval. Our recitation of the statutory authority upon which the proposed instrument in the form of a lease rests, and of a few of the provisions of the instrument, and of the

powers and duties conferred upon the Board by the Public Utility act, are entirely sufficient to show that the function of the Board with respect to the approval or disapproval of the lease involved the decision of questions of law and fact, and was not purely ministerial, and that the legal obligation to approve the proposed instrument was not clear.

It is not necessary, nor wise, for us to determine on this application that our interpretation of the provisions of the proposed lease and our application of the statute thereto are demonstrably correct; they certainly are permissible. To obtain *this* writ, the relator must show that the opposite view is clearly the correct one, and that it has not done.

The position taken by the relator is that the Board is confined to determining whether the conditions under which the statute authorizes a lease exist, and whether the statutory procedure has, in all respects, been followed, and that, if the statute is construed to vest broader powers in the Board, it delegates legislative power in violation of the constitution. This position is based upon the mistaken assumption that the proposed instrument involves the exercise of the power to lease alone. The Public Utility Act does not delegate to the Board the determination of whether the leasing of the road of one company to another shall be sanctioned, without prescribing a general rule by which such Board should be governed in reaching its determination. On the contrary, the Legislature, by the Public Utility Act, has attached to the exercise of privileges and powers granted by it the condition that, in the exercise of such privileges and powers, the determination of the Board that the limitations and restrictions to which such privileges and powers are subject have not been exceeded, shall be first had. That it may lawfully do. And it is not only within the power, but is also the duty of the Board to require that the instrument by which such privileges and powers are proposed to be exercised shall be so framed as to put it beyond reasonable doubt that such limitations have not been exceeded.

Our conclusion that the mandamus applied for must be denied is not to be taken as a concession that mandamus is the proper and complete remedy to obtain the relief sought. The distinction between mandamus and certiorari should not be overlooked. Mandamus issues to compel, and certiorari to review, official or judicial action. The order of the Board denying and dismissing the application is official action by it. *Mathis* v. *Voorhees, 52 Vr. 26; Newark* v. *Lewis, Com'r., 53 Vr. 278, aff'd 54 Vr. 802.* To grant the relator the relief sought without more would be to compel the Board to have outstanding two directly conflicting orders. In *Interstate Tel. & Tel. Co.* v. *Board of Public Utility Commissioners, 86 Atl. 363,* certiorari was employed to review the order refusing the application for leave to issue bonds and mandamus was applied for to compel approval of the issuance of the bonds. In *Leeds* v. *Atlantic City, 23 Vr. 332,* an office was filled by mandamus after it had been vacated by certiorari. There is a place in our practice for a writ having this double function. Whether it can be worked out by allowing a rule to show cause for a mandamus with the allocatur

of the certiorari, or by permitting the certiorari to be turned into a rule for mandamus, may well be considered in a proper case which, for the reasons stated, this is not.

But for the reasons indicated the application for the writ of mandamus will be denied, with costs.

No. 122.

IN THE MATTER OF THE APPLICATION OF THE CITY OF PATERSON FOR PERMISSION TO CONSTRUCT A CROSSING AT GRADE ACROSS THE TRACKS OF THE ERIE RAILROAD AT SIXTH AVENUE.

The crossing of a railroad track by a number of people at a place other than the lawfully established highway cannot be accepted as a reason for increasing the number of crossings, unless it plainly appears that the lawfully established highway crossings are not reasonably adequate, or that the new crossing will be free from danger incident to the established crossings.

It does not appear to be entirely reasonable to ask that legal sanction be given to a railroad crossing which is being used unlawfully, in order that the railroad company may be required to maintain a guard for the crossing's protection.

Petition for approval of new crossing DENIED.

Edward F. Merrey, for the City of Paterson.

Duane E. Minard, for the Erie Railroad Company.

The petitioner in this matter claims that for a number of years there has been a demand for the opening of Sixth Avenue across the right of way of the Erie Railroad Company. In compliance with this demand the Board of Aldermen of the City of Paterson passed, in the year 1904, an ordinance opening this street. As a result of litigation over this ordinance, another ordinance was passed in 1908.

Crossing Sixth Ave., Paterson, over Erie R. R. Tracks.

This latter ordinance was sustained on appeal by the Supreme Court and the Court of Errors and Appeals.

Notice was served by the city upon the Erie Railroad Company, ordering said company to plank the crossing, the city stating that in default of the company so doing the city would proceed to do so. The railroad company then applied to the Court of Chancery for an injunction preventing the city from planking the crossing. It was alleged, as a reason why this injunction should be allowed, that the city should not plank the crossing until it had permission therefor from the Board of Public Utility Commissioners. The injunction was allowed, Vice-Chancellor Howell stating in his opinion (filed November 11th, 1912):

"As it looks to me the Legislature has by the act in question formulated a public policy for the State which cannot be controlled, enlarged, restricted, or varied by the courts; they can only enforce the rule which the Legislature has prescribed. It was the manifest intention of the Legislature to place the whole question of railway crossings at grade under the control of a central body having administrative functions, for purposes of convenience, of safety and of uniformity of procedure, and for this purpose the legislative body has conferred upon the Board of Public Utility Commissioners plenary power to act for the protection of the people from such accidents as are liable to happen at railway crossings. This policy appears in the legislation of this State as far back as 1862, and has been continued by a series of legislative declarations tending to the abolition eventually of grade crossings. In what is substantially its present form it appears first in the act of 1909, now repealed (Laws 1909, p. 282), section 3 of which forbade the construction of any new street or highway across the tracks of any railway company at grade without the permission of the Board of Railway Commissioners, and it has been enlarged and extended by the act of 1911, the twenty-first section of which is hereinabove quoted at length, so as to include the construction of highways generally across railways at grade.

"I am of the opinion therefore that the permission of the Public Utilities Board must be obtained before the crossing can be actually constructed, and that such permission must be sought by the city for the reason that it is the moving party.

"I will advise an order for an injunction as prayed."

Following this decision the Board was asked to permit the construction of the crossing. In support of the petition it is contended that large numbers now cross the railroad

at Sixth Avenue; that the crossing lies in a direct route to factories where many persons are employed, that if the crossing is properly planked it can be used with greater convenience, and if properly protected, with much less risk than at present. It is claimed that the location of the crossing is a public necessity. The counsel for the City of Paterson directs attention in his brief to the attitude of the city in opposition to grade crossings. The pending application, it is claimed, is not inconsistent with this opposition because of the exceptional conditions at the crossing. The Board does not question that the city brings this application believing these conditions are such that its application is consistent with its declared policy on grade crossings, and further believing that this Board can grant permission to construct the crossing without violating its policy of discouraging the multiplication of crossings at grade.

The Board has considered the testimony taken at the hearing, and the members of the Board have inspected the site of the crossing and the location of the adjacent crossings. After such consideration and inspection the Board is unable to agree with the petitioner. It may be admitted that a number of persons now daily cross the tracks at Sixth Avenue, and that this is done because it is for these persons the most convenient place of crossing; but people not only here but elsewhere will cross a railroad track at the nearest accessible place rather than walk to the highway crossing. This cannot be accepted by the Board as a valid reason for increasing the number of places of crossing, unless it plainly appears that the lawfully established highway crossings are not reasonably adequate, or that the new crossing for which the Board's approval is sought will be free from dangers incident to such established crossings. It does not appear to the satisfaction of the Board that the existing crossings are inadequate. The Board is of the opinion that the crossing for which its approval is sought

would be quite as dangerous, if not more so, than the high ways now used, and that the public safety would rather be lessened than increased by diverting travel to a crossing at Sixth Avenue. It is claimed by the petitioner that there will be less likelihood of injury at the crossing if the same is planked than there is at present, because of the liability of those crossing to stumble over the rails. This could be said of every place where the tracks of a railroad are crossed off a public highway. It is further contended that if the crossing is authorized, a proper guard will increase the safety of those now using it. There is no suggestion by the city that the expense of maintaining such guard, or any part of such expense shall be borne by it. It does not appear entirely reasonable to ask that legal sanction be given to a railroad crossing, which is being unlawfully used, in order that the railroad company may be required to maintain a guard for the crossing's protection.

It does not appear to the Board that conditions in the case under consideration are so exceptional as to justify the Board in departing from its rule heretofore established, and the petition will be DISMISSED. An order will be so entered.

Dated July 22d, 1913.

ORDER.

This application having been duly heard, and the Board having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the Board's approval of this petition is withheld, and

It is ordered that the petition be and the same is hereby DISMISSED.

Dated July 22d, 1913.

No. 123.

GLEN ROCK CIVICS LEAGUE
VS.
ERIE RAILROAD COMPANY.

Conditions at the grade crossing of Maple Avenue and the Erie Railroad Company in the Borough of Glen Rock found to be such as to require that a flagman shall be stationed and maintained thereat daily between the hours of 6:45 A. M. and 7:15 P. M.

Theodore J. Burgess, for the Company.

The above matter was brought to the Board's attention through an informal complaint made by the Civics League of Glen Rock, in which they urged the need of a watchman and gates at Maple Avenue and Rock Road, where the Erie Railroad crosses said streets, and also protection at the Rock Road crossing of the Erie main line. The letter stated that at the present time the only protection is an electric bell at the Rock Road crossing.

The complaint was referred to the Board's Inspector, Charles D. McKelvey, for investigation and report. The inspector reported that "Maple Avenue is protected by a bell. The view at this crossing is bad and should be protected by a flagman, being a dangerous crossing with large traffic over it. At Rock Road the view is good, with the exception that when driving westerly westbound trains can be seen for a short distance only. There is a good loud bell at this crossing, which if kept in order, should be sufficient protection. At Rock Road main line the view is unobstructed. The building spoken of is sixty feet from the track, and before reaching it there is a good open view. I do not consider any protection necessary at this crossing." The recommendation made by the inspector was that

"Maple Avenue be protected by a flagman from 6:45 A. M. to 7:15 P. M., and that the bells at Maple Avenue and Rock Road be kept in working order at all times."

In accordance with the practice of the Board, the above recommendation was forwarded to the Erie Railroad Company, and a reply was received from said company under date of March 17th, 1913, in which it was claimed that "additional protection of a flagman between the hours referred to is not reasonably necessary." The matter was again referred to Mr. McKelvey for further report and under date of March 19th, 1913, after making another inspection of the crossing, Mr. McKelvey in a letter to the Board repeated his former recommendation.

On April 11th, 1913, a hearing was held, at which the Erie Railroad Company was represented. After such hearing and upon consideration of the entire record in this matter, the Board is of the opinion and finds that conditions at the grade crossing of Maple Avenue and the Erie Railroad Company in the Borough of Glen Rock require, for protection of the traveling public at said crossing, that a flagman shall be stationed and maintained thereat daily to give warning of the approach of trains between the hours of 6:45 A. M. and 7:15 P. M.

An order requiring this will be entered.

Dated August 11th, 1913.

ORDER.

This case having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Board having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

The Board of Public Utility Commissioners HEREBY ORDERS the Erie Railroad Company to station a flagman at the crossing of its tracks at Maple Avenue in the Borough of Glen Rock and to maintain said flagman at such crossing each day in the week between the hours of 6:45 A. M. and 7:15 P. M.

This order shall become effective August 25th, 1913.

Dated August 11th, 1913.

No. 124.

MORRISTOWN AND ERIE RAILROAD, MCEWAN BROTHERS, INC., UNITED BOX BOARD COMPANY, MORRIS SAND COMPANY AND HANOVER BRICK COMPANY

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, RARITAN RIVER RAILROAD COMPANY, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NORTHERN CENTRAL RAILWAY, PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PHILADELPHIA AND READING RAILWAY COMPANY, LEHIGH VALLEY RAILROAD COMPANY, LEHIGH AND HUDSON RIVER RAILROAD COMPANY AND NEW YORK AND LONG BRANCH RAILROAD COMPANY.

HELD—That the respondents in this proceeding have failed to bear the burden of proof imposed upon them by statute to show that the increases in existing rates, resulting from cancellations for the carrying of traffic, interchanged between them, or any of them, and the Morristown and Erie Railroad respectively are reasonable and just.

Said increases are disapproved by the Board.

It appears that over cases involving the equitable apportionment of joint earnings the Court of Chancery has jurisdiction. But it does not follow

that for that reason this Board is without jurisdiction in the apportionment of joint rates.

In case such action seemed to this Board imperative for the protection of shippers, the Board would incline to assume jurisdiction. But it is evident that the primary task explicitly delegated to this Board concerns the relations of public utilities with their patrons, rather than the relations of public utilities, *inter se*. For this reason the Board in the pending case, so far as regards divisions of joint rates and car hire equipment, confines itself to recommendations to the two carriers principally concerned.

E. O. Stanley, of Pitney, Hardin and Skinner, for Morristown and Erie Railroad Company, McEwan Brothers, Inc., United Box Board Company, and Hanover Brick Company.

Benjamin F. Jones, for the Morris Sand Company.

John L. Seager, for the Delaware, Lackawanna and Western Railroad Company.

Edwin J. Bates, for the Pennsylvania Railroad Company.

By petition filed with this Board May 16th, 1913, it was represented, that the Delaware, Lackawanna and Western Railroad Company, had cancelled certain through rates upon traffic formerly handled, under such through rates, between the Morristown and Erie Railroad Company and the Lackawanna, and the Lackawanna's connections. The petition also represented that the Lackawanna had given notice of the cancellation of other similar rates. The petition also represented that as the result of the through rates cancelled or to be cancelled, there had resulted or there would result on the traffic affected, combinations of local rates which were averred to be unjust, unreasonable and unduly discriminatory in violation of Chapter 195, Laws

of 1911. Said petitioner further represented that the resulting rates would work irreparable harm to the petitioners, rendering traffic impossible or unprofitable, and asked that the respondents, after due hearing and investigation, be required to restore the rates displaced by the cancellation made or announced.

Accordingly, after notice served on the respondents a preliminary hearing on the aforesaid petition was had at the offices of the Board in Newark, on May 19th, 1913, when petitioners and the principal respondent were represented by counsel.

The Board thereupon issued an order suspending the advances resulting from cancellations made or to be made, pending hearing and investigation of the allegations of the petition. The original order of suspension ran until July 26th, 1913, and was extended by a supplementary order extending the suspension until August 19th, 1913. Both orders issued in accordance with P. L. 1911, Chap. 195, II. 17 (h).

The respondents in their answer to the petition alleged that the revenue received from the traffic interchanged with the Morristown and Erie has long been unremunerative, and in part returns less than the cost of transportation; that the Morristown and Erie refuses to pay the regular *per diem* charge on the equipment furnished by the Lackawanna, and refuses to accord to the Lackawanna the proper division of joint revenue. The Lackawanna, therefore, asked the dismissal of the petition; the setting aside of the preliminary order of suspension; and, in case the preceding requests were denied by the Board, and in case joint rates were set by the Board, that the divisions thereof be also fixed by the Board's order, and that such order also establish just and reasonable charges for the use of the respondent's equipment furnished to the Morristown and Erie.

Upon the issues thus raised hearings were had as follows: On June 10th, 1913, at Trenton; on June 20th, 1913, at Jersey City; on June 26th, 1913, at Newark; and thereafter at Trenton on July 3d, 10th, 17th and 24th. Testimony was introduced by both parties, exhibits were submitted, and on August 5th, 1913, briefs were filed.

1. The Board of Public Utility Commissioners, after due hearing and due consideration of the testimony and data adduced, finds and determines that the respondents have failed to bear the burden of proof imposed upon them by statute to show that the increases in existing rates resulting from the aforementioned cancellations for the carrying of traffic interchanged between them, or any of them, and the Morristown and Erie Railroad Company respectively, are reasonable and just; and further determines that it is not satisfied that the increases in rates resulting, or that would result from the cancellation of the aforementioned joint rates, are reasonable and just; and further determines that such increases as resulted or would result from the cancellations aforementioned are unreasonable and unjust. Upon such determination, the Board of Public Utility Commissioners hereby disapproves said increases, resulting or that would have resulted from the cancellations of the joint tariffs aforementioned.

It is hardly necessary to discuss at length the question of the reasonableness and justice of the rates that would have become effective, upon the cancellation of the joint tariffs, upon traffic interchanged between the Morristown and Erie and the Lackawanna and its connections. The respondents can hardly have expected to maintain the reasonableness and justice of the rates that would have resulted upon the cancellation of the through joint rates. Such resulting rates would have been combinations of locals so greatly in excess of the former joint rates as to

have been prohibitive upon some traffic, and unprofitable to the shipper upon most of the remainder.

The presumption of reasonableness which attaches to rates long established, and generally acquiesced in, would have to be overcome by the respondent to justify the rates that would have ensued. The rates now in vogue upon the Erie and its connections upon traffic interchanged with the Morristown and Erie would have constituted another unsurmountable barrier to the justification of the rates that would have ensued. Moreover, the operation of the cancellations referred to would have constituted a territorial discrimination against shippers on the Morristown and Erie that could not be justified. At the hearings the Lackawanna admitted itself satisfied with certain joint rates and the divisions thereof, *e. g.*, on sand and brick, which the cancellations would have abolished. In view of these facts, and in view of the complete silence of the respondent's brief upon the reasonableness and justice of the rates that would have ensued upon the abrogation of the joint rates, whose cancellation was advertised by the Lackawanna, there can, we think, be no doubt whatever that the finding of the Board upon this point is correct, and this conclusion is practically not contested.

The real intent of the Lackawanna in the cancellations was largely, if not wholly, due to its desire to ventilate its dissatisfaction with the divisions accorded it and its connections of joint rates with the Morristown and Erie, and its dissatisfaction with what is claimed to be an unfair and unjust practice of the latter with reference to payment for the hire of equipment furnished by the Lackawanna. The Lackawanna doubtless desires also to demonstrate, if necessary, in court, that its participation in joint rates and in through route traffic with the Morristown and Erie is a forced and unwilling participation.

So far as the complaint of the Morris Sand Company as to rates on sand to Milburn and vicinity is concerned, we understand the complainant virtually withdraws his complaint, so long as the present joint rates are maintained. As these joint rates are virtually reinstated by the Board's disapproval of the aforementioned cancellations, we shall make no order in the premises, unless or until advised that the existing through rates on sand are disturbed or altered.

2. The Lackawanna in its cross petition for relief asks that divisions of joint rates be fixed by the Board, in the event that joint rates are set by the Board.

This raises the explicit issue whether the Board's power embraces the compulsory apportionment of joint rates for intra-state traffic as between the co-operating carriers.

That the Board may fix joint rates appears from P. L. Chap. 195, II, 16, (c).

The statute provides that the Board shall have power:

"After hearing, upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility as herein defined, whenever the Board shall determine any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage, or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential."

The petitioners point out that no explicit power is given by this section to apportion a joint rate amongst carriers participating in the joint haul. They point out also that the Interstate Commerce Act, as amended, and the Public Service Commission Act of New York State explicitly delegate to the respective commissions such power of apportionment of joint rates between the participating carriers.

Petitioners also recite that the Court of Chancery has undoubted jurisdiction over the divisions of a joint rate, and cite *Sussex R. R.* v. *Morris and Essex R. R., 20 N. J.*

Eq. 542, as authority for this proposition. Petitioners claim that even if the Board has power to make apportionment of a joint rate which the Board should create and establish, the Board's power of apportionment must lie dormant where no new joint rate is established, but merely continues by reason of the disapproval of an increase or change in an existing rate. On the other hand, it is urged that the grant to the Board of the power to fix joint rates necessarily implies the collateral power of apportioning the same; that without the power to apportion, the power to fix the joint rate would be nugatory, because of the failure or refusal of a participating carrier to render the service for an unknown and uncertain part of the joint rate fixed.

It is also argued that the power of apportioning a through rate exists because the Board can attain the same result by a fixation of individual rates, affording each participating carrier an amount exactly equal to what might be alloted to each respectively by an apportionment of the through joint rate.

It is also urged that the Board's power under P. L. 1911, Chap. 195, II, 16, (k), to order such just and reasonable connections as shall be necessary to promote the convenience of shippers or property, etc., implies not only power over the physical means usually employed at junction points, but extends to the financial divisions of the joint earnings.

This last contention we are disposed to disallow. The clause of the statute is apparently spatial or geographical in its purport, applicable "*at any junction or point of connection or intersection* * * *," etc. P. L. 1911, Chap. 195, II, 16, (k).

It appears indisputable that over cases involving the equitable apportionment of joint earnings the Court of Chancery has jurisdiction. But it does not follow that for

that reason this Board is without jurisdiction in the apportionment of joint rates. In the matter of protection at grade crossings, as the statutes now stand, both the Court of Chancery and this Board apparently have jurisdiction, though that Court, in one case, has remanded a case of that character to this Board for determination in the first instance.

Nor, do we decide that this Board cannot take jurisdiction of the apportionment of a joint intrastate rate. In case such action seemed to this Board imperative for the protection of shippers, this Board would incline to assume jurisdiction in such a case. But it is evident that the primary task explicitly delegated to this Board concerns the relations of public utilities with their patrons, rather than the relations of public utilities *inter se.* For this reason we shall, for the present, in the pending case, so far as regards divisions of joint rates, and car hire equipment, confine ourselves to recommendations to the two carriers principally concerned. If they agree to the recommendations, the dispute is ended. If either of them begins a suit in equity, our conclusions are at the disposal of the Court to make such use of as the Court may see fit. If they do neither, and either party renews the proceeding before this Board, showing clearly that injustice or unreasonableness results from conditions within the Board's jurisdiction to remove or alter, the Board will determine the matter as the status of the case requires.

3. In the matter of divisions of joint through rates between the two carriers principally concerned we find and determine that the new divisions proposed by the Lackawanna are not equitable to the Morristown and Erie; and on the evidence adduced we find and determine that, except as indicated below, the substitution of other divisions for

those in vogue before the cancellations made or announced by the Lackawanna is not warranted.

The exception to which we have referred above refers to the rates on car lot paper stock from Orange and Newark to points on the Morristown and Erie. Out of a rate of 90 cents per 100 pounds, the Lackawanna receives but forty cents. There prevails in general, as far as this traffic is concerned, a division of the joint through rate which accords half or more of the joint rate to the Lackawanna. There appears no reason for a reversal of the proportions as regards the 90-cent rate between Newark and Orange and points on the Morristown and Erie. At one of the hearings the petitioners themselves evinced surprise at the existing division of this rate, and practically conceded that it was a mistake. (Testimony, July 8th, 1913, pp. 34, 35.) We shall expect the Morristown and Erie hereafter to agree to accept 50 per cent. of this rate; and failure on their part so to do, will be followed by a mandatory order on the part of this Board designed to effect an equal division of the 90 cents per 100 pounds on car lot paper stock between the points indicated.

With the exception above noted, we RECOMMEND to the carriers concerned to continue the divisions of joint through rates in force prior to the cancellations above referred to. Our reasons for our conclusions herein and our resulting recommendation are as follows:

In the first place, the divisions proposed by the Lackawanna are *ex parte*. There is not here the same excuse or reason as for the Lackawanna's proposals in the matter of *per diem*. Those are also *ex parte;* but in the latter case the Lackawanna is proposing the car hire for the equipment owned or furnished to the petitioners by itself alone. Whereas, as regards joint through rates, these are the joint

product of both carriers, and each party is equitably entitled to a voice in any scheme for their division.

In the second place, the divisions which the Lackawanna propose for the apportionment of joint through rates involve a block shorter than any other we are advised of. As is well known, where a short line road which performs switching service unites with a longer line for a joint haul, it is customary to arrange a block basis upon which to apportion the joint earnings. The short line road is commonly allowed a constructive block in excess of the actual mileage traversed on the short line. Such blocks are not infrequently of 25 miles in length, despite the fact that the actual haul on the short line may be but a fraction of 25 miles. The evidence disclosed no case in this territory where the block allowed the short line is less than 25 miles. Thus on the Raritan River Railroad (12 miles in length), divisions with its connections, the Pennsylvania and the Central of New Jersey, are upon the basis of a 25-mile block. (Testimony, July 17th, 1913, pp. 1, 2, 3.) Upon the Wharton and Northern (15 miles long) on business originating on the Central and Susquehanna, the Wharton and Northern is allowed a constructive mileage of 30 miles. (Testimony, July 24th, 1913, p. 12.) The Erie, which connects with the Morristown and Erie at Essex Fells, has always made rates with the latter on a block basis, allowing the Morristown and Erie a constructive mileage, or block of about 40 miles, and allows the latter 40 per cent. of joint through class rates on a two-block haul. (Testimony, July 10th, 1913, p. 34.)

We are not unmindful of the fact that the Raritan River Railroad is not allowed by the Central of New Jersey the advantage of an equal division on a two-block haul so far as the 25-mile block covers Newark and Jersey City, but on joint rates to these two points which are excepted from the

normal rule of equal divisions (where one block is traversed by each carrier) 40 per cent. of the joint rate goes to the short line road. (Testimony, July 17th, 1913, p. 4.) Even more striking is the arrangement between the Central and the New Jersey and Pennsylvania, by which the latter road obtains 50 per cent. of joint through rate to Jersey City (44 min.) or to Phillipsburg, although nominally the shorter road has a constructive block of but 25 miles. (Testimony of July 24th, 1913, p. 9.)

It appears then that the scheme of division submitted by the Lackawanna would allow the Morristown and Erie the benefit of a 40 per cent. division where the haul on the longer road (Morristown to South Orange) is no more than approximately 16 miles. On longer hauls on the longer line, the Lackawanna proposed that at least 65 per cent. of the joint rate shall be its share. The 75 per cent. division, claimed by the Lackawanna on joint traffic from the Unadilla Valley, has apparently never been conceded by the latter, and the flat allowances per car on the South Buffalo Railroad and on the Northampton and Bath Railroad seem to involve an arrangement foreign to the case at issue.

Viewed, therefore, in the light of the normal lengths of constructive blocks adopted for divisions of joint through rates, as well as in the light of the percentages commonly allowed the short line on joint hauls over such blocks, actual or constructive, the Lackawanna's proposed basis for division is more onerous than those commonly in vogue. For this reason we regard it as inequitable to the Morristown and Erie.

The Lackawanna has recounted the difficulties incident to freight traffic over the Morris and Essex Division, a commutation line primarily, and the heavy terminal expenses involved in carrying traffic over this line. But congestion seems, if anything, as serious on the Morristown and Erie;

and the real issue is not illuminated by testimony, to wit, the changes in operating ratios between the two carriers since the original divisions were agreed upon. So far as we can learn from the testimony, it does not appear that the Lackawanna's expenses per ton as compared with its earnings per ton on this joint traffic have become relatively more unfavorable than the Morristown and Erie's expenses per ton as compared with its revenue per ton on the same traffic.

The Lackawanna contends that the Morristown and Erie contents itself with a less revenue per ton on three (3) line hauls than it obtains from similar traffic interchanged directly with the Lackawanna, the service on the Morristown and Erie being the same in both cases. The lesser revenue accruing on the three (3) line haul is a class rate arbitrary, derived from traffic carried a longer distance than traffic interchanged directly with the respondent. The joint rate on paper stock and box board between the two carriers mainly concerned, however, is historically a rate originally akin to a special commodity rate. The class rate is ordinarily higher than a commodity rate, and the higher class rate arbitrary received by the Morristown and Erie may possibly be explained on this ground. The Lackawanna receives on the through line haul more per ton than on the traffic directly exchanged with the Morristown and Erie. But the fact that these arbitraries are seemingly out of joint with the divisions on traffic directly interchanged would, *a priori*, impeach the arbitraries to the same extent that the arbitraries impeach the divisions on traffic directly interchanged.

The more essential issues involved are whether the revenue accruing to the Lackawanna under its divisions of the joint through rates with the Morristown and Erie have

been unremunerative, or have been less than the cost to the Lackawanna.

We are not convinced that the evidence submitted establishes these facts.

Mr. Learoyd's testimony on July 8th, 1913, was to the effect that the 30-mile haul of strawboard to Hoboken, affording on the average $12.50 revenue to the Lackawanna, was not "exceedingly profitable" (p. 18). He expressly declined to pronounce it "unremunerative" (p. 18). He testified it did not afford "the average profit on the average traffic" on the Morris and Essex Division (p. 19). It appears from his testimony that on this division for a 58-mile haul the average revenue is about 1½ cents per ton a mile (p. 21). But gauged by this average, the ton-mile revenue to the Lackawanna on paper board to Hoboken is not inadequate, being approximately 1.6 cents, and even higher per ton mile to Newark and Orange. The revenue per ton on boxboard to Newark (22) miles appears to be .0245 and to Orange .029 cents. What allowances should be made in comparing an average 58-mile haul with the shorter haul between Morristown and Hoboken, Paterson, Newark and Orange, respectively, we do not know. There is nothing in the evidence to enlighten us on this point. But whether the ton-mile rate be computed on boxboard, paper stock or commodities in general, we cannot find that the actual revenue falls below the stated average per ton-mile on this division. In most cases it is notably in excess of the average revenue of 1½ cents per ton-mile.

The respondent's witness, Mr. Learoyd, testified (Testimony of July 8th, 1913, 10-36) that the average terminal expense per car is about $7.50, and that where the Lackawanna's revenue per car, as on paper stock between Hoboken and Morristown is only $6.00, loss results to the respondent. There is no evidence, however, to show how

this $7.50 terminal cost per car is calculated. Moreover, the witness assented to the proposition that no rates for traffic between Hoboken and Newark are remunerative to the Lackawanna. He testified:

"We don't consider any traffic from New York or Hoboken to short-haul territory in New Jersey is remunerative, based on the cost of operation, as far out as Summit." (Testimony of July 8th, 1913, p. 34.)

The same witness testified (p. 26) that the Lackawanna was no longer desirous or willing to meet the competition for the traffic of the Morristown and Erie, which it was ready to meet in 1904.

The conclusion fairly to be drawn from this testimony seems to be that the Lackawanna desires over this division to carry primarily the traffic that affords the maximum net revenue; that it is not so much a question with the carrier whether traffic can be carried at the average rate per ton-mile, but whether the traffic is productive of the maximum of net profit.

It is, perhaps, not surprising that railroad officials insensibly adopt this attitude towards traffic. It is, nevertheless, incompatible with the obligation of a public carrier. The railroad is primarily and essentially a public highway. It is owned and operated by means of private capital upon which a proper return is allowed by the State. The State thereby is freed from the direct administration of these avenues of travel. But the maximum of profit to the operating company is and must remain subordinate to the maximizing of facilities for traffic over these public highways. This Board cannot tolerate the doctrine that traffic which seemingly accords to the carrier its average of revenue shall be discouraged from traversing a public highway, because a carrier can enhance its net earnings by shunting this traffic upon other lines of transportation.

The plea for higher rates or larger divisions thereof for the chief respondent is based in part on the respondent's having borne the burden of shrinkages in rates in the past. Such shrinkages, however, were largely due to the competition of the Erie, and the competition of the Erie was precipitated originally by the respondent's demand on the Morristown and Erie for a larger share of the then joint earnings. Prompted by the fear which such a demand inspired, and advised by no less sagacious and experienced counsel than the late Edward M. Sheppard, the Morristown and Erie hastened to extend their line to the Erie's rails. The shrinkage, therefore, which the Lackawanna cites was a shrinkage the responsibility for which rests largely on the Lackawanna itself.

From whatever point viewed, the contention that the respondent and its connections are entitled to greater sums out of the joint earnings on traffic interchanged with the Morristown and Erie appears to us unsubstantiated. In commerce, as well as in law, there is a considerable province in which deference should be shown to the doctrine of *stare decisis*. We are not disposed to disturb these rates of long standing, to which industry and commerce alike have become accustomed.

4. In the matter of car hire equipment, after careful consideration of the evidence and data submitted, the Board finds and determines that the present allowance made by the Morristown and Erie of mileage at the rate of 6 mills per mile on equipment furnished by the Lackawanna is insufficient, inadequate and inequitable, and RECOMMENDS to both carriers to adopt a modified system of *per diem* payments such as is outlined below, and to apply the same in settlement of pending claims.

It seems unnecessary here to pass upon the question

whether the Board's jurisdiction as to *per diem* charges extends to such charges on cars engaged in interstate commerce. We are contenting ourselves in the first instance with a recommendation to the two carriers, intended to effect an equitable arrangement between them, irrespective of the Board's technical jurisdiction. It has been held that demurrage is in part compensation to the carrier, and in part a penalty to secure the release of equipment (I. C. C. Reports, Vol. XXV, p. 315). Should *per diem* be similarly held to be in part compensation to the carrier, *per diem* on cars employed in interstate service might be found to be beyond our jurisdiction. On the other hand, the case of *Chicago, Milwaukee and St. Paul R. Co.* v. *Becker, 32 Fed. 849,* may be cited to the effect that a State commission may regulate switching charges, for it is a local service and has no reference to interstate shipments. *Michie* v. *N. Y., N. H. & H. R. R., 151 F. R., 694,* seems to imply that a *per diem* charge is strictly rental.

Car hire equipment on the basis of the ordinary mileage payments of three-quarters or three-fifths of a cent per mile of haul is equitable only upon hauls of considerable length. Under any circumstances mileage fails to act as a spur to provoke the prompt return of equipment.

Per diem payments at the rate of 45 cents per day per car, as provided by the regular *per diem* rules of the American Railway Association, have the merit of acting as an increasing incentive to the prompt return of equipment. The strict application of the rule, however, to short line roads upon which a large amount of switching service is performed, and where the short line is unable to obtain long haul revenue, is recognized as inequitable to the short line roads. Accordingly the rigor of the rule is tempered to short line roads, whereby a switching reclaim, or free time, is allowed short lines by agreement with the long line

connection. The qualification just referred to is worded as follows, under Rule 5:

"An arbitrary amount for each car in switching service may be reclaimed by the switching line from the road for which the service was performed. This amount shall be based upon the average number of days actually required, and determined by the roads directly interested for each local territory."

As testified by Mr. Learoyd, respondent's witness,

"Exceptions (to straight *per diem*) are made in the case where a switching carrier receives a revenue so low (per car) that it does not enable him to pay *per diem*." (Testimony of June 26th, 1913, p. 28.)

The suggestion that short lines should procure sufficient equipment to provide for traffic originating on their rails, and thus obtain from connections *per diem* equivalent to a straight payment of *per diem* by short lines on foreign equipment, seems hardly practicable. The *per diem* is far less than the average daily car earning per day. The short line's equipment would seldom be on its own rails; and when on foreign rails would be subject to heavier wear and tear, owing to the long haul on connections, than foreign equipment undergoes on the short haul on the short line.

The Morristown and Erie have no car equipment of their own. They prefer to avail themselves of the equipment furnished by connecting lines, the Lackawanna and Erie. The Morristown and Erie thus escape a very considerable capital outlay (variously estimated by themselves at from $30,000 to $150,000). While there is some justification for short lines not providing themselves with extensive car equipment, or for keeping such equipment as they do own upon their own rails, it is nevertheless only equitable that they shall pay reasonable car hire upon other carrier's equipment which the short line railroads use. Particularly

is this true of such companies as collect demurrage upon equipment belonging to other carriers. This is true of the Morristown and Erie. Its annual report filed with this Board shows that the Morristown and Erie in the fiscal year ending June 30th, 1912, collected $1,448 demurrage. The same report apparently does not indicate what was paid out during the same year by way of mileage to the carriers owning said equipment. But if the petitioner's exhibit, p. 5, of July 17th, 1913, be taken as a basis, we find the total mileage accrued in two typical months to be $133.36. Multiplying this by six, we obtain an annual mileage compensation accruing to its connections of $800.16. It is certainly anomalous that the Morristown and Erie shall first omit to provide itself with equipment, drawing on its connections for the same, and then collect from consignees on *overtime* detention almost double what the Morristown and Erie accords its connections for the *entire time* such equipment is borrowed.

Such an arrangement is neither just nor equitable, and it is quite easy to see how it provokes and justifies the annoyance and irritation of the long line connection. The proposal made by the Lackawanna is that on Lackawanna equipment furnished to the Morristown and Erie, the latter pay *per diem* with two days' allowance of free time on a single load, and four days' allowance of free time when a car is received under load and redelivered under a return load. To this the Lackawanna adds that the Morristown and Erie be required to pay straight *per diem* on all foreign equipment delivered upon the latter's connecting tracks.

It appears that a not inconsiderable part of the foreign equipment loaded by the Lackawanna upon the Morristown and Erie consists of cars carrying traffic which originated on the Lackawanna. Thus petitioner's exhibit 3 of July 24th, 1913, shows that during the typical months of Janu-

ary and April of this year, of 362 cars delivered by the Lackawanna to the Morristown and Erie, 44 were foreign equipment loaded with merchandise originating on Lackawanna rails. It appears to us indisputable that if the Lackawanna finds it convenient to utilize foreign equipment to load with merchandise traffic originating on its own rails, instead of employing its own equipment for this purpose, such cars should be assimilated, so far as *per diem* charges are concerned, to the Lackawanna's own equipment. On such foreign equipment the *per diem* reclaim, or free time, should be allowed exactly as on the Lackawanna's own cars.

There appears to be no clearly defined rule of equity by which the allowance of free time to short lines equipment is determined. Among the relevant considerations would appear to be the average car revenue to the short line, the average reasonable detention of cars on the short line, and the net income of the short line. In the present case there is also to be considered the fact that the Erie, the other connecting line with the Morristown and Erie, will be entitled to as equitable *per diem* treatment as the Lackawanna. Still another question arises as to the different treatment, if any, to be accorded foreign equipment in the matter of *per diem*, where said equipment comes over the short line's immediate connection from a point of origin upon a third road.

The average car earnings of the Morristown and Erie on traffic interchanged with the Lackawanna for March and April, 1913, were represented by the respondent to be $8.66 per car. (Exhibit R 4, July 24th, 1913.)

The respondent tried to show that even this was a misleading average which would be raised considerably by the exclusion of certain traffic and by the consolidation of less than carload lots. The Morristown and Erie (Ex. p. 9, July 17th, 1913) gives the car earnings for all cars re-

ceived from the Lackawanna during March and April, 1913, as follows:

350 cars, loaded and empty, $2,248.88—$6.42 per car.
254 cars, loaded, $2,248.88—$8.85 per car.
For cars delivered to the Lackawanna:
532 cars, loaded and empty, $2,176.81—$4.09 per car.
357 cars, loaded, $2,176.81—$6.09 per car.
All cars received and delivered.
882 cars, loaded and empty, $4,425.69—$5.02 per car.
611 cars, loaded, $4,425.69—$7.24 per car.

The average detention time on cars furnished the Morristown and Erie by the Lackawanna appears to be 4.92 days per car, according to exhibit, p. 3, July 17th, 1913. The allegation that irregular deliveries, or bunching of cars by the Lackawanna, contributes to this detention period, was disproved. We are not satisfied, however, that the respondent's contention that detention time could be considerably reduced by consolidation of L. C. L. traffic by the Morristown and Erie is established.

Assuming that the Morristown and Erie in two cases out of three obtained earnings on two loads per car, and in one case out of three obtained earnings on one load per car, the average earnings per car load would be about $6.50. If we assume that the actual detention is a necessary detention, and amounts to approximately five days on this traffic, full *der diem* would absorb $2.25 per car. Such an absorption of gross revenue is readily seen to be excessive.

On the other hand, the mileage basis of payment would accord the Lackawanna about 5 cents per car irrespective of the time it is detained on the Morristown and Erie's rails. This is about one cent per day. In exceptional cases the detention runs as high as 27 days. (Ex. R. 4, June 26th, 1913.) The longer the detention the higher is the demurrage accruing to the Morristown and Erie, while the

Lackawanna's mileage becomes infinitestimal. The mileage allowance is grossly unjust to the latter.

The switching reclaim, or free time deducted from straight *per diem* is to be based, according to the rule of the American Railway Association, "upon the average number of days actually required" (in switching and similar service upon the short line connection).

There seems, however, to be sound reason for differentiating between the free time allowance on cars arriving under load and returned empty, and cars arriving under load and redelivered under a return load. The Lackawanna proposes to allow on its own equipment free time periods of 2 days and 4 days, respectively. The Morristown and Erie demands 3 days and 6 days, respectively, on all cars irrespective of ownership.

5. *An allowance of 3 days free time for a single load and 4 days free time on a double load, with one day free time on foreign equipment (foreign equipment to be construed as cars not belonging to the Lackawanna and cars whose haul did not begin on the Lackawanna's rails; and the per diem being the present 45 cents per car), appears to us fairly well to meet the equities in the present case.*

The considerations supporting this award are as follows:

First: On the road whose general situation most nearly approaches the Morristown and Erie's, to wit, the Raritan River Railroad, the *per diem* allowances with its two long haul connections, the Pennsylvania and the Central of New Jersey, are three days and four days, respectively, apparently without regard to single or double loads. (Testimony, July 17th, 1913, pp. 3, 4.)

Second: The stricter exaction of *per diem* on foreign equipment is customary, to reimburse the long line connection for its out of pocket expense to the foreign road. It is true that no free time on foreign equipment is allowed by

the Pennsylvania to the Raritan River. But this is explained by the fact that the Pennsylvania furnishes a far greater percentage of its own cars to the short line than does the Central of New Jersey. (Testimony, July 17th, 1913, p. 19.) The latter allows to the Raritan River one day free time on foreign equipment moved upon the rails of the short line. The New Jersey and Pennsylvania is billed by the Central of New Jersey for *per diem* on foreign equipment moved on to the latter's rails. The Rahway Valley is allowed by the Central of New Jersey as much as three days free time on the latter's equipment. On foreign equipment the shorter line accounts to the owner direct. (Testimony, July 24th, 1913, p. 3.) Similarly, the Wharton and Northern pay the Central of New Jersey, and the Lackawanna full *per diem* on foreign cars. (*Ibid.*, p. 3, 11.)

Third: Free time allowance somewhat less than the average actual detention is proper in the interest of good railroading, and should act as an incentive to a short line in expediting return of equipment.

Fourth: Payments on the basis indicated would not be an undue charge on the revenues of the Morristown and Erie.

In this connection it may be said, *obiter*, that this Board would not give countenance of any arbitrary raising of *per diem* that would operate to extinguish the net revenue of short line roads. These short lines have their proper *role* and function, and are entitled to protection against any attempt, should the attempt be made, to crush them, under an arbitrary advance of *per diem* charges.

But payment by the Morristown and Erie on the basis above indicated would not have a disastrous effect.

It is quite apparent that the Morristown and Erie has exaggerated the amount of *per diem* that would be required of it, even under the Lackawanna's proposals. In Exhibit, p. 6, July 24th, 1913, there is no allowance made for the four

days free time on a car carrying an inbound and an outbound load.

In this exhibit, the Morristown and Erie computes the annual *per diem* accruing to the Lackawanna at $2,692.98.

By contrast, the actual bills rendered by the latter for *per diem* from June, 1911, to January, 1913, both inclusive, amount to $2,146.05, or $1,287.66 per year.

It is much more probable that a bill rendered by the payee for actual service performed more nearly measures the charge than an estimate based on partly mistaken premises by an apprehensive payer.

Even the annual *per diem* account to be rendered by the Lackawanna would be reduced by our award, by reason of assimilating foreign cars loaded on the Lackawanna's rails to Lackawanna equipment, and by reason of allowing three days instead of two days on a car carrying a single load.

For the two months of January and April, 1913, of 362 cars delivered the Morristown and Erie, 42 were foreign cars whose load originated on the Lackawanna rails. If this is a fair average, there would be in a year something like 252 cars of this character on which full *per diem* under our award would not have to be paid. The full *per diem*, on an average of five days detention, would amount to $567. Assuming that this block of cars required *per diem* payments on an average of three days instead of five days, there would be a decrease in *per diem* accruing of $226.80. This amount deducted from the annual amount billed would reduce the Morristown and Erie's annual charges to $1,060.80. The three-day allowance would certainly bring the sum below $1,000.

In round figures, our award would apparently require the Morristown and Erie to pay not more than $1,000 a year car hire to the Lackawanna for equipment, an amount not

excessive either in consideration of the cars furnished or of the annual net earnings of the short line.

It was contended by the Morristown and Erie that an allowance for *per diem* to the Lackawanna would imply an allowance also to the Erie for equipment furnished by the latter. This is true, and, therefore, before considering the effect of our award upon the net earnings of the short line some attention must be paid to the possible amount of such payment.

In the first place, it does not appear that the Erie has demanded such an allowance; and, in view of the admission by the Morristown and Erie that they divert all possible traffic to the Erie, it may well be that such traffic preference may temper any claim which the Erie might make.

In the second place, the Erie equipment on the Morristown and Erie appears to be something less than three and a half times the Lackawanna's. If this flat basis were taken, and even $3,500 annually were paid for such car hire to the Erie, the remaining net earnings of the Morristown and Erie would still be substantial.

It was pointed out that the average detention on Erie equipment was greater than on Lackawanna equipment; and this, it might be urged, would increase the payment due the Erie. On the other hand, the greater detention was specifically attributed to the Erie's heavy deliveries of cars to the Morristown and Erie, especially of paper stock (Testimony, July 10th, 1913). And, furthermore, the proportion of foreign cars loaded by the Erie upon the rails of the short line carrier is much less than the proportion of foreign cars received from the Lackawanna. Thus in January and April of this year, of 357 cars received from the Lackawanna, 209 are classed as foreign (Exhibit, p. 6, July 24th, 1913); whereas of the 1,166 cars received from the Erie only 364 were foreign (Exhibit, p. 7, July 24th, 1913).

We may well leave the computation of the *per diem* allowance due the Erie until the latter makes demand for the same. Our preliminary canvass confirms us in believing that under the most extreme circumstances it cannot fail to leave substantial net earnings to the Morristown and Erie.

The total operating revenue for the year ending June 30th, 1912, reported by the Morristown and Erie to this Board was $92,103.49. The operating expenses reported were $54,563.36. The net operating revenue was, therefore, $37,540.13. Other income, including $1,448 demurrage, was reported as $2,097.04. After taxes, interest on the bonded debt and other interest were deducted, the net corporate income was $14,709.65.

The provision in the mortgage securing the bonds that ten per cent. of the gross earnings shall be paid annually into the sinking fund, we do not regard as constituting a fixed charge properly to be taken account of in determining a fair return on the Morristown and Erie's property, used and useful in rendering service to the public. It is an altogether anomalous provision, affording unwonted protection and security to the bond holders, and would result, taken in connection with five per cent. bond interest, in the fiscal year above mentioned, to over 8 per cent. on the principal of the bonded indebtedness.

That the road has not fully met this sinking fund provision in the past is no reason for regarding it as an earning to which the road has an imprescriptible right. The acquiescence of the bond holders in such partial failure, and the voluntary policy of the company in applying portions of the net available corporate income to purchasing additional terminal and other property instead of meeting the sinking fund requirement of the mortgage, all go to justify the non-inclusion of the sinking fund provision as a fixed charge that

must be provided out of income before available free income is computed for paying due car hire.

It appears that the Morristown and Erie was practically built from the proceeds of the bonds amounting to $300,000, and that the $400,000 stock was practically water.

The State Board of Assessors, in its Report for 1912 (Part I, p. 741), put an aggregate assessed valuation upon the company of $335,802, including therein $54,362 for franchise. Without contending that a tax valuation is identical with a base for rate making it is clear from the testimony as to the road's cost (Testimony, July 17th, 1913, p. 84 Sq.) that its present fair value for rate making is nowhere near the aggregate of the face of securities. If the shareholders were allowed an equity in the property at the present time of $100,000, it would be about that amount more than they ever invested in cash or its equivalent, and would fully measure, and probably largely exceed, the base upon which (after all operating expenses, taxes and interest have been paid) they are entitled to a reasonable return or profit.

The net earnings, during the year ending June 30th, 1912, were approximately $15,000. If *per diem* for car hire should amount to no more than would leave two-thirds of that amount as available to the shareholders, it is certain that they would receive a fair return on the fair present value of their equity in the property.

For the above reasons we RECOMMEND the two carriers principally concerned to adopt the *per diem* arrangement outlined *supra* at the head of paragraph five and there underlined.

Dated August 18th, 1913.

No. 125.

IN THE MATTER OF THE APPLICATION OF THE OCEAN CITY ELECTRIC LIGHT COMPANY FOR APPROVAL OF ORDINANCE No. 47, PASSED BY THE COMMISSIONERS OF OCEAN CITY, MAY 22d, 1913.

Jno. D. McMullin, Frank S. Katzenbach, Jr., and *W. F. Millikin*, appeared for the Company.

The Ocean City Electric Light Company petitions the Board for approval of an ordinance, passed May 22d, 1913, by the Commissioners of the City of Ocean City.

The pertinent sections of the ordinance are as follows:

Section 1. That the rights, privileges and franchises for the use of the streets, avenues, parks, highways, alleys and other public places in the said city, both above and below the surface thereof, for the transmission of electric current for light, heat and power, as granted by ordinance approved by the Mayor of the Borough of Ocean City on November 1st, 1892, and the ordinances amendatory thereof and supplemental thereto, be and the same are hereby ratified and confirmed in the said Ocean City Electric Light Company, its successors and assigns, for a period of fifty years from this date.

Section 2. That no failure to comply with the provisions of the aforesaid ordinance of November 1st., A. D. 1892, by one of the companies therein mentioned or referred to shall work any forfeiture of the rights, privileges or franchises of the other company therein mentioned or referred to.

Section 3. That this ordinance shall take effect immediately.

The petition is filed under Section 24 of the Public Utility Act (*P. L. 1911, p. 13*), which section is as follows:

"No privilege or franchise hereafter granted to any public utility as herein defined, by any political subdivision of this State, shall be valid until approved by said Board, such approval to be given when, after hearing, said Board determines that such privilege or franchise is necessary and proper

for the public convenience and properly conserves the public interests, and the Board shall have power in so approving to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require."

The proof shows that the statutory formalities prescribed by the Limited Franchise Act were complied with in the passage of the ordinance. The purposes of the ordinance are succinctly stated by counsel for the petitioner to be, first, to ratify and confirm the rights of the Ocean City Electric Company in the streets of the City of Ocean City; second, to limit the term of these rights to fifty years; and, third, to divorce the Ocean City Electric Light Company from the Ocean City Electric Railway Company, in respect to their several rights in the streets of Ocean City, so that no failure on the part of either of said companies might work a forfeiture of the franchises of the other.

It appears from testimony taken at the hearing upon the petition that on November 1st, 1892, Ocean City was as to its corporate form a borough. It passed, on that day, an ordinance entitled "An Ordinance to grant a location for tracks for an electric railway within the corporate limits of the Borough of Ocean City, and to provide light, heat and power for said Borough and the inhabitants thereof."

The sections of the ordinance so adopted, pertinent to this application are as follows:

"Section 1. Be it enacted by the Mayor and Council of the Borough of Ocean City, that consent is hereby given to such company or companies as may be formed and incorporated by Ezra B. Lake and his associates, to locate the tracks of a street railway within the corporate limits of said borough, as follows." (Then follows route of street railway.)

"Section 7. And be it enacted that consent is hereby given to the said company or companies to erect poles and construct conduits and to string wires, in the streets, alleys, avenues and lanes of the said borough, for the

purpose of furnishing electric light, heat and power to the borough and inhabitants thereof."

"Section 8. And be it enacted that the said Borough Council hereby agrees with said company to accept enough of the electric light aforesaid of (1200) twelve hundred candle power to amount to the sum of two thousand (2000) dollars per annum, and pay forty cents per night for each and every light kept burning from sunset to sunrise, and thirty cents for those kept burning from sunset until twelve o'clock midnight, payable semi-annually, and that they agree to take the said lights to the said amount of two thousand dollars for at least ten years, and the said price of said lights not to change for fifteen years, providing the said company lights the city hall and buildings of said borough free of cost to said borough, and pay all expenses of wiring and switchboards or connecting * * *"

"Section 10. And be it enacted that this ordinance shall become null and void without repeal or notice at the expiration of one hundred days from the date of its enactment, unless within that period a bona fide company or companies shall be legally incorporated by the said Ezra B. Lake, his associates or assigns, under some valid law of this State, which corporation shall speedily prosecute the work herein provided for, and unless within two hundred and thirty (230) days from the date of said enactment, the said road shall be in actual successful operation from the beginning point over the said route, designated as far southward as Sixteenth Street, provided the work is not delayed or obstructed by adverse litigation, the time which such obstructions continue to be added to the said two hundred and thirty days (230) allowed for the completion of the work."

"Section 12. And be it enacted that upon the incorporation of said company or companies, and before it shall proceed to take any rights or to construct any works under the provisions of this ordinance it shall file with the clerk of said borough a written acceptance under its corporate seal and duly acknowledged, which acceptance shall provide that said company or companies shall not in any manner question or contest the legality of this ordinance or any provisions thereof, but will accept the same with all the binding force of a contract so far as said company or companies are concerned and proceed wholly thereunder."

The Ocean City Electric Company was organized February 3d, 1893, under the General Corporation Act of this State. On February 25th, 1893, that company filed with the Borough an acceptance of the ordinance last referred to. The acceptance contained an agreement on the part of the company that it would "not in any manner question or contest the validity of the said ordinance or any provision

thereof, but accepts the same with all the binding force of a contract so far as said company is concerned and proceed wholly thereunder."

The Ocean City Electric Company thereafter constructed, and has since maintained, its poles and wires in the public highways of Ocean City and has ever since furnished electric light, etc., to the Borough and its inhabitants.

The reading of the ordinance of 1892 shows that it did not purport to grant any consent to Ezra B. Lake and his associates, nor to create any contractual relation with them.

The ordinance did, however, purport to extend consent to erect poles and construct wires in the streets, alleys, avenue and lanes of the Borough, for the purpose of furnishing electric light, heat and power to the Borough and inhabitants thereof, to a company thereafter to be formed, and to enter into a contract with such then non-existent company for public lighting, extending over a period of ten years; and in its provision against changes in price over a period of fifteen years.

Consideration of the careful discussion of the question in the brief of the petitioner has not removed the doubt we suggested at the hearing as to the validity of the ordinance of 1892.

At the time of the adoption of the ordinance the statute entitled "A further supplement to an act entitled 'An act concerning corporations,' approved April 7th, 1875" (*P. L. 1884, p. 331*), provided that any company organized under the act of 1875 "for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric light, heat and power shall have full power to use the public roads or highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures

upon, first obtaining the consent in writing of the owners of the soil."

The statute contained the following proviso: "provided, however, no posts or poles shall be erected in any street of any *incorporated city or town* without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed and the manner of placing the same * * *." This statute vested in the Ocean City Electric Company power to erect its poles upon the highways of the Borough of Ocean City. The power so vested was not limited by any requirement that permission should be first obtained from the Borough, since the proviso of the statute extended only to *cities and towns.*

(*1899*) *East Orange* v. *Suburban Electric Light and Power Co., 59 N. J. E. 563.*

(*1901*) *Point Pleasant Electric Light Company* v. *Bayhead, 62 N. J. E. 296.*

It would seem, therefore, that the power to erect posts and poles upon the public highways of the Borough became vested in the Ocean City Electric Company, upon its incorporation, by the statute, wholly irrespective of the consent purporting to be given by the ordinance.

If we assume that the statute made consent by the Borough a prerequisite to the construction of poles, the fact remains that at the time of the passage of the ordinance the company was non-existent, and we incline to the view that an ordinance granting such consent to a non-existent corporation is void.

(*1898*) *Stevens et al.* v. *Borough of Merchantville et al., 62 N. J. L. 167.*

(*1898*) *Lake* v. *Ocean City, 62 N. J. L. 160.*

The ordinance, as before indicated, purported to create, or at least lay the basis through acceptance for a contract for public lighting extending over a period of ten years. At

the time of the passage of the ordinance there was in force "An act authorizing the lighting of public streets and places in the cities, towns, townships, boroughs and villages of the State." (*P. L. 1886, p. 389.*)

This statute authorized boroughs, from time to time, and by ordinance or resolution, to order and cause any public street, etc., to be lighted with gas or otherwise, and for that purpose to erect and maintain, etc., all necessary and proper posts, lanterns and fixtures, and to make and enter into any contract or contracts with any other party or parties in relation to the same.

In *Taylor* v. *Lambertville, 43 N. J. E. 107, 188,* this statute was, however, construed as limiting the contract entered into thereunder to the period of one year.

If, as we must assume, this construction of the statute is correct, the statute then would not suffice to authorize the contract attempted to be entered into which extended over a period of ten years.

Moreover, if the statute was broad enough to warrant the contract, the question before suggested would still remain as to the effect of the fact that the company was non-existent at the time of the passage of the ordinance. We, therefore, conclude that the ordinance of 1892 was ineffective, and it may be dismissed from further consideration except as it is referred to in the ordinance submitted for approval. The situation heretofore considered continued unchanged until 1897. On March 25th, 1897, the Borough of Ocean City became a city by the enactment of a statute entitled "An act to incorporate Ocean City as a city, and to fix the boundaries thereof." (*P. L. 1897, p. 107.*)

The statute of 1884 relating to electric light, heat and power companies had in the meantime been superseded by P. L. 1896, p. 322.

Under the statute the consent of the City of Ocean City to the erection of posts and poles by the Ocean City Electric Company in the public highways of the city was requisite. The poles upon the public highways at the time of the incorporation of the city were lawfully there by force of the authority conferred by the statute of 1884.

The poles erected upon the public highways, after the incorporation of the city and before the enactment of the confirmatory statute, (*P. L. 1898, p. 458*), were without lawful warrant unless that statute was retroactively effective to legalize the occupation of the public highway by them.

(*1909*) *Taylor* v. *Public Service Corporation of New Jersey, 75 N. J. E. 371.*

(*1909*) *Passaic* v. *Public Service Corporation of New Jersey, 75 N. J. E. 379.*

(*1912*) *Public Service Corporation* v. *Westfield, 80 N. J. E. 295.*

At all events the subsequent erection of poles, etc., by the company within the city without the consent of the city was without lawful warrant. (1912) *Public Service Corporation* v. *Westfield, 80, N. J. E. 295.* In the meantime "An act regulating the granting by municipalities of consent to the use of the streets, avenues, parks, parkways and other public places" (*P. L. 1906, p. 50*) (the Limited Franchise Act), has been enacted, and from time to time amended. That act provides that hereafter where by law the consent of any municipality is required, for the use of any street, avenue, park, parkway, highway or other public place, either above, below or on the surface thereof, such consent shall not be granted by such municipality except in accordance with the terms of the act.

In connection with the ordinance submitted for approval all of the requirements of this act have been met.

In the meantime, too, the statute creating this Board and rendering its approval of the privilege resulting from such municipal consent a prerequisite to its validity has been enacted. That the passage of an ordinance by the city of Ocean City granting its consent to the erection of poles, etc., in the public highways by the Ocean City Electric Company is now within the power of the municipality is unquestioned. That such consent is a prerequisite to the possession of such power by the company is our conclusion. The ordinance, however, makes in terms no grant of municipal consent except as it does so through ratification and confirmation of the rights, privileges and franchises "as granted by the ordinance" of 1892.

In view of the rule that a municipal corporation may ratify and confirm acts done without authority, when power has been conferred upon it by the Legislature to grant authority for the act ratified and confirmed, we conclude that the ordinance submitted for approval is operative in grant.

The ordinance embodying the terms of the ordinance of 1892 is not objectionable. It sets at rest all questions as to the lawfulness of the present occupancy of the public highways by the Ocean City Electric Company, an end desirable in itself. It authorizes the extension of such occupancy. It limits the term of the occupancy to fifty years. Under the ordinance of 1892, the rights, if any, of the lighting company were subject to forfeiture not only through a breach of its terms by the company, but also through breach of its terms by the street railway company to which a grant of consent was thereby attempted to be made.

That this condition of affairs is open to objection is obvious. It is remedied in the ordinance submitted by a provision that no breach of the ordinance of 1892 by one of

the companies shall work a forfeiture of rights, privileges or franchises of the other company.

A certificate of approval will therefore issue.

Dated September 2d, 1913.

No. 126.

CITY OF LONG BRANCH, TOWNSHIP OF EATONTOWN AND THE BOROUGH OF WEST LONG BRANCH

VS.

MONMOUTH COUNTY ELECTRIC COMPANY.

Distance alone is not the controlling factor in the establishment of fare zones. The fact that one zone is greater than another, or that they are equal in distance or that a greater rate of fare is charged in one than in the other, does not prove that the rate is necessarily unjustly discriminatory. Among the factors which must be considered in determining the reasonableness of a zone charge are the distance, number of stops, the density of population along the route, the passengers carried, the number of riders and the number of short trip riders, and the investment required to furnish the service. The power of a municipality to exact a condition limiting the rate of fare flows merely from the statutory necessity of the municipality to consent to the construction of the line.

It is unreasonable to suppose that the legislature in merely making the municipal consent or permission a condition precedent to the construction of the line intended to surrender its governmental power of fixing rates.

The ordinance of the municipality in so far as it fixes a rate of fare continues effective as between the municipality and the company until such time as the state sees fit to exercise its paramount authority and until such time only.

The Board finds that the company is not at the present time earning an unreasonable return on its investment.

William A. Stevens, for the City of Long Branch and the Borough of West Long Branch.

William L. Edwards, for the Township of Eatontown.

McDermott & Enright, for the Company.

A hearing was had upon the above complaint, at which all parties in interest were represented. The complaint is divided into two parts, namely: That safe, adequate and proper service is not furnished by the respondent company, and, secondly, that the rate of fare charged on certain portions of the line is excessive and unjustly discriminatory.

The complainants also contend that the rates of fare charged are contrary to and in excess of the rates allowed under the terms of the franchise under which the company is operating.

The answer of the company amounts to a general denial of all of the allegations set forth in the complaint.

SERVICE.

Upon the receipt of the complaint and before hearings were held, the Board deemed it wise to make an immediate inspection of the property. The result of this inspection showed the necessity for immediate attention by the company, to its equipment and roadbed. Upon the Board's suggestion, improvements were begun by the company and have continued up to the present time.

In this respect the company has shown a disposition to comply with the suggestions of the Board as to the betterment of its physical property. The constant supervision by the Board, through its inspectors, will not abate until it is satisfied that the company has attended to all things necessary, as it is legally required to do, to furnish safe, proper and adequate service, and hence no specific order or recom-

mendation will issue at this time respecting that part of the complaint.

RATES.

The complainants base their charge of discrimination in fares upon the fact that the company imposes a rate from Red Bank to Oceanic of five cents, from Eatontown to Red Bank a charge of one fare or five cents, from Eatontown to Long Branch a charge of two fares or ten cents, and alleges that the three zones are approximately equal in distance. It may be pertinent to state that the company in the operation of its system divided it into two divisions, with Red Bank as a common terminus of both divisions. The first division extends from the City of Long Branch through Eatontown to Red Bank. The second division extends from Red Bank through Fairhaven to Oceanic.

The Board has encountered more or less difficulty in its attempt to adjust rates of fare based upon the zone system, and in its memorandum of December 11th, 1911, "*In the matter of the application of the South Englewood Improvement Association* vs. *New Jersey and Hudson River Railroad and Ferry Company* and *Public Service Railway Company,*" No. 34, p. 221, Vol. I, it said: "While the immediate introduction of a radical departure from the present system is not before the Board, we incline to believe that eventually the entire zone system, together with the flat five cent fare, will have to be replaced by a more rational and equitable system of charges."

In the same memorandum the Board proceeded to point out what, in its opinion, would be a proper basis for trolley fares.

It must be obvious that distance alone is not the controlling factor in the establishment of fare zones. We need

only point to the condition in this and other states respecting this subject to show that there is no uniformity in the matter of length of zones, and the fact that one zone is greater than another, or that they are equal in distance, or that a greater rate of fare is charged in one than in the other, does not prove that the rate is necessarily unjustly discriminatory. It is generally true that within cities the rate per mile for trolley fares is much lower than in suburban or interurban territory. In some cities in this state the rate of five cents entitles the rider in some instances to a ride of fifteen miles, while, on the other hand, an ordinary fare for interurban lines is not far from one and three-fourths cents per mile.

Among the factors which must be considered in determining the reasonableness of a zone charge are the distance, number of stops, the density of population along the route, the passengers carried, the number of riders and the number of short trip riders, and the investment required to furnish the service.

It appeared from the testimony that the investment of the company in the Long Branch division was much greater than in the other division, owing to the necessity of the construction of an expensive trestle and because of the purchase of a private right of way through the heart of the city, due to the refusal on the part of Long Branch to grant access to the company to its public streets.

Comparing the traffic conditions of the two divisions we find that Long Branch is essentially a summer resort, which means that it affords to this division much less traffic in the winter than in the summer months, while Red Bank and the other towns along the second division are what are known as all year round communities. The truth of this is demonstrated in the following figures:

In the year nineteen hundred and thirteen during the month of January the fares received between Eatontown and Second Avenue, Long Branch, aggregated		$43,274.00
While in July of the year previous in the same zone the fares aggregated		88,893.00
Comparing the two a falling off of 51% in the winter season will be noted. In the year 1913 during the month of January the fares aggregated in the zone between Red Bank and Eatontown		39,559.00
While in the month of July previous the fares aggregated		62,737.00
Showing a falling off of only 37%.		

PHYSICAL VALUATION.

As the complainants contended that the present capitalization of the company was no indication of the real value of the property, and as the Board deemed it necessary to a proper determination of the question submitted regarding rates, it caused an appraisal of the value of the physical property of the company to be made. The result of this appraisal was as follows:

Cost to reproduce new line from Long Branch to Red Bank	$466,000.00	
Cost to reproduce new line from Red Bank to Oceanic	200,000.00	
Total		$666,000.00

REVENUES AND EXPENSES.

The annual report for the year of 1912 gives a gross revenue of	$101,377.70	
Surplus from 1911	5,839.71	
Total		$107,217.41
Operating expenses	75,682.40	
Taxes	7,537.09	
Interest on bonds	20,000.00	
Interest on debt	3,540.87	
Total		$106,760.36
Surplus December 31st, 1913,		457.05

It will be noted from the above that as a surplus of	5,839.71
Was carried over from the year 1911, there was therefore an actual deficit in the year 1912 of	5,382.66
Take the income for 1912 and deducting operating expenses and taxes amounting to	83,219.49
We find the amount available for payment of interest and dividends to be	18,158.21
Which represents approximately 2.7 per cent upon the above appraised, namely	666,000.00

The above figures are proof that the company is not at the present time earning an unreasonable return upon its investment.

FRANCHISES.

There remains to be discussed the legal right of the company to collect the fares which it now charges. The point in dispute relates to the right of the company to collect more than one fare from Eatontown to Second Avenue, Long Branch, which is the terminus of the road in Long Branch. The charges now made by the company are as follows:

"Eatontown, La Fretra's Brook to Branchport Avenue, Long Branch... 5c
Turtle Mill to Second Avenue, Long Branch, ... 5c"

It is contended by the petitioners that the company has no right to charge two fares. This is based upon the conditions in the ordinance of Eatontown Township, under which the road was constructed. This ordinance was passed May 10th, 1897, and with reference to fares, section 16, reads as follows:

"That the rate of fare for the carrying of passengers between Eatontown and Red Bank, or between Eatontown and Long Branch, shall not exceed five cents for one adult person. All children under the age of five years accompanied by parents or guardians shall ride free of charge."

It is the contention of the company that the meaning of the clause just quoted is that the company has the right to charge the five cent fare from Eatontown to the boundary line between Eatontown Township and the city of Long Branch. It is claimed by the company that this portion of the line was constructed before the extension down into the city. It is further contended that the township of Eatontown, in passing the ordinance above referred to, could have referred to nothing else than the fare to be charged within the township, as the fare to be charged within the City of Long Branch, it is alleged by the company, would be entirely beyond the control or jurisdiction of the township of Eatontown.

Because of the conclusion we have reached as to our jurisdiction, which we hereinafter state, we are not obliged, in order to reach a determination in these proceedings, to construe this provision of the ordinance.

It is undisputed that the consent and permission of the municipality is by the statute made a prerequisite to authority in the company to construct its line within the limits of the municipality. That the municipality may, under the statute, refuse its consent and permission is also undisputed. That the municipality may, in granting its consent and permission, exact such conditions as it sees fit, provided that they are not unlawful in themselves, and are reasonably protective of the public interest and are germane to the subject, is settled.

(1869) *Jersey City and Bergen R. Co.* v. *Jersey City and Hoboken Horse R. Co., 20, N. J. E. 61.*

(1870) *Jersey City & Hoboken Horse R. Co.* v. *Jersey City & Bergen R. Co., 21 N. J. E. 550.*

(1884) *Davis* v. *Town of Harrison, 46 N. J. L. 79.*

(1893) *Humphreys* v. *Bayonne, 55 N. J. L. 241.*

(1898) *Lake* v. *Ocean City, 62 N. J. L. 160.*

(1906) *Rutherford* v. *Hudson River Traction Co., 73 N. J. L. 227.*

(1907) *Asbury Park & S. G. Railway Co.* v. *Neptune Township, 73 N. J. E. 323.*

That such a condition may limit the rate of fare seems likewise determined.

(1905) *The Long Branch Commission* v. *Tintern Manor Water Co., 70 N. J. E. 71.*

The power of the municipality to exact such a condition limiting the rate of fare flows, however, merely from the statutory necessity of the municipality to consent to the construction of the line.

The power does not find its source in any statute authorizing the municipality to enter into contract fixing the rate of fare.

It is unreasonable to suppose that the legislature in merely making the municipal consent or permission a condition precedent to the construction of the line intended to surrender its governmental power of fixing rates.

If, therefore, we regard the ordinance granting consent and permission as a contract, it is a contract the provision of which as to the rate of fare lacks specific legislative authority. That provision, therefore, cannot affect the exercise later by the legislature of the legislative power to fix the fare.

In this view, the ordinance, in so far as it fixes a rate of fare, continues effective as between the municipality and the company until such time as the state sees fit to exercise its paramount authority and until such time only.

The mere enactment of the Public Utility Act of 1911 re-declaring the common law rule confining the rates of public utilities to the standard of "justice and reasonableness" was not such an exercise of the State's paramount

authority and did not take from this provision of the ordinance its binding force and effect.

That act, however, created this Board with the power and the duty to fix just and reasonable rates whenever it determined an existing rate to be unjust and unreasonable. For the reasons stated, we cannot find the existing rate of fare to be unjust and unreasonable. If we conclude that the ordinance imposed the obligation to exact a lesser rate of fare, we should, nevertheless, on our view fix the existing rate of fare as the just and reasonable fare. Such action on our part under the statute would operate to displace and render ineffective the present ordinance provision.

Any other conclusion as to the force of similar ordinance provisions would permit them to stand in the way of the State's power. If the ordinance provision is construed to operate to prevent the fixing as just and reasonable by this Board of a rate of fare, in a given case, in excess of that fixed by the ordinance provision, it would, in another case, preclude this Board from fixing as just and reasonable a rate of fare less than that fixed by the ordinance provision.

Such a construction in view of the many ordinances granted before the creation of this Board, which contain similar provisions would be disastrous to the effective exercise of the power to fix just and reasonable rates. We decline, therefore, to disturb the existing rate.

(1911) *City of Manitowoc* v. *Manitowoc & Northern Traction Company.* (*Wis.*) *129, N. W. 925.*

The prayer will, therefore, be denied and the petition dismissed. An order will be so entered.

Dated September 2nd, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the

parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

It is ordered that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated September 2nd, 1913.

No. 127.

BOROUGH OF BUTLER

VS.

BUTLER WATER COMPANY.

The provisions of the ordinance of the Borough of Butler cannot stand in the way of the exercise by this Board of its power to fix just and reasonable rates; to set standards of adequate and proper service, and to establish just and reasonable practices, rules and regulations. In so far as the action of this Board in the exercise of these powers contravenes the terms of the ordinance, the ordinance provisions must give way.

The municipality in imposing the terms contained in the ordinance simply acted as an agency of the state. The legislature might directly abrogate, modify or alter, so far as the municipality is concerned, the terms imposed by the municipality. While the legislature has not done this directly, yet it has by the creation of this Board with powers stated, constituted a body whose orders, in fixing just and reasonable rates, setting standards of adequate and proper service, and establishing just and reasonable practices, rules and regulations, may indirectly have that result.

The Board finds that the Butler Water Company fails to maintain its property and equipment in such condition as to enable it to furnish safe, adequate and proper service. The company is ordered to increase its water supply and storage capacity, to lay and construct lines and mains, to install meters, to make certain changes in its rules, and to put in effect a schedule of rates fixed by the Board as just and reasonable.

Paul Witteck, Mayor, and *William L. McCue,* Borough Counsel, for the Borough of Butler.

Roland S. Palmer, for the Butler Water Company.

This matter comes before the Board in the form of a complaint filed by the Mayor and Council of the Borough of Butler, making certain allegations concerning the rates, rules and regulations, practices and adequacy of service of the Butler Water Company.

A copy of the complaint was served upon the Butler Water Company and answer received thereto. Owing to the fact that the application of the Borough of Butler requested a suspension of the rates, the matter was set at an early date, namely, December 30th, 1912. Upon that date, it was the opinion of the Commission that the application for suspension of rates should be denied, excepting in the matter of the rate for sprinkling, and a stipulation was entered into between the company and the complainants, by which the company in sending out January bills would omit all references to the charge for sprinkling, and would stamp on the bills the following:

"At the suggestion of the Public Utility Commission, we have omitted the sprinkling charge for this quarter. After final hearing, it will be billed in accordance with the finding of the Public Utility Commission."

It was further agreed that in the meantime no one would be denied service.

At this hearing, it developed that the Counsel for the Borough wished to file an amendment to the original petition. The amended petition was received on January 3d, 1913, and served upon the company, the answer being filed with the Board on January 17th, 1913. A second amended complaint was filed under date of February 10th, and the

hearing was set for February 15th. A further hearing was also held on February 21st.

Conference was also held on June 4th, 1913, by representatives of the Board and the various parties interested. This conference was held in Butler, at which time a general inspection was made of the territory, and of the conditions referred to in the testimony taken at the hearings.

On March 28th, 1913, a letter was received from the Borough Counsel, referring to a service furnished to the American Hard Rubber Company and the Pequannock Rubber Company. This letter, together with the accompanying correspondence and further correspondence from the Butler Water Company under date of April 7th, added information to that already submitted.

During the month of May, a complete inventory and appraisal of the property of the Company was prepared by the engineers of the Commission. This inventory was based upon a map which had just been prepared by the engineers of the water company.

The Butler Water Company was incorporated January 3d, 1905, the purpose of the company being to supply the Boroughs of Butler and Bloomingdale with water. The larger portion of the plant as it now exists was constructed within a short time after the company commenced business. Owing to the manner in which the records of the company were kept, it is impossible to get any exact figures regarding the cost of the property of the company or regarding the earnings and expenses of the company up to the beginning of 1911. For the year 1911 the report submitted by the company is incomplete. An explanation is contained in the report to the effect that the incompleteness is due to the lax methods of bookkeeping previously in use by the company.

Service was furnished in accordance with flat rates, that is, rates based on the number of fixtures in the various premises, and from the testimony it would appear that no very careful record was kept by the company as to the actual number of fixtures in the various premises. The testimony further developed that there were certain persons receiving water who had been connected up by the Superintendent, but whose names had never been taken up on the books of account of the company.

The complaint of the Borough alleges:

(1) Exorbitant and excessive prices;

(2) Excessive charges, particularly with reference to sprinkling service;

(3) Unreasonable charges for the tapping of mains;

(4) Inadequate distribution system because of the sizes of the pipes and because of the location of mains too near the surface of the ground, the resultant pressures in certain portions of the Borough being insufficient for satisfactory service;

(5) The petitioners also allege that the rules and regulations of the company with reference to the method of installing service pipes are improper;

(6) That the Butler Water Company did not have any right, under the ordinance under which it is operating, either to compel consumers to install meters, or to install the same itself and to charge for the water in accordance with meter measurements;

(7) The Borough also alleges that the water-supply itself is inadequate for a community such as this company is serving.

The Butler Water Company, in its answer January 17th, 1913, denies that it is charging, or was proposing to charge, "exorbitant and excessive prices."

The company affirmatively alleges that the flat rates charged are in accordance with the terms of the ordinance under which the company is operating, and further alleges that the "rates referred to are extremely low in view of the service rendered and the burden of taxation placed upon this company by the said borough of Butler."

It also affirmatively alleges that it has not increased rates except in so far as necessary to establish reasonable rates for service for which rates had not heretofore been established.

It also alleges that meter charges heretofore established had been reduced by establishing a diminishing rate, based upon the number of gallons used, which would operate to reduce the meter rates heretofore charged by it, "and further that the alleged change in sprinkling rates is not in truth a change in rates, but the establishment of just and reasonable rules regulating the use of such service, with a view to correcting abuses and equalizing rates charged to consumers of property of different character and extent, and further with a view to equalizing the distribution of water to the various classes of consumers," etc.

The Butler Water Company admitted the allegation referring to the charge for tapping the main line, and contended that the fee charged by it for tapping the main is reasonable, and that any and all conditions imposed by it upon those desiring to become consumers are reasonable and just, and that its practice generally conforms to the practice of other water companies.

The Butler Water Company denies that its storage of water and the pipe system are inadequate and not properly equipped for service, and denies that its pipes are too near the surface of the ground.

The Butler Water Company claims that with the correction of certain abuses by the enforcement of the proposed

rules and rates (attacked by the petitioners) the capacity of its reservoir and pipe lines would be adequate to supply a much larger population than that now supplied, and contends that no fire hydrants had ever been disabled by frost when actually required for the extinguishment of fire.

The Butler Water Company denies the allegations of the complainant to the effect that the water company "is attempting to compel the inhabitants and consumers to install meters or install them itself, and to use the water on a meter basis, except in so far as certain provisions of its rules and regulations heretofore filed with this Board relate to the use of meters"; * * * "and the water company alleges that the use of meters for the purpose of determining the prices to be charged for water furnished by it is not prohibited by said ordinance empowering this company to be in business; that the use of such meters has been acquiesced in since the incorporation of this company; that such meters are in almost all, if not all, instances requested by the consumers; that this company believes it has the right to enter into any contract with its consumers which is reasonable and not discriminatory, and that this company believes the use of such meters upon the service wherein it desires to use them, as more particularly set forth in said rules, will be for the best interests both of the company and of its public and private consumers."

A. W. Cuddeback, hydraulic engineer, appeared as an expert on behalf of the Borough of Butler. His testimony was to the effect that the sources of water supply now available to the Butler Water Company are inadequate. He based this opinion upon his knowledge of the available sources of water in the northern portions of this State, and his testimony is replete with comparisons between the available run-off of the various watersheds in northern New Jersey. Mr. Cuddeback further made reference to the

information found in Volume 3 of the Publications of the Geological Survey of New Jersey.

Mr. Cuddeback also expressed the opinion that, due to the small drainage area from which the water supply for Butler is taken, the reservoir capacity would have to be of larger proportions than where the areas are much greater.

Mr. Cuddeback's general opinion is that the storage capacity of the Butler Water Company is approximately one-half as great as it should be in order to forestall the danger of insufficient supply in times of extreme drought.

With further reference to the capacity of the reservoir, Mr. Owen testified (see p. 112, Testimony, Feb. 21st, 1913):

> "Question (by Mr. McCue): Do you know what saved the reservoir from going dry last August?"
>
> "Answer: The opening of the Kinney dam to make repairs. We have been cognizant of this fact —as a result of putting in the water in the reservoir from Mr. Kinney's dam last winter. It is an old leak; it has been our life saver for a good many years. They repaired it last June, which eliminates all the leak.
>
> "Mr. Foster's 400,000 gals. a day, about 200,000 gals. of that has been the leak from Mr. Kinney's dam."

With reference to the adequacy of the distribution system, Mr. Cuddeback testified that in his opinion the piping system was such that the main business portion of the town has fair fire protection.

> "There are, however, certain sections, for instance, the residential sections on Boonton and Bartholdi

avenues that have insufficient fire protection, and the section in which the paper mill and the excelsior mill are located has practically no fire protection whatever."

With further reference to the adequacy of the system for fire protection purposes, a series of tests was made by an inspector of the Commission, in company with the officials of the Borough and of the water company, a report having been submitted to the Board under date of May 8th, 1913. The results of the tests confirmed the statements made by Mr. Cuddeback, to the effect that adequate pressures are now available in the main business portion of the Borough, but that pressures upon the hillside, that is, on Boonton and Bartholdi avenues, are insufficient to afford proper fire protection.

Based on this testimony, the tests which have been made by inspectors of the Board, and the inspection which was made of the entire territory by representatives of the Commission on June 4th, it is the opinion of the Board that steps will have to be taken in the near future to increase the water supply and the storage capacity, and to remodel or extend the distribution system, so as to provide sufficient pressures where the pressure is not now sufficient to furnish adequate fire protection.

With reference to the rules and regulations of the company, complainants allege that it is improper to compel the consumer to pay the cost of tapping the mains and to pay also the cost of installing the service pipe.

It is true that in connection with most small water companies a charge is made for tapping the mains. It is also true that a service pipe is usually paid for in small towns and villages by the consumer. It should be noted that if the consumer pays for these items, the company is not com-

pelled to do so, and its investment is less. On the other hand, if the consumer does not pay for these items, the company's investment is greater and the base upon which a system of rates must be predicated is higher. In the last analysis, it will not result in any great difference to the consumer. At the present time the Board is not prepared to declare unreasonable the company's present practice with regard to the manner in which the service connections are paid for.

With regard to the type of connection which the company insists shall be made when tapping the main, the Board is of the opinion that this type of connection is unnecessarily expensive and might easily result in clogged service pipes, and believes that some simpler method of connecting the service pipes to the main should be adopted.

With regard to the installation of check valves on service pipes, a rule of the company provides that these must be installed, and the complainants allege that they are not necessary. Mr. Cuddeback testified that in his experience, and in his personal practice, in which he has charge of over 30,000 such services, they are not required, and that where check valves are used certain other means of relief for the pressure due to heating water in house boilers must be provided; that the object of installing the check valve is to prevent hot water from backing out from a consumer's premises through the meter and damaging the meter. Mr. Cuddeback testified that in all his experience he has not known of damage being caused to meters in the way referred to; and the Board is of opinion that the requirement by the water company of a check valve located upon the consumer's premises, so arranged as to prevent the water from backing out into the mains, is unnecessary and unreasonable.

With reference to the charge for sprinkling which was the original cause of the complaint against the company, the following is the statement of fact.

In the ordinance of the Borough of Butler, under which the company is operated, Section 5 reads as follows:

> "That the annual rates to be charged consumers for domestic service shall not exceed $8 for the first faucet, $2 for the second faucet, and 50c. each for additional faucets; $4 for bath tubs, $4 for water closet, $5 for the use of hose, and $5 for the use at private barn, payable quarterly in advance, and according to the rules and regulations published by the company."
>
> From the statement above, it is clearly seen that the charge "for the use of hose" is not to exceed $5, "payable quarterly in advance, and according to the rules and regulations published by the company."

The rules and regulations published by the company are found on the reverse side of the form of bill which was in use by the company under the old management. Rule 8 reads as follows:

> "The regular water rents for the use of hose for lawn or garden sprinkling and dust laying, viz., $5 per annum shall be based on the moderate use of the same for such purposes and the extent of such use must not exceed one hour in any one day, which said use shall be between the hours of 5 and 7 in the forenoon or 5 and 8 in the afternoon. The company reserves the right in the case of low water to still further restrict the use of hose or prohibit its use entirely. No greater use of hose for such purposes

> will be allowed except in cases and rates especially agreed upon by the parties interested and the company. No continuous flow to guard against frost or for any other purpose will be allowed unless by special permit under special contract."

The Board is of the opinion that in so far as the matter is covered by the old form of the rule, it is reasonable. In the rules and regulations filed by the company with the Board under date of December 28th, 1912, Rule 27 reads as follows:

> "All hand hose must be used with a nozzle, the internal diameter of which shall not exceed ¼ of an inch and the use of the hose for street and lawn sprinkling must not exceed one hour in any one day, to be used 6 months from May 1st to Nov. 1st, which said use shall be between the hours of 5 and 7 in the forenoon and 5 and 8 in the afternoon. No fixed or portable fountain or jet or lawn sprinkler will be allowed under any circumstances, except where the water first passes through a meter."

The Board is of opinion that in so far as the wording of Rule 27 is concerned, it is reasonable. The contention of the complainants, however, is that in the enforcement of the regulation regarding sprinkling, the company has further interpreted its rules and regulations, regarding the use of hose, to the use in connection with a plot of ground having a frontage of 25 feet and a depth of 100 feet, and that where a lot contained, for instance, a frontage of 100 feet and a depth of 200 feet, a separate charge of $5 would be made for each area of 25 by 100 feet.

In the opinion of the Board such a method of determining the charge for hose service is unreasonable and improper. The Board believes that a reasonable provision would be to restrict the use of a single hose for sprinkling purposes to a plot having a frontage of 50 feet and having a depth not exceeding 200 feet. Where a much larger area requires sprinkling, or where water is required for irrigation purposes, the Board deems it reasonable for the company to require the installation of a meter.

With reference to the use of meters by this company, the attitude of the Board has always been favorable toward the installation of meters for the purpose of measuring the supply of water delivered to consumers. The Board stated *"In the matter of the complaint of Jacob DeLazier* vs. *the Passaic Water Company," March 28th, 1913* (No. 92, p. 639, Vol. I):

> "In a water system where the water is supplied by gravity, and the supply is far in excess of the maximum demand, there is some excuse, from an economic standpoint, for saving the expense of meter installation, but even in this character of system, water consumed for special or business purposes should be metered to prevent discrimination. * * *
>
> "We are convinced that the large consumption of water, as shown by the statistics of American cities, is largely the result of waste of water by the consumers who are upon the flat rate basis. It is an economic waste to spend money for the extension of a plant, when the use of meters would prevent such waste and conserve the energy of the system."

The complainants allege that the Butler Water Company has no legal right to install or use meters in connection with the charges for its service.

This contention is based upon the terms of ordinance No. 15, dated January 3d, 1905, under which the company is operating. We are not put to the necessity of determining the soundness of this contention. In our judgment, the provisions of this ordinance cannot stand in the way of the exercise by this Board of its power to fix just and reasonable rates; to set standards of adequate and proper service, and to establish just and reasonable practices, rules and regulations.

In so far as the action of this Board in the exercise of these powers contravenes the terms of the ordinance, the ordinance provisions must give way.

The municipality in imposing the terms contained in the ordinance simply acted as an agency of the State. The Legislature might directly abrogate, modify or alter, so far as the municipality is concerned, the terms imposed by the municipality. While the Legislature has not done this directly, yet it has by the creation of this Board with the powers stated constituted a body whose orders in fixing just and reasonable rates, setting standards of adequate and proper service and establishing just and reasonable practices, rules and regulations, may indirectly have that result.

The Board is, therefore, of opinion that when ordered to do so by the Commission, the Butler Water Company may install meters and substitute a schedule of meter rates for other schedules, by which its charges are computed.

Analysis of all of the testimony and the facts in this case indicates that the greatest care must be observed by this company, and by its consumers, in conserving the water supply. This alone justifies such steps as will result in conserving the water supply, if such can be done without placing undue hardship upon the consumers. The Board is, therefore, of opinion that meters should be installed in

connection with the service of water to all hotels, boarding houses, industrial establishments, livery stables, saloons, garages, and in all cases other than supply of water to private families for domestic use.

In the opinion of the Board all new applicants for service should be served through meters from the outset, and all present consumers should be given the option of taking service through a meter.

There remains to be discussed the rate schedule to be applied in connection with the service of water through meters. The company has submitted a schedule which is as follows:

$3.00 per thousand cubic feet for the first 5,000 cubic feet per quarter;

$2.00 per thousand cubic feet for the second 5,000 cubic feet per quarter.

$1.30 per thousand cubic feet for 10,000 cubic feet per quarter;

$1.15 per thousand cubic feet for 20,000 cubic feet per quarter;

$1.00 per thousand cubic feet for water in excess of 30,000 cubic feet per quarter.

Analysis of the list of consumers supplied by the Butler Water Company indicates that there are comparatively few who will be affected by the sliding scale of charge. There are two consumers, the Pequannock Rubber Company and the American Hard Rubber Company, whose consumption is very large, and whose bills will be very materially increased in accordance with the new schedule proposed.

These two consumers have in the past rendered special service to the town and to the water company by supplying water under heavy pressure from their own private fire protection systems, and because of this fact the flat rates

paid by the two consumers referred to have been lower than they otherwise would have been.

The facts regarding the consumption of these consumers have been canvassed by representatives of the Board, and the opinion has been reached that the schedule of the company ought to be modified by providing still lower steps beyond those now included in the schedule.

The last step of the present schedule provides for a charge of one dollar per thousand cubic feet for water in excess of 30,000 cubic feet per quarter. The suggestions for change will provide for still lower rates for water consumed in very much larger quantities. The first step of the company's schedule provides for a charge of three dollars per thousand cubic feet for the first 5,000 cubic feet per quarter.

With reference to this, an examination has been made of schedules of rates, beginning with the still authoritative list found in the Manual of American Water Works for 1897, and also including current rates reported to this Board. The following table gives the maximum and minimum rates per thousand gallons in a number of cities supplied by gravity systems, as taken from the report named above.

SCHEDULE OF METER RATES IN CITIES SUPPLIED BY GRAVITY SYSTEMS.

	Per Thousand Gallons.	
Name of City.	Maximum Rate.	Minimum Rate.
Bridgeport, Conn.,	$0.20	$0.04
Bristol, Conn.,	.30	.05
Butte, Mont.,	.50	.20
Connellsville, Pa.,	.27	.04
Greensville, S. C.,	.40	.10
Greenwich, Conn.,	.29	.16
Hagerstown, Md.,	.30	.05

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Helena, Mont.,	.40	.20
Johnstown, Pa.,	.40	.05
Little Falls, N. J.,	.40	.05
Monessen, Pa.,	.30	.08
Morgantown, W. Va.,	.30	.10
Norwich, N. Y.,	.15	.10
Ogden, Utah,	.20	.06
Portland, Me.,	.26	.09
San Francisco, Cal.,	.33	.16
Sante Fe, N. M.,	.30	.10
Scranton, Pa.,	.20	.06
South Bridge, Mass.,	.30	.15
Williamsport, Pa.,	.10	.05

NOTE.—The average highest rate is 30.7c, and the average lowest rate is 11.8c.

While the rates in this list run as high as 50c., and there are several at 40c., it should be noted that the average of the maximum rates is 30.7c. per thousand gallons, which corresponds approximately to a rate of $2.25 per thousand cubic feet. By comparison with rates charged in other places where the population is fairly constant throughout the whole year, the Board is of the opinion that the maximum rate, viz., $3 per thousand cubic feet, is higher than necessary, and believes that a rate of $2.62½ per thousand cubic feet is as high, from a comparative standpoint, as the base rate should be.

The Board, therefore, believes that the rate schedule should be as follows, based on bills rendered quarterly:

$2.62½ per thousand cubic feet for the first 5,000 cu. ft. consumed in the quarter;

$2.00 per thousand cubic feet for the second 5,000 cu. ft. per quarter;

$1.30 per thousand cubic feet for the water in excess of 10,000 cu. ft., and less than 20,000 cu. ft. per quarter;

$1.15 per thousand cubic feet for water in excess of 20,000 cu. ft., and less than 30,000 cu. ft. per quarter.

$1.00 per thousand cubic feet for the water in excess of 30,000 cu. ft., and less than 100,000 cu. ft. per quarter;

$0.75 per thousand cubic feet for the excess over 100,000 cu. ft. per quarter, and less than 200,000 cu. ft.;

$0.37½ per thousand cubic feet for all water in excess of 200,000 cubic feet per quarter.

In considering the justification for a schedule descending as rapidly as this, it must be noted that no pumping or filtering is required, the water coming to the town by gravity. Under such circumstances, it is found that the difference between the rates charged for small quantities and those charged for large quantities is greater than in cases where all of the water has to be pumped and filtered. In such a case, the rates charged for large quantities of water must be higher than in the case of gravity plants.

It will be noted from the table of rates applicable in gravity plants in various cities that the rates named in the proposed schedule conform fairly closely to the maximum and minimum rates given in the table of water rates in various cities, and upon the basis of comparison the schedule which we have proposed appears to be reasonable. It differs from the schedule submitted by the company in two particulars, namely, the reduction in the base rate from $3.00 to $2.62½ per thousand cubic feet for the first 5,000 cubic feet, and extends the schedule by the addition of two steps in the rate, namely, the 75c. and 37½c. steps.

With reference to the reasonableness of the rates charged by the company, it should be noted that the company is entitled to a fair return upon the value of that which it devotes to the public use. On the other hand, what the customer is entitled to is service at rates which are in themselves fair. In accordance with our first statement, we must have a knowledge of the valuation of the property and of the revenues and expenses of the company. With reference to

the valuation of the property, we have a statement by Mr. Cuddeback that the plant is probably worth about $50,000. We have a report of the company for the year 1911, in which the book value of the plant and system is given at $56,800. We have a valuation made by the engineers of the Board, which indicates that the cost to reproduce the property new is not far from $51,465.

Owing to the fact that the company's records have been kept in such a very poor way, it is impossible to ascertain just what the plant has cost the company. It was almost entirely owned by a single individual, and no proper books of account were kept. The earnings of the company were invested in extensions to the plant. The company has outstanding capital stock in the par value of $20,000. There are no bonds outstanding.

For the purposes of this discussion only, we can assume that the property is worth approximately $50,000. As no careful record was kept of the expenditures, it is impossible to analyze them and determine just which expenditures were for operation and which were for extensions to the plant and system. The annual report for 1911, which is the only annual report which has been submitted to the Board, gives as the gross revenue for the year 1911 $5,361.07. The total revenue deduction is given at $4,712.97, this including an allowance of $600 for depreciation. It does not include any allowance for interest or dividends, no dividends ever having been paid by this company. The net operating revenue for the year 1911 is reported as $648.10, and at 5% this would pay the interest on less than $13,000 of invested capital. After making all possible allowances for inadequacy in the records, it is readily seen that the company has not earned anything like a proper return upon the investment which has been made.

Owing to the fact that no detailed information was available with regard to the operating expenses of this company, Mr. W. C. Foster, for the company, submitted an estimate of the operating expenses which should be fair under proper management for a company of this size. His estimate is given on page 36 of the Testimony of February 21st, and is to the effect that ordinary operating expenses would amount to $2,570 per annum. His impression was that the taxes amounted to $752. The annual report for 1911 shows that the company paid for that year for taxes $778.90. Some criticism was made of the estimate of operating expenses, but, on the whole, the Board is of opinion that Mr. Foster's estimates, except for depreciation, appear to be reasonable. It should be noted that they are very much lower than the amounts stated in the report for the year 1911, and would be still further decreased by a smaller allowance for depreciation.

Mr. Foster's estimates of the financial condition of the company would be somewhat as follows:

Gross revenues,		$7,000.00
(NOTE.—The excess of this over the amount received by the company in 1911 is largely due to the fact that it is found that many people have been receiving water whose names were not found upon the books of the company, and who were never rendered bills for service.)		
Operating expenses,	$2,570.00	
Taxes,	800.00	
3% on the entire property,	1,500.00	
Total revenue deductions,		4,870.00
Net income,		$2,130.00

This assumed net income would be sufficient to pay a return of 5% on a valuation of $40,000, and on the basis of Mr. Foster's calculations, an adequate return would not be

obtained. Should we substitute 1½% on $50,000 for annual depreciation, the net revenue would become $2,880, or a trifle under 6 per cent. upon the $50,000 base representing the company's property at present. Inasmuch, however, as the company will be required by order to make additional capital investment, it seems likely that the return upon the eventual total investment will not be excessive and may even prove inadequate.

We do not wish to be understood as placing any exact value upon the property of the Butler Water Company. The figures given above are sufficient to show that the rates do not afford more than a fair return upon the present fair valuation.

The rates must, therefore, be tested by comparison with rates charged for similar service under similar circumstances, and we have already stated that in our opinion the suggested schedule is fair and reasonable.

The valuation given above is an estimate of the reproduction value new of the plant which is in existence today. The testimony in this case and the subsequent investigations made by representatives of the Board indicate that the Butler Water Company is not in possession of sufficient property of certain kinds to enable it to furnish, safe, proper and adequate service, and any system of rates which would be designed to produce for a company a fair return must be predicated upon the value of a plant which is capable of furnishing safe, proper and adequate service.

With regard to the small reservoir capacity and the insufficient pressure obtained at certain points in the distribution system, additional reservoir capacity must be obtained, and extensions to the distribution system must be made in order to provide sufficient pressure for adequate fire protection.

Summing up the matters which have been discussed, the Board finds and determines:

1. That the Butler Water Company fails to furnish safe, proper and adequate service; fails to maintain its property and equipment in such a condition as to enable it to do so; and, in order to furnish such service, must proceed at once to obtain an increased water supply and storage capacity, which shall be approximately double the present supply and storage capacity; and an order will enter requiring the company so to do.

2. The Board finds and determines that the pressure available on the southern extremities of Boonton and Bartholdi avenues is inadequate, and an order will issue to make certain extensions and additions to its distribution system, such as will provide sufficient pressure to insure adequate fire protection. For the present, the Board will order the following additions to be made, within four months from date:

(a) An 8"-line in Mabie Lane from Boonton avenue to Bartholdi avenue, connecting to the mains in each of these two avenues. When these connections are made, the specials installed at the connections should provide for 8"-connections in Bartholdi and Boonton avenues.

(b) A 6"-line in Hasbrouck avenue from Boonton avenue to Bartholdi avenue, connecting to the mains in each of these two avenues. When these connections are made, the specials installed at the connections should provide for 8"-connections in Boonton and Bartholdi avenues.

(c) An 8" main in Western avenue, commencing at Kiel avenue, the same to extend as far as the Valley road and through Valley road to the last hydrant, approximately 300 feet east of Centre street, connecting at that point to the 4"-line which comes up the Valley road from Boonton avenue.

The connections referred to as "a," "b" and "c" appear to be the smallest amount of work which should be done by the company in an attempt to furnish sufficient pressure toward the southern portion of Boonton and Bartholdi avenues.

If the construction of the mains referred to does not result in sufficient improvements in the pressure available, the Board will take the matter up further for consideration, but will wait until after these connections are made before determining whether any additional pipe shall be laid.

3. The Board further finds and determines, and an order to this effect will enter, that the Butler Water Company should install meters in connection with the service of water to all hotels, boarding houses, industrial establishments, livery stables, saloons, garages, and in all cases other than the supply of water to private families for domestic use. All new applicants for service shall be served through meters, and all present consumers shall be given the option of taking water through meters.

4. The Board finds and determines that the rules of the company regarding the charge for tapping and the requirement that the consumer pay for the installation of his own service are reasonable, and the complaints with regard to these matters are dismissed.

5. The Board further determines that the regulation requiring a consumer to install a check valve where the water enters his premises is unjust and unreasonable, and an order will enter requiring the company to desist from the enforcement of this rule.

6. With reference to the rules and regulations for sprinkling, the Board finds and determines that where water is supplied at flat rates and a hose is used for sprinkling purposes, the rules and regulations of the company, as stated

in Rule 27, are reasonable, and to this extent the complaint is dismissed.

The Board further finds and determines that the charge for hose service of five dollars for each lot 25 x 100 feet is unreasonable, inasmuch as the ordinary lot in such communities exceeds this in size, and determines that the charge of $5 per annum for hose use shall apply to any lot 50 x 200 feet or less; and where water is required for larger areas or for irrigation purposes, the company shall install a meter and charge for the water consumed in accordance with the meter rates.

7. The Board further finds and determines that the schedule which the company should put into effect is as follows:

$2.62½ per thousand cubic feet for the first 5,000 cu. ft. consumed in the quarter;

$2.00 per thousand cubic feet for the second 5,000 cu. ft. per quarter;

$1.30 per thousand cubic feet for the water in excess of 10,000 cu. ft. and less than 20,000 cu. ft. per quarter;

$1.15 per thousand cubic feet for water in excess of 20,000 cu. ft. and less than 30,000 cu. ft. per quarter;

$1.00 per thousand cubic feet for the water in excess of 30,000 cu. ft. and less than 100,000 cu. ft. per quarter;

$0.75 per thousand cubic feet for the excess over 100,000 cubic feet per quarter, and less than 200,000 cu. ft.;

$0.37½ per thousand cubic feet for all water in excess of 200,000 cu. ft. per quarter.

Bills to be rendered quarterly.

The schedule of minimum charges to be as follows:

½" meter,	$2.00	per quarter
¾" "	3.00	" "
1" "	4.00	" "
1½" "	5.00	" "
2" "	6.00	" "

3"	"	.....	15.00	"	"
4"	"	.....	25.00	"	"
6"	"	.....	50.00	"	"

Dated July 29th, 1913.

ORDER.

The above-entitled proceeding, having been brought on for hearing upon notice before the Board of Public Utility Commissioners, hearings therein having been had, and the parties thereto fully heard, and the Board of Public Utility Commissioners having, after consideration of the testimony taken at such hearings, filed its report of findings and determinations, which report is by reference thereto made a part of this order, the Board of Public Utility Commissioners now, on this eighth day of September, 1913, in accordance with the several findings and determinations contained in said report, hereby orders, directs and requires Butler Water Company:

(a) To increase its water-supply and storage capacity so that its supply and storage capacity shall be approximately double the present supply and storage capacity.

(b) To lay and construct an 8" line in Mabie lane from Boonton avenue to Bartholdi avenue, connecting to the mains in each of these two avenues. When these connections are made, the specials installed at the connections shall provide for 8" connections in Bartholdi and Boonton avenues.

(c) To lay and construct a 6" line in Hasbrouck avenue from Boonton avenue to Bartholdi avenue, connecting to the mains in each of these two avenues. When these connections are made, the specials installed at the connections shall provide for 8" connections in Boonton and Bartholdi avenues.

(d) To lay and construct an 8" main in Western avenue, commencing at Kiel avenue, extending same as far as the Valley road, and through Valley road to the last hydrant, approximately 300 feet east of Centre street, connecting at that point to the 4" line which comes up the Valley road from Boonton avenue.

(e) To install meters in connection with the service of water to all hotels, boarding houses, industrial establishments, livery stables, saloons, garages, and all cases other than the supply of water to private families for domestic use; to serve all new applicants for service through meters; to give present consumers other than those specified above the option of taking water through meters.

(f) To cancel and desist from enforcing its rule or regulation requiring a consumer to install a check valve where the water enters the consumer's premises, which rule or regulation said Board finds and determines to be unjust and unreasonable.

(g) To impose in lieu of the existing charge for such service, which the said Board finds and determines to be unjust and unreasonable, a charge not exceeding $5 per annum for hose use in connection with any lot of the dimension of 50 x 200 feet or of less dimension, which charge the said Board hereby fixes and determines to be a just and reasonable charge; and to install a meter and charge for water consumed in accordance with the meter rates where water is required for larger areas or for irrigation purposes.

(h) To put in effect, impose, exact, observe and follow the following schedule of rates, which schedule the said Board finds and determines to be just and reasonable; in lieu of its existing schedule of rates which the said Board finds and determines to be unjust and unreasonable.

$2.62½ per thousand cubic feet for the first 5,000 cubic feet consumed in the quarter;

$2.00 per thousand cubic feet for the second 5,000 cubic feet per quarter;

$1.30 per thousand cubic feet for the water in excess of 10,000 cubic feet and less than 20,000 cubic feet per quarter;

$1.15 per thousand cubic feet for water in excess of 20,000 cubic feet and less than 30,000 cubic feet per quarter;

$1.00 per thousand cubic feet for the water in excess of 30,000 cubic feet and less than 100,000 cubic feet per quarter;

$0.75 per thousand cubic feet for the excess over 100,000 cubic feet per quarter, and less than 200,000 cubic feet;

$0.37½ per thousand cubic feet for all water in excess of 200,000 cubic feet per quarter.

Bills to be rendered quarterly.

The schedule of minimum charges to be as follows:

½" meter,	$2.00	per quarter
¾" "	3.00	" "
1" "	4.00	" "
1½" "	5.00	" "
2" "	6.00	" "
3" "	15.00	" "
4" "	25.00	" "
6" "	50.00	" "

The Board of Public Utility Commissioners hereby dismisses the complaint herein, except to the extent that the same is covered by this order and except as to the matters reserved by its said report for future consideration.

This order and each of the requirements hereof shall become effective on October 1st, 1913; the steps and work required to comply with the provisions of section (a) hereof shall be completed on or before May 1st, 1914; the work required to comply with sections (b), (c) and (d) hereof respectively shall be begun within one (1) month after September eighth, 1913, and completed on or before November eighth, 1913; the work required to comply with section (e)

hereof shall be begun within one (1) month after September eight, 1913, and shall be completed on or before May 1st, 1914; the requirements of sections (f), (g), (h) shall be effective on October 1st, 1913, and shall thereafter, and until the further order of this Board, be observed and followed.

Dated September 8th, 1913.

NO. 128.

BOARD OF STREET AND WATER COMMISSIONERS OF NEWARK
VS.
PENNSYLVANIA RAILROAD COMPANY.

Unlawful discrimination is practiced by a carrier when it accords its patrons different treatment under circumstances and conditions essentially the same. It does not argue illegal discrimination that one carrier exacts rates of fare higher or lower than those exacted by another carrier.

The system of charges for urban traffic differs from the system in vogue in interurban traffic. It is because of the multitude of short rides that the occasional traveler can ride ten or fifteen miles upon an urban line at the fixed rate of fare.

Herbert Boggs and *Joseph G. Wolber*, for the Board of Street and Water Commissioners.

Henry Wolf Bikle, for the Pennsylvania Railroad Company.

On April 18th, 1913, there was filed with this Commission a complaint from the Board of Street and Water Commissioners of Newark. The complainant alleged "an unjust and unreasonable rate of fare between Park Place, Newark, and Summit avenue, Jersey City." The impugned rate of fare (15 cents, one way, after cashing the refund coupon)

was compared in said complaint with the fare of seven (7) cents on the 33d street line of the Hudson and Manhattan Railroad, which the complaint described as "a direct continuation of the electric line" first mentioned. The aforesaid seven-cent fare suffices to carry a passenger from Summit avenue, Jersey City, to 33d street, New York, a distance not greatly different from the distance from Park Place, Newark, to Summit avenue, Jersey City, for which the fifteen (15) cent rate of fare is charged.

After answer by the respondent, the case was set for hearing on May 23d, 1913, but was adjourned by request until June 13th, 1913, on which latter date the case was heard at the Court House, Newark, New Jersey. Both sides were represented by counsel; oral testimony and exhibits were introduced, and briefs had been filed by counsel by July 21st, 1913.

The fare to Summit avenue from Park Place, Newark, was attacked in the complaint as "unjust and inequitable." Counsel for the complainant construe this as tantamount, in the first place, to a fare that is "unjustly discriminatory and unreasonable."

In the strict legal sense the fare complained of cannot be adjudged as unduly discriminatory or unreasonable simply by its contrast to the fare of seven cents between Summit avenue and 33rd street, New York. The latter fare is set by a different carrier, the Hudson and Manhattan Railroad Company, on a line which connects, it is true, with the Pennsylvania's, but over which the Pennsylvania has no control. Summit avenue is the dividing line between the two roads; eastward it is under the control of the Hudson and Manhattan; westward under the control of the Pennsylvania.

Unlawful discrimination is practiced by a carrier when it accords its patrons different treatment under circumstances

and conditions essentially the same. But it does not argue illegal discrimination that one carrier exacts rates of fare higher or lower than those exacted by another carrier. The rate of fare, therefore, cited on the uptown branch of the Hudson and Manhattan is incompetent to prove unlawful discrimination against the Pennsylvania.

Waiving the legal or technical side of the matter, the fares compared are for essentially different varieties of transportation. Between Park Place, Newark, and Summit avenue, Jersey City, a distance of 5.8 miles, there is no source of traffic, save at Harrison. Between 33rd street, New York, and Summit avenue, Jersey City, there is a fairly dense inter-stational urban traffic. The system of charges for urban traffic differs from the system in vogue in inter-urban traffic. It is because of the multitude of short rides that the occasional traveler can ride ten or fifteen miles upon an urban line at the fixed rate of fare. There is, therefore, an essential difference in the circumstances on the two lines which meet at Summit avenue. This essential difference explains the difference in the basis on which their respective rates are made. The rate in one case is practically a fixed rate (five or seven cents), irrespective of the length of the individual's trip; the rate in the other is proportioned to distance traversed.

Moreover, it cannot be assumed that because a passenger for seven cents can ride from 33rd street, New York, to Summit avenue, Jersey City, the average rate per mile is less on that line than on the line from Park Place, Newark, to Summit avenue, Jersey City. There is some presumption to the contrary. On the Hudson and Manhattan from Exchange Place, Jersey City, to the Hudson Terminal the fare is five (5) cents; the distance is but a mile and a quarter; the travel is dense; and the rate per mile is four (4) cents. From the Erie station to Christopher street the

distance is less than two miles, and the charge is seven (7) cents, or over three and a half (3½) cents a mile.

We do not assume that the rates on the Hudson and Manhattan are excessive. We simply point out that the inference which may be drawn from the comparison of the seven (7) cent rate as against the fifteen (15) cent rate, that the average rate per mile from Park Place to Summit avenue is higher than the average rate on the Hudson and Manhattan is not warranted.

While the complaint contained no reference to the divisions of joint through rates between the Pennsylvania and the Hudson and Manhattan, the testimony disclosed the fact that out of the one-way joint fare of seventeen (17) cents between Newark and Jersey City points, other than Summit avenue, the Pennsylvania obtains twelve (12) cents, and the Hudson and Manhattan obtains five (5) cents. This fare is relied on by complainant's counsel as showing undue discrimination. The argument seems to be that the Pennsylvania charges different rates for performing the same service. It charges the individual traveler fifteen (15) cents between Park Place and Summit avenue. It carries the traveler over the same route, delivers him at Summit avenue to the Hudson and Manhattan, which in turn carries him over its lines to Exchange Place or to the Hudson Terminal; whereupon out of the seventeen (17) cents collected from the passenger the Pennsylvania accords five (5) to the Hudson and Manhattan, and contents itself with the residue, or twelve (12) cents.

If the complainant's contention were sound, no carrier is entitled to a local rate in excess of the division, or share for the same haul it accepts out of a joint through rate. This would mean a speedy end of voluntary joint through rates, except when they happen to be of the same amount as the sum of the constituent local rates. Carriers in many

cases would cancel the through joint rates and routes, to prevent their local rates from being depressed. It would eliminate all competition in through rates between carriers, and accord the short line road a practical monopoly of the through business. Such an outcome would work to the detriment of carriers, passengers and shippers.

The joint arrangement with the Hudson and Manhattan, whereby the Pennsylvania secures for its passengers the use of the latter's tunnel, by according five (5) cents out of the seventeen (17) cents collected, as the through joint fare from Park Place to Grove Street, Exchange Place, or Hudson Terminal does not per se impeach the fairness of the local rate of fifteen (15) cents from Park Place to Summit avenue. The through route with the large corresponding volume of traffic resulting may make a revenue of 12 cents per passenger adequate and proper, where the comparatively slight volume of traffic over the Pennsylvania's line to Summit avenue might warrant, in the concrete circumstances, the exaction of a fare greater than the Pennsylvania's quoted per passenger out of the through joint fare to a point beyond.

The evidence showed that in April the Pennsylvania carried 903,609 passengers between New York and Newark (both ways); and in the same month tickets between Park Place and Summit avenue were sold representing 16,852 passengers. It must be remembered that the passenger taking the longer trips pays the greater fare. But the greater volume of traffic (over 50 to 1) through the tunnel would warrant an acceptance by the Pennsylvania as its share from the co-operating carrier, of less per capita than may be set for the passenger travelling the Pennsylvania's strip of the through route.

The things compared by the complainant are not fairly comparable. One is a fare exacted direct from a passenger.

The other is a share allotted out of a joint earning by a participating carrier. Even when the joint haul includes the strip for traversing which in the first case a fare is paid, the share allotted may be less than the fare directly exacted without any necessary implication of undue, unjust or unlawful discrimination.

Counsel for complainant cite the Newark-Elizabeth rate of 13 cents, one way fare, to prove that the respondent does not universally conform to the basis of 2½ cents per mile in making its one way rates. The distance between Market street, Newark, and Elizabeth appears to be 5.4 miles (testimony, p. 40). At 2½ cents per mile this would make a fare of 13½ cents. In this case the extra half cent is dropped, and the fare set at 13 cents. Between Park Place, Newark, and Summit avenue, Jersey City, the distance is 5.8 miles. At 2½ cents per mile the fare comes to 14½ cents. In this case the rate is set ½ cent higher, or 15 cents. We do not think this comparison shows an inconsistency so great as to impeach the claim of the respondent that it conforms to the 2½ cent per mile basis. This basis per mile was not attacked by the complainant; it was rather the failure to conform uniformly thereto which was subject to attack. (Testimony, p. 17.)

One other practice of the respondent was assailed by the complainant, to wit: the selling of tickets with a rebate coupon. This device (which in the form of a cash rebate without presentation of coupon is in vogue on the Hudson and Manhattan on the New York side) is declared by complainant's counsel, "an unreasonable and discriminatory regulation in violation of the statute."

The issuance of tickets between Park Place, Newark, and Summit avenue, Jersey City, with a 2-cent rebate coupon was devised by the company to accord a 15-cent fare for the trip without subjecting the company to the loss of revenue

that would ensue in case purchasers of tickets from Park Place to Summit avenue should remain on the train and ride through beyond Summit avenue to Grove street, Exchange Place or Hudson Terminal. As is well known, the cars are not "worked" for fares or tickets between Summit avenue and the three other stations mentioned above. The fare between Newark (any station) and the aforesaid three stations is 17 cents. Passengers east bound are counted between Manhattan Transfer and Summit avenue; and for every passenger delivered by the Pennsylvania to the Hudson and Manhattan, at Summit avenue the Pennsylvania accounts to the latter road, allowing in the case of single fare, 5 cents to the tunnel line. Should the passenger at Newark pay 15 cents for a trip to Summit avenue, and ride on through Summit avenue eastward, the Pennsylvania would obtain but 10 cents out of the fare of 15, although entitled, by its joint agreement with the Hudson and Manhattan to 12 cents out of the regular fare of 17 cents to stations between Newark and stations east of Summit avenue.

Testimony showed that tickets to Summit avenue are now used by passengers going on to New York (testimony, pp. 26, 37). Of 9,328 tickets recently sold with redemption coupons, only 6,340 were redeemed (testimony, p. 36). It seems hardly probable that any great number of these refund coupons are afterwards cashed at Summit avenue, inasmuch as they must be presented on the day of issue. But we are satisfied that a refund coupon of larger amount would augment the chance of loss to the company. And we are also satisfied that the refund arrangement is far more desirable in the interest of the travelling public, than the alternative arrangement of detraining at Summit avenue, or gateing of passengers on and off platforms to secure the company against the improper use of tickets.

It is worthy also of notice that the refund coupon arrangement was instituted by the company after a complaint made to this Board by Mr. A. Bourgeois had been presented to them, calling their attention to the fact of the seemingly discriminatory treatment accorded Summit avenue passengers. The arrangement is one not elsewhere in effect on the Pennsylvania system, and was instituted to accommodate the Summit avenue traffic at the usual 2½-cent per mile rate, without endangering the arrangement for through fares (testimony, p. 26). As explained by respondent's witness, Mr. DeLong, it is impossible to refund at Summit avenue without requiring coupons, because of the number of free riders who there detrain, many of them the company's employees, who cannot be distinguished from the pay passengers alighting at the same station (testimony, p. 29).

We find it unnecessary, in the disposition of this case, to pass upon the issue (not raised by the complainants) whether the 3-cent per mile maximum fare permissible under the general Railroad Act is or is not, under the constitutional reserved power, to alter, repeal or amend corporate charters, modified or displaced by the Public Utility Act (*P. L. 1911, Ch. 195*), which empowers this Board after hearing, upon notice, by order in writing, to fix just and reasonable fares and charges, where the existing rates are found unjust, unreasonable, or discriminatory.

A memorandum signed by Mr. Moses Plant, chairman of the committee on Internal Trade, a committee of the Newark Board of Trade, was presented to this Board. It was accepted as a brief, but does not constitute a part of the testimony in the case. The memorandum warrants a brief addendum to the report in this case.

One of the contentions of said memorandum is that the rates between Newark and Jersey City direct a trade of large value from the merchants of Newark. The popula-

tion of Jersey City in and around Summit avenue to an alleged number of 150,000 is described as a population tributory to Newark. This trade is alleged to be diverted by extant fares to New York; and the further contention is made that the rate tariff fabric has been constructed to favor New York City to the injury of Newark and other points.

Without an inquiry into the actual effect of rates upon trade, which was no part of the present inquiry, it would not be appropriate for the Board to pass upon the allegations above cited. But *prima facie,* it would appear that if the Newark-Summit avenue one way rate were reduced from 15 cents to 12 cents, the latter being the only definite figure suggested by complainants' counsel, the reduction, while it made the trip to Newark three cents less, would similarly make the rate from Newark to New York three cents less. It may well be that this increased incentive to trade in New York would counteract the equal increase in incentive for Jersey City people to trade in Newark. Furthermore, it would seem true that increased facility of reaching New York, while it may augment the number who go there from New Jersey either to trade or to work, acts on the other hand to induce numbers who otherwise would live in New York to establish homes and live in New Jersey.

There is another aspect of this matter which fairly deserves notice. The service from Park Place to Jersey City, and via the Hudson and Manhattan to New York uptown and downtown is an undoubted advantage to the cities at either terminus. The number of trains, the time of the trip, and the character of the service are sufficiently in evidence to substantiate this. When the Pennsylvania proposed to accept tickets to and from the Hudson and Manhattan over the latter's line's uptown New York stations, other carriers remonstrated (testimony, pp. 38,39). The

respondent in this case, doubtless actuated by self-interest, but not, therefore, necessarily improper motives, persisted, and afforded the City of Newark the full use of an up-to-date system of transportation in advance of anything then existing between Newark, Jersey City and New York. The Pennsylvania contended it was entitled to remuneration for their enterprise and investment, and put the through facilities of the McAdoo tunnels at the disposal of the citizens of Newark. When upon this line which has not been long in operation the fares are based upon the same system as elsewhere on the Pennsylvania system, the question arises whether, in the public interest of the City of Newark, some equitable consideration is not due the respondent, and whether some further experience is not necessary before attempting to force down the fares upon this particular electric line.

For the reasons cited *supra* in the report, the petition of the Board of Street and Water Commissioners of Newark will be DISMISSED. An order will be so entered.

Dated September 8th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It is ordered that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated September 8th, 1913.

Application Lehigh Valley R. R. Co. of N. J. for Approval of Lease to L. V. R. R.

No. 129.

IN THE MATTER OF THE PETITION OF THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY FOR APPROVAL OF A LEASE OF ITS RAILROAD TO THE LEHIGH VALLEY RAILROAD COMPANY.

It must be considered as settled in this State that the right to build and operate a railroad is a franchise which can be derived only from the State.

It also must be considered as settled in this State that a railroad company cannot lease its property and franchises necessary in the fulfillment of its obligations to the State without legislative sanction.

The power to make the lease in the form in which it is submitted is not free from reasonable doubt. If authority to make the proposed lease existed, the Board would withhold its approval until the question of its jurisdiction over the company, after leasing, had been set at rest.

Approval of the lease would sanction indirectly subjecting the road and franchises to a bonded indebtedness secured by mortgage contrary to the policy of the State, as to its railroads, declared by statute.

R. W. Barrett and *Edgar H. Boles,* for the companies.

The petition herein is submitted to the Board in accordance with Section 18, par. (h) of the Act Concerning Public Utilities (P. L. 1911, p. 374). This section of the statute provides that no public utility as defined in the act shall "without the approval of the Board sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof."

By the petition, the Lehigh Valley Railroad Company of New Jersey, a corporation of this State, asks approval of a lease of its railroad, property and secondary franchises for a period of ninety-nine years to Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania.

Application Lehigh Valley R. R. Co. of N. J. for Approval of Lease to L. V. R. R.

The Lehigh Valley Railroad Company of New Jersey was formed by an agreement of consolidation entered into July 29th, 1903. The companies consolidated comprised (1) Easton & Amboy Railroad Company; (2) Lehigh Valley Terminal Railway Company; (3) Greenville & Hudson Railway Company; (4) Perth Amboy & Raritan Railway Company; (5) Pittston Branch Railway Company; (6) Middlesex Railway Company.

Subsequently there were merged with it (1) National Docks Railway Company and (2) Irvington Railroad Company. The company owns some seventy-four miles of line, together with some forty-six miles of branches and spurs, all in this State. Its railroad extends from Phillipsburg to Perth Amboy and Jersey City. The lines of the Lehigh Valley Railroad Company (the Pennsylvania corporation) and the railroad of the Lehigh Valley Railroad Company of New Jersey connect at Phillipsburg. The entire outstanding capital stock of the New Jersey corporation, amounting to $12,506,000, is owned by the Pennsylvania corporation. One hundred shares of this outstanding capital stock stand in the names of the directors of the New Jersey corporation to qualify them to act in their respective capacities, and the remainder thereof stand in the name of the Girard Trust Company of Philadelphia, Pennsylvania, trustee under the General Consolidated Mortgage of the Lehigh Valley Railroad Company, dated September 30th, 1903, and are deposited with the trustee under the mortgage.

On June 30th, 1912, there were outstanding, guaranteed by the Pennsylvania corporation, bonds and obligations of the New Jersey corporations and the corporations consolidated in, and merged with it, as follows:

Lehigh Valley Terminal Railway Company, first mortgage $10,000,000. Easton and Amboy Railroad Company, first mortgage $6,000,000. The bonds foregoing are in the

hands of the public. Greenville and Hudson Railway Company, first mortgage $350,000. Irvington Railway Company, first mortgage $125,000. These bonds are in the treasury of the Pennsylvania corporation and also in the hands of the trustee under its General Consolidated Mortgage. Debenture of Lehigh Valley Railroad Company of New Jersey, $1,401,000.

The annual reports of the New Jersey corporation contain a statement that its railroad is "operated by the Lehigh Valley Railroad Company through the ownership of its entire outstanding capital stock." The petition submitted herein recites "that the said railroad of the Lehigh Valley Railroad Company of New Jersey was constructed to form, and has since its construction been operated as a part of the system of railroad controlled and operated by the Lehigh Valley Railroad Company." It further recites "that the said railroad and its appurtenances are now and have been for a number of years under practical operation by the said Lehigh Valley Railroad Company."

These statements are in substance repeated in the brief submitted on the petition. As to equipment, the statement was made before the Board that (Test., p. 6): "The equipment is all owned by the Pennsylvania company traveling through Phillipsburg."

As to officers and employees, it was stated that the two corporations have "similar officers, similar employees" (Test., p. 6) and that "the Lehigh Valley Railroad Company pays all the employees both in New York, Pennsylvania and New Jersey." (Test., pp. 6, 7.)

The proposed lease demises for a period of ninety-nine years, to the lessee, its successors and assigns, the entire railroads of the lessor extending from Phillipsburg, in the State of New Jersey, to Perth Amboy and Jersey City, in the State of New Jersey, as the same are now *or may here-*

after be located and constructed, and also all railroads, branch lines, laterals, extensions, sidings, bridges, rights of way, equipment, machinery, water tanks and pipe lines, buildings, structures, telegraph poles and wires, lands, tenements and hereditaments, improvements and appurtenances, and property real and personal, of whatsoever kind or description and wheresoever situate, now held, owned, leased or controlled *or which may hereafter* be acquired or controlled by consolidation, purchase, lease or otherwise howsoever by the lessor; also all the rights, powers, *franchises* (other than the franchise of being a corporation) and the privileges of the lessor thereto belonging, or in any way appertaining, which are now *or may hereafter,* during the term of this lease, be lawfully exercised or enjoyed in or about the premises.

At the outset of the consideration of the petition a question as to scope of our jurisdiction is raised. It is suggested that our power is limited to determining whether statutory authority for the proposed lease exists; and if such authority exists, whether the statutory requirements have been complied with in exercising such authority; and, that if we determine that such authority exists, and that the statutory requirements have been met, our approval must be granted. We grant that the contention is not without force. We cannot, however, on consideration of the statute creating this Board, accede to the contention. A reading of the statute shows that, wherever it was the legislative intent to limit the matters to be considered by us in granting or withholding approval, and so circumscribe our powers, apt words indicative of such intent were employed. Illustrations of this may be found in Section 18 (e) and Section 24.

We considered this question in a report filed July 19th, 1913, "In the matter of the application of the West Jersey

& Seashore Railroad Company for approval of a lease of its railroad, property and secondary franchises to the Pennsylvania Railroad Company for 999 years."

We there said: "In our judgment * * * the approval of such leases as the pending one is discretionary with the Board, and we are equally satisfied that our duty requires of us nothing less than obtaining the maximum of certainty as to its operation, as well as the maximum of legitimate advantage to the public." We find no reason for withdrawing from the position there taken. We must, of course, in exercising the power conferred by the section of the statute under which the petition is filed determine whether there is statutory authority for the proposed lease, and if so, whether the statutory requirements have been complied with. Such determination, in our judgment, is not conclusive on the question whether our approval should be granted or withheld.

If we conclude that statutory authority exists, and that the statutory requirements have been observed we, in our judgment, are still free to consider the terms of the lease; the purposes sought to be accomplished by the lease, and the consequences attendant upon its approval, in order to determine whether the public interest will be advantaged or disadvantaged thereby, and whether the general policy of the State will be furthered or jeopardized. With this conclusion as to our power and our duty, we consider the granting or withholding our approval.

First: Is there statutory authority for the leasing of the property and secondary franchises of the Lehigh Valley Railroad Company of New Jersey, a corporation of this State, to the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania?

It must be considered as settled in this State that the right to build and operate a railroad is a franchise which

can be derived only from the State. (1867, *Raritan & Del. Bay R. R. Co.* v. *Del. & Rar. Canal and C. & A. R. & T. Co., 18 N. J. E. 546, 570;* 1871, *Erie R. R. Co.* v. *Del., Lack. & Western and Morris & Essex R. R. Co., 21 N. J. E. 283, 286.*)

It must also be considered as settled in this State that a railroad company cannot lease its property and franchises necessary in the fulfillment of its obligations to the State without legislative sanction. (1873, *Black* v. *Delaware and Raritan Canal Co., 24 N. J. E. 455, 465;* 1875, *Stewart* v. *Lehigh Valley R. R. Co. 38 N. J. L. 505, 513;* 1886, *Mills* v. *Central R. R. Co., 41 N. J. E. 1, 6;* 1892, *Stockton* v. *Central R. R. Co., 50 N. J. E. 53, 56.*)

In determining whether authority to lease exists and, if so, the scope and extent of such authority, this Board must be governed by the rule that a corporation created by statute can have no power and has no rights, except such as are expressly given or necessarily implied. (Cases before cited and 1850, *Camden and Amboy R. R.* v. *Briggs, 22 N. J. L. 623, 647;* 1873, *Pennsylvania R. R. Co.* v. *Atlantic Railway Co., 23 N. J. E. 441, 452;* 1882, *Elkins* v. *The Camden and Atlantic Railroad Co., 36 N. J. E. 5;* 1908, *State* v. *Atlantic City and Shore R. R. Co., 77 N. J. L. 465;* 1908, *Colgate* v. *United States Leather Co., 75 N. J. E. 228.*)

The seventeenth section of the General Railroad Act of 1873 (*P. L. 1873, p. 88*) authorizes any corporation organized thereunder at any time during the continuance of its charter "to lease its road or any part thereof, to any other corporation or corporations of this or any other State, or to unite and consolidate as well as merge its stock, property and franchises and road with those of any other company or companies, of this or any other State, or to do both; and such other company or companies are hereby authorized to take such lease, or to unite, consolidate as

well as merge its stock, property, franchises and road with said company, or to do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road may use and operate such road and their own roads, or all or any of them and transport freights and passengers over the same, and take compensation therefor, according to the provisions contained in this act * * *."

In 1885 the Legislature of this State, however, enacted, "An act respecting leases of railroads" (*P. L. 1885, p. 324*). This statute expressly repealed inconsistent legislation, and provided that no company incorporated under the general railroad act of 1873, or under any other law or charter enacted or granted by the Legislature of this State should have power to lease its road or franchises or any part thereof to any *foreign corporation* or to any resident of any other State, until the consent of the Legislature of this State should first have been obtained.

The act of 1881 was amended in 1898 (*P. L. 1898, p. 235*). The amendment did not affect the prohibition of the act of 1881 just referred to.

The General Railroad Act of 1873 permitted the leasing of the roads, or any part thereof, of corporations organized thereunder to corporations of any other State. The Act of 1885 declared a new State policy and prohibited the leasing of the road or franchises, or any part thereof, of any corporation created under the General Railroad Act, or under any other law or charter granted by the Legislature of the State, *to any foreign corporation or to any resident of any other* State, except as the consent of the Legislature of this State to such lease should first have been obtained.

The General Railroad Act of 1873 was revised in 1903 (*P. L. 1903, p. 645*). The sixty-fourth section of the act so

revised as amended (*P. L. 1906, p. 266*) now provides: "Any railroad company of this State may lease its road or any part thereof, to any other railroad company of this or any other State, or may take a lease of the road or any part thereof, of any other railroad company of this or any other State, or may unite and consolidate as well as merge its stock, property, franchises and road with those of any other company or companies of this or any other State, or may do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road, may use and operate said road and their own road, and collect fares and freights as provided in the case of companies organized under this act, but not in excess of the charges on the line of any of the consolidated companies, and shall not exceed the rates limited by any special act incorporating such company; such leasing or consolidation may be made where the roads of the said companies connect either directly or over the intervening line of one or more other railroad companies."

The sixty-fifth section of the act, as revised, provided: "Nothing in this act shall be construed to repeal the act entitled: 'An act respecting the leasing of railroads,' approved May 2d, 1885, as amended April 2d, 1898."

The revision of the General Railroad Act made in 1903 therefore left intact the prohibition of the act of 1885, as amended in 1898, prohibiting the leasing of the road or franchises of any railroad company of this State to any foreign corporation or to any resident of any other State without the consent of the Legislature of this State to such lease. However, by section (29) of "An act to repeal sundry acts concerning railroads or other common carriers" (*P. L. 1904, p. 314*), the act of 1885 and the amendatory act of 1898 were both repealed. Section 64 of the General Railroad Act as revised in 1903 (amended 1906)

therefore now stands authorizing any railroad company of the State to lease its road to any railroad company of this or any other State. Under this section the lease carries with it the franchise to operate the leased road and collect fares and freights. In this situation the leasing by the New Jersey corporation of its road to the Pennsylvania corporation would seem to be authorized. Such lease would under the statute carry with it to the lessee the franchises of using and operating the road and collecting fares and freights.

The lease submitted for approval, however, apparently seeks to bring within its grant more than the mere road of the New Jersey corporation and the franchises of using and operating the road and collecting fares and freights. It purports to include "*all the rights, powers, franchises,* (other than the franchise of being a corporation and the privileges of the lessor thereto belonging, or in any wise appertaining, which *are now* or *may hereafter,* during the term of this lease be lawfully exercised or enjoyed in and about the premises." It possesses the franchise to construct connecting roads and branches (Secs. 7, 8, 9 General Railroad Act, *P. L. 1903, p. 645*). It is vested with the power of eminent domain. (Secs. 12, 13.) It is also vested with the right to establish and operate ferries for the transportation of persons and property and to collect rates of fare and tolls. (Sec. 19.)

We find in the statute, in terms at all events, no authority for the transfer by lease of these franchises by a railroad corporation of this State to a railroad corporation of another State. (Section 64 of the General Railroad Act as revised in 1903 (as amended in 1906) confines the authority to lease to the "*road or any part thereof.*" It provides merely that the lessee may use and operate the leased road and may collect fares and freight. The omission of all ref-

erence to *franchises* in general in conferring the power to lease is significant in that in specific legislation conferring such power the authority has been in terms extended to road, property and *franchises.* An illustration of this may be found in the statute giving consent to the New York, Susquehanna and Western Railroad Company to lease to Erie Railroad Company (*P. L. 1898, p. 236*). In that act the authority to lease was specifically extended to "*franchises,* railroad and property." Other illustrations may be found. The most recent is found in the statute giving consent to the Pennsylvania Tunnel and Terminal Railroad Company to lease to the Pennsylvania Railroad Company (*P. L. 1910, p. 531*). This statute also explicitly extended the consent thereby given to a lease of the "*franchises,* railroad and property." In this situation we are not satisfied that the question of the power to make the lease in the form in which it is submitted to us for approval, is free from reasonable doubt. Under the rule of construction which we have referred to we cannot resolve that doubt in favor of the possession of the power. If this doubt was resolved in favor of the power to make the lease, other considerations would, on our view of the authority and duty conferred and imposed upon us, impel us to withhold our approval.

Second: Assuming that power exists to make the lease in the form submitted, should it be approved? The terms of the lease make it doubtful whether certain powers now entrusted to us in the public interest, would not be impaired or lessened or made impossible of administration. (1) The act creating this Board (*P. L. 1911, p. 374*), section 18 (h) provides that no public utility as therein defined shall without our approval "* * * sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof, * * * ." A

"public utility" as defined by the statutes includes every corporation and its lessee, owning, operating, managing or controlling any steam railroad for public use, under privileges granted by this State or any political subdivision thereof. In our opinion the Pennsylvania corporation falls within this definition and if the proposed lease was approved by us, any transfer, mortgage, or other disposition or encumbrance of the rights created thereby made by the Pennsylvania corporation would require our approval. Counsel for the petitioning company, however, as we understood him, advanced a contrary view at the hearing. If his view is correct, then our sanction of the proposed lease would operate to take the road and franchises of the New Jersey corporation, in so far as the term created therein by the lease is concerned, wholly out of the operation of this section of the statute, and sale, mortgage or other disposition or encumbrance thereof could be made by the Pennsylvania corporation without the necessity of obtaining our prior approval. Such a result is, in our judgment, inconsistent with the State policy indicated by the statute creating this Board of making inquiry and approval by an administrative body a condition precedent to corporate action affecting the alienation or encumbrance of franchises and property devoted to public use thereunder. In this situation, even though we had found that authority to make the proposed lease existed, we would have withheld our approval until the question raised had been set at rest either by adjudication, legislation or binding stipulation, since as an administrative, not a judicial body, any determination that we might make on the issue arising out of the conflict of views would have no binding force. (2) In our report on the application of the West Jersey and Seashore Railroad Company we directed attention to Sec. 6 of the General Railroad Act (*P. L. 1903, p. 645*), which limits

the power of a railroad company to issue its bonds secured by mortgage of its road and franchises to an amount not to exceed in the whole its paid-up capital stock, and makes departure from the rule laid down a misdemeanor.

The provisions of this section govern the New Jersey corporation. There is reason to doubt whether it is applicable to the Pennsylvania corporation, in an issue of bonds secured by mortgage including the leasehold term in road and franchises to be acquired under the proposed lease. In fact, the position taken before us by counsel for petitioner is that the provision cannot govern the Pennsylvania corporation in such issue of bonds. The paid-up capital stock of the New Jersey corporation as of June 30th, 1912, aggregates $12,506,000. The roads and franchises of the New Jersey corporation are, as of June 30th, 1912, subject to bonded indebtedness secured by mortgages created by the consolidated and merged companies aggregating $16,475,000. The excess of bonded indebtedness secured by mortgage over the paid-up capital stock is accounted for by the fact that in the conversion of the capital stock of the companies consolidated into the capital stock of the company created through consolidation one share of the capital stock of the Lehigh Valley Railroad Company of New Jersey was issued for five shares of the Middlesex Railway Company and of the Perth Amboy and Raritan Railway Company, respectively. The bonded indebtedness secured by mortgage (not including equipment obligations) of the Pennsylvania corporation aggregates as of June 30th, 1912, $54,639,000. If the proposed lease is approved by us the leasehold term thereby created in the railroad and franchises of the New Jersey corporation will at once come within the operation of the General Consolidated mortgage of the Pennsylvania corporation, which,

according to the statement of counsel contains a clause extending its provisions to after acquired property.

Through the proposed lease, therefore, the Pennsylvania company's leasehold term in the road and franchises of the New Jersey corporation would be subjected to a bonded indebtedness secured by mortgage which does not bear the statutory relation to the paid-up capital stock of the New Jersey corporation, the lessor. Our approval of the lease, then, would not operate merely as sanctioning the creation of a leasehold term in the road and franchises, but would also sanction the indirect subjecting of the road and franchises to a bonded indebtedness secured by mortgage contrary to the policy of the State as to its railroads declared by statute.

(3) The proposed lease contains in its third section the following provision: "All the additions and betterments to the property hereby demised shall, from time to time, be made by the said lessee to such an extent and at such times and in such manner as may be satisfactory to the said lessee and the *said lessor shall, and will, when and as requested by the Lessee, reimburse the Lessee for the cost of said additions and betterments, either in cash or in good and sufficient securities of the Lessor Company or in the securities of any other company or corporation acceptable to the Lessee.*"

Section 18 (e) of the act creating this Board (*P. L. 1911, p. 374*) provides that no public utility as therein defined may issue any stocks, stock certificates, bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the Board for such proposed issue. The section makes it the duty of the Board, after hearing, to approve of any such proposed issue, maturing in more than one year from the date thereof, when satisfied that the same is to be made

in accordance with the law and the purpose of such issue be approved by the Board. The provision of the proposed lease above set out might be construed as a general approval in advance of the purpose of the issue of securities thereunder, and so divest the Board to this extent of the jurisdiction conferred upon it when later issues of securities are made under the provision. These doubts, as to the effect of our approval of the proposed lease upon the jurisdiction which this Board now has, would, in themselves not merely warrant, but demand, the withholding of approval until some determination with respect thereto be made in some authoritative form. We are, in particular, of the opinion that this should be our attitude as a body engaged in administrative work under legislation, since the statute, authorizing the formation of the New Jersey corporation and its consolidation with the Pennsylvania corporation (*P. L. 1903, p. 189*), (of which latter provision the companies have not availed themselves) contains the following provision of the legislative then intent: "This act shall not in any way lessen or decrease or destroy the jurisdiction or control which the courts of this State and the Legislature now have over the said road."

We are further of this opinion because since the enactment of the repealing statute which operated to authorize the leasing of the roads of this State to corporations of another State without specific legislative sanction, the Legislature has put into effect in the enactment of the Public Utility Act, a new Sate policy in the control and regulation of the public utility corporations operating in this State and of their property. If inconsistencies exist between the policy so newly declared and acts permitted by pre-existing statutes, or the results which may flow from such acts, we should not by our action preclude the Legislature from the opportunity in a specific case to bring such inconsistencies

into harmony. Such, however, would be the result of our approval in this proceeding if the position taken by counsel for the petitioner is correct.

The petition herein will, therefore, be denied. An order will be so entered.

The hearing herein, by reason of conflict between statements contained in the annual reports of the New Jersey corporation and in the brief submitted by counsel, developed a question as to the status of the New Jersey corporation which should be determined so far as may be by this Board.

The annual reports of the New Jersey corporation recite that "these roads were consolidated and the Lehigh Valley Railroad Company of New Jersey created thereby, July 29th, 1903, under the General Railroad laws of the State of New Jersey." The brief filed on the petition alleges that the consolidation "was effected on July 29th, 1903, pursuant to an act of Assembly of the State of New Jersey, approved April 8th, 1903, (*P. L. 1903, p. 189*)." The act referred to is that authorizing the consolidation of the New Jersey corporations with the Pennsylvania corporation. Examination of the agreement of consolidation filed in the office of the Secretary of State shows that it contains no reference to the statute under which the consolidation was effected. The General Railroad Act (Sec. 64) provides that no consolidation should take effect

"until the parties thereto file in the office of the Secretary of State an agreement surrendering to the State all rights of exemption and contract privileges with respect to taxation, and reserving to the State any existing right to take the property of any of the parties, and the property and franchises in this State * * * of such consolidated company shall be subject to taxation under the general laws of the State."

The act of April 8th, 1903 (*P. L. 1903, p. 189*), contains a somewhat different proviso:

"No union or consolidation shall take effect under this act until a copy of the contract or contracts therefor shall have been filed in the office of the Secretary of State; *and also* an agreement to be approved by the Governor and Attorney-General, surrendering to the State all rights of exemption from taxation, and all privileges and advantages arising from any alleged contract establishing any special mode of taxation in respect to said companies, and agreeing further that such contract or contracts shall not in anywise affect or impair the right of the State to take the property of said companies under any existing law of this State, and that any law affecting such companies shall be subject to alteration or repeal by the Legislature."

The certificate filed with the Secretary of State upon the creation of the New Jersey corporation through consolidation, complies with the provision above quoted of the General Railroad Act. It does not comply with the above quoted provision of the act of April 8th, 1903. It, therefore, follows that in the creation of the New Jersey corporation through consolidation, the provisions of the General Railroad Act were taken advantage of, and that the authority conferred by the act of April 8th, 1903, was not attempted to be exercised. The statement in the annual reports of the New Jersey corporation as to the creation of that corporation is, therefore, correct. The statement in the brief submitted is erroneous.

The hearing herein further developed a situation which we ought not to pass unnoticed. As indicated at the outset of this report, it appears from the petition and statements made before us that the New Jersey corporation and the Pennsylvania corporation have "similar officers, similar employees," and that the Pennsylvania corporation "pays all the employees both in New York, Pennsylvania and New Jersey," "that the equipment is all owned by the Pennsylvania company traveling through Phillipsburg," and that the railroad of the Lehigh Valley Railroad Company of New Jersey was constructed to form, and has, since its construction, been operated as a part of the system of railroad con-

trolled and operated by the "Pennsylvania corporation."

The annual reports made by the New Jersey corporation to this Board wholly lack operating data; reference is simply made to the report of the Pennsylvania corporation where in the total the results of operation of the Pennsylvania corporations entire system appear. From this report it is impossible to ascertain the results of the operation of the railroad of the New Jersey corporation. It, therefore, seems as though the New Jersey corporation existed as a legal entity of this State holding the title to a railroad in this State, vested with franchises representing part of the State's sovereign power and having outstanding certain obligations.

It further appears that the New Jersey corporation was not formed for the purpose of exercising these franchises formerly exercised separately by the New Jersey corporations which were brought together in the consolidation but was, in fact, formed to permit the use and operation of its railroad, and the exercise of its other franchises by the Pennsylvania corporation. It appears that in fact the New Jersey corporation has not and does not, use and operate its railroad nor exercise its franchise to collect and receive fares and rates for the transportation of passengers and property upon its railroad, and that such use and operation of the railroad and the exercise of such franchises has been and is enjoyed by the Pennsylvania corporation. This situation is brought about through the ownership by the Pennsylvania corporation of all of the outstanding shares of the capital stock of the New Jersey corporation. The acquisition of these shares is, it appears, authorized by the statutes of Pennsylvania. That the use and operation of a railroad and the collection and receipt of fares and rates for transportation thereover is a franchise, is settled by the adjudi-

cation of the courts of this State already cited. That the exercise of such franchise requires the sanction of the Legislature of this State is also determined by these authorities. That a corporation of another State may not exercise and enjoy such franchise in this State with the assent of the Legislature of this State is likewise settled by these cases.

We find no legislation in this State authorizing the use and enjoyment of the franchises of the New Jersey corporation by the Pennsylvania corporation. Such use and enjoyment of the franchises of the New Jersey corporation by the Pennsylvania corporation cannot be rested on the ownership of all of the shares of outstanding capital stock of the New Jersey corporation by the Pennsylvania corporation. The franchises are vested in the New Jersey corporation, an artificial personage created by and subject to the power and authority of this State. They are not vested in those in whom the ownership of the shares of the outstanding capital stock may be from time to time. The act of April 8th, 1903, before referred to, gave the assent of the State to the acquisition and exercise by the Pennsylvania corporation of these franchises through consolidation upon certain conditions. The General Corporation Act, on certain conditions apparently leaves the way open to each acquisition and exercise through consolidation on other conditions. These acts the Pennsylvania corporation has not taken advantage of. The cause of its failure to do so is stated to be its desire not to subject itself to certain restrictive provisions contained in the Pennsylvania Constitution of 1874.

Had we seen our way clear to approve the lease submitted to us the future use and operation of the railroad of the New Jersey corporation by the Pennsylvania corporation. and the collection of fares and rates would have been authorized. Such approval we have, however, felt our-

selves obliged to withhold for the reasons before stated. The question raised is important. It should be speedily determined in an authoritative manner either through additional legislation or litigation.

As its determination through litigation will require the assent of the Attorney-General of the State, the matter will be brought to his attention.

Dated September 16th, 1913.

ORDER.

This application having been duly heard and the Board having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the approval of this petition is withheld and the application is hereby DISMISSED.

Dated September 16th, 1913.

No. 130.

RESIDENTS OF HASKELL
VS.
ERIE RAILROAD COMPANY.

Edmund G. Stalter, for the complainants.

Duane E. Minard, for the Erie Railroad Company.

The petition in the above-entitled cause sets forth that Haskell is a community located on the Greenwood Lake branch of the Erie Railroad in the County of Passaic, and is a point at which regular stops are made by certain trains of the Erie Railroad Company; that a large amount of freight and express matter is received by the residents of Haskell and that because there is no station agent at said point, said residents are unduly annoyed and inconvenienced. From the testimony it appears that the facilities afforded at Haskell station consist of an open shed.

The answer of the railroad company shows that the point where the station is proposed to be established is one and one-eighth miles west of Pompton Junction and one and one-tenth miles east of Midvale, there being agents and stations maintained at the two places, respectively, with adequate facilities for the handling of freight, passenger and express business. It further states that only a few local trains have been stopped at Haskell for the convenience of the employees of the Laflin & Rand Powder Mill; and further that the business available at this point does not justify the maintenance of a station and agent.

Hearings were held upon the above complaint, at which the petitioners were represented by counsel. Numerous residents of Haskell and the Erie Railroad Company were also represented.

At the close of the hearing, the Erie Railroad Company was requested to submit a plan for an enclosed station, which could be heated during the winter season. In accordance with this request a plan was submitted by the Erie Railroad Company marked "Plan showing proposed addition to waiting shed at Haskell, New Jersey, dated April 25th, 1913."

Under date of June 13th, 1913, the said "Plan" was submitted to the petitioners by the Board and they were noti-

fied that unless they requested a further hearing the record would be closed by the approval of the said plan.

In answer thereto, Mr. Martin Drew, acting for the petitioners, informed the Board that a further hearing was desired, and the same was held on July 18th, at the Court House in Newark.

In addition to the testimony taken at the hearing, the Board has caused an exhaustive investigation to be made by its Inspector, who approves of the plan submitted by the railroad company, and after careful consideration of all the facts in the case, the Board is of the opinion that the plan submitted is adequate for the present needs of the residents of Haskell, and the Erie Railroad Company by an appropriate order will be directed to construct a building in accordance with said plan before November first, nineteen hundred and thirteen.

Dated September 22nd, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

IT IS ORDERED that the Erie Railroad Company build and complete, before November first, nineteen hundred and thirteen, an addition to the waiting shed, at Haskell, New Jersey, in accordance with the plan submitted to the Board by the Erie Railroad Company and referred to in the Board's Report.

This order shall become effective October 15th, 1913.

Dated September 22nd, 1913.

No. 131.

IN THE MATTER OF THE FAILURE OF THE HACKENSACK WATER COMPANY TO APPLY FOR AND OBTAIN AUTHORITY FOR THE ISSUE OF BONDS IN THE AGGREGATE AMOUNT OF $250,000.

Bonds sold by the Hackensack Water Company since the Public Utilities Act became effective, held to be issues requiring the approval of this Board.

The fact that the mortgage authorizing and securing the issues of bonds was executed and delivered before jurisdiction over issues of capital securities was conferred upon this Board did not make it unnecessary to secure the Board's authorization, when the bonds were issued after jurisdiction was vested in the Board.

It appears upon this inquiry that the Hackensack Water Company on July 1, 1902, executed what is known as its first mortgage to secure six million dollars of 4% bonds.

The purpose in executing this mortgage was, in part, to retire outstanding issues of five (5) per cent. bonds aggregating three million dollars. This outstanding issue of bonds was subsequently retired in accordance with the terms of the mortgage.

From time to time, on certificate of the company that certain amounts had been expended for "improvements, betterments and other property which had been made subject to the lien of the mortgage," all the remaining bonds were certified and delivered by the Trustee under the mortgage to the company.

The execution and delivery of the mortgage; the retirement of the three million dollars of outstanding five per cent. bonds, and the certification and delivery by the Trustee to the company of the remainder of the bonds secured by the mortgage, all preceded July 4th, 1910, the date when the original statute creating a Board of Public Utility Commissioners went into effect. (*P. L. 1910, p. 56.*)

The bonds aggregating $250,000, which are the subject of this inquiry, were certified and delivered by the Trustee, under the mortgage, to the company prior to January 31st, 1907, on which day they were pledged as collateral to a loan made to the company. From time to time thereafter these bonds were again pledged as collateral to loans.

They were subsequently released as collateral and became available for sale.

Forty-seven (47) of the bonds were sold by the company on June 10, 1912, at 87 and accrued interest, and two hundred and three (203) were sold on December 31, 1912, at 85½ and accrued interest.

At the time of these sales the present statute concerning Public Utilities was in force. (*P. L. 1911, p. 374.*) Sec. 18 (e) of that statute provides that no public utility as therein defined shall thereafter "issue" any bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from this Board for such proposed issue.

In our judgment the sales and deliveries of these bonds by the company constituted "issues" thereof within the meaning of the term "issue" as used in this section of the statute and our authorization thereof should have been obtained.

In our opinion, the fact that the mortgage authorizing and securing these issues of bonds was executed and delivered before jurisdiction over issues of capital securities was conferred upon this Board did not make it unnecessary to secure our authorization for such bonds when issued after such jurisdiction was vested in us.

In our judgment, the fact that the bonds had been certified and delivered to the company by the Trustee under the mortgage before the enactment of the statute of 1911 did not make the subsequent sales and deliveries thereof by the

company any the less "issues" thereof within section 18 (e) of that act.

Nor did the fact that before the enactment of the statute of 1911 the bonds had been pledged by the company as collateral, take the sales and deliveries thereof when later released as collateral, out of the operation of the section.

The execution and delivery of the mortgage was a mere *authorization* of the subsequent issue of the bonds thereunder, upon prescribed conditions.

The certification and delivery of the bonds to the company by the Trustee under the mortgage did not have the effect of giving them the character of outstanding obligations of the company.

Whatever effect the various pledges thereof by the company may have had, such effect was terminated and spent when the bonds pledged were later released as collateral.

The bonds, then, became outstanding obligations of the company, through the sales and deliveries thereof by the company.

Such sales and deliveries were "issues" and required the authorization of this Board.

We are satisfied that the sales and deliveries so made without our authorization, were made in good faith and in the belief that they did not under the circumstances constitute "issues" requiring our authorization. We have no reason to doubt that the prices realized were advantageous.

Neither have we any reason to doubt that the issues represented the capitalization of expenditures for proper capital purposes.

We will, if desired, entertain an application now by the company for approval of the several issues as of the dates of the sales and deliveries.

Dated September 22nd, 1913.

No. 132.

IN THE MATTER OF THE PLEDGING BY PUBLIC UTILITY COMPANIES, SUBJECT TO THE JURISDICTION OF THE BOARD, OF THEIR BONDS AS COLLATERAL.

The practice, in the past, of certain public utility corporations, now subject to the jurisdiction of the Board, of pledging their bonds as collateral security for loans makes it advisable that this memorandum be issued.

The Board directs the attention of the companies subject to its jurisdiction to the following statutes:

First: "An act relating to the issuance, sale and delivery of stock and securities by corporations of this State which have been acquired or may hereafter acquire authority, permission or a franchise from the State, or any municipality thereof, to use or occupy any street, highway, road, lane or public place within this State." (*P. L. 1906, p. 730.*)

This statute provides, among other things, that no corporation of this State which has acquired or may hereafter acquire authority, permission or a franchise from the State or any municipality thereof, to use or occupy any street, highway, road, lane or public place within this State shall thereafter "issue, sell and deliver its bonds, notes or obligations of any character except in return for cash to the extent of at least eighty per centum of the face value of said securities issued, or for property of an actual cash value of at least eighty per centum of the face value of the securities issued in payment therefor."

It further provides that any securities issued except in compliance with the terms of the act "shall be deemed to be illegally issued."

Second: "An act concerning public utilities; to create a

Board of Public Utility Commissioners and to prescribe its powers and duties." (*P. L. 1911, p. 374.*)

Section 18 (e) of this statute provides that no public utility as therein defined shall thereafter "issue any bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the Board for such proposed issue."

The Board does not, of course, in the absence of a specific case before it, determine that the first of these statutes wholly prevents the use by the corporations to which it applies of their bonds as collateral to loans, nor does it determine under what, if any, conditions the statute permits such use of bonds.

It considers it, however, the part of prudence to suggest these questions to the companies subject to the provisions of the statute and to the jurisdiction of the Board, and to direct attention to the following case in which a somewhat similar statute was construed.

(1892) *Pfister et al.* v. *Milwaukee Electric Railway Co. et al., (Wis.) 53 N. W. Rep. 27,* was an action involving validity of 250 bonds of the defendant company for $1,000 each, delivered by the company to the plaintiff, Pfister, as a collateral security for a loan of $125,000 made by him to the company.

Lyon, C. J., said: "The learned circuit judge held that the bonds in question were issued in violation of section 1753, Rev. St., and were therefore void. So much of the section as is applicable to this case is as follows: 'No corporation shall issue * * * any bonds * * * except for money, labor or property, estimated at its true money value, actually received by it, equal to 75 per cent. of the par value thereof, and all * * * bonds issued contrary to the provisions of this section * * * shall be void.' We are clearly of the opinion that the circuit judge ruled correctly. The object of the statute is to protect stockholders and bona fide creditors from the improvident issue of its bonds by the corporation, which might, and, if allowed, probably would result in the wrecking of the corporation. Hence, the statute requires that no corporate bonds shall be issued unless the com-

pany shall actually receive therefor 75 per cent. of their par value. When a corporation puts its bonds beyond its control by hypothecating them as security for loans, it issues them, within the meaning and intention of the statute. If it so hypothecates them without stipulating that they shall be accounted for not less than 75 cents on the dollar of their par value it violates the statute, and the bonds thus issued are void. Any other construction would render the statute a dead letter, thus defeating all the wise and salutary purposes it was intended to accomplish. Had the company sold Pfister the bonds for $125,000, it would have been a safer transaction for stockholders and bona fide creditors of the corporation, for in that case nothing would have remained due to Pfister. But now if this transaction is upheld, Pfister may sell his remaining bonds for 25 cents on the dollar of their face value, or less, and thus leave due him a large debt from the company, while the company would remain liable for the full face value of the bonds. No construction of the statute which would permit such an evasion of its provisions can be tolerated. The judgment of the circuit court is affirmed."

The Board, however, does determine that, if the first of these statutes admits, under any circumstances, the use by the companies of their bonds as collateral to loans that such use constitutes an "issue" of bonds under the second of these statutes and that such issue requires authorization by the Board.

Dated September 22d, 1913.

No. 133.

IN THE MATTER OF DETERMINING WHETHER THE NEW JERSEY AND PENNSYLVANIA RAILROAD COMPANY PROVIDES SAFE, ADEQUATE AND PROPER SERVICE AND KEEPS AND MAINTAINS ITS PROPERTY IN SUCH CONDITION AS TO ENABLE IT TO DO SO.

On April twenty-second, nineteen hundred and thirteen, the Board of Public Utility Commissioners ordered the New Jersey and Pennsylvania Railroad Company and Frederic V. Pitney, Receiver of the New Jersey and Pennsylvania Railroad Company to make provision for certain changes, alterations, additions, repairs and betterments, as recommended by the Board's Chief Inspector of Railroads and the Board's Engineer of Bridges. These repairs were to be begun not later than May fifteenth, nineteen hundred and thirteen, and to be completed not later than August fifteenth, nineteen hundred and thirteen. The Board, in its order, specified further that in default by May fifteenth, nineteen hundred and thirteen, of beginning the actual work in question the New Jersey and Pennsylvania Railroad Company and Frederick V. Pitney, Receiver as aforesaid, should cease wholly to operate trains over said road.

Because of representations made by Frederic V. Pitney, Receiver as aforesaid, that there was prospect of him, as Receiver, obtaining funds sufficient to complete the work ordered by the Board, the Board extended the time until October fifth, nineteen hundred and thirteen, when, for default of compliance with its order of April twenty-second, nineteen hundred and thirteen, the New Jersey and Pennsylvania Railroad Company and Frederic V. Pitney,

Receiver thereof, should cease wholly to operate trains over said road.

The Board fixed Friday, September nineteenth, nineteen hundred and thirteen, at the Court House, Newark, New Jersey, as the time and place for further hearing of this matter. At such time and place, Frederic V. Pitney, Receiver, appeared and by his counsel, Corwin Howell, advised the Board that he had been unable to obtain funds required for the completion of the work ordered by the Board, and that no reasonable prospect existed that such funds could be procured.

The Board now finds and determines, after hearing, that the New Jersey and Pennsylvania Railroad Company and Frederic V. Pitney, Receiver thereof, do not furnish safe, adequate and proper service and keep and maintain the property and equipment of the New Jersey and Pennsylvania Railroad Company in such condition as to enable it to do so. The order of the Board adopted April 22nd, 1913, is hereby revoked.

The Board of Public Utility Commissioners on this twenty-third day of September, nineteen hundred and thirteen,

HEREBY ORDERS the New Jersey and Pennsylvania Railroad Company and Frederic V. Pitney, Receiver thereof, on and after the date on which this order becomes effective, to cease wholly to operate trains over the track of the New Jersey and Pennsylvania Railroad Company.

This order shall become effective October 13th, 1913.

Dated September 23rd, 1913.

No. 134.

IN THE MATTER OF THE PARTIAL RESCINDING OF THE DECISION ENTERED OCTOBER 27TH, 1911, AS REGARDS CERTAIN PASSENGER TARIFFS SUBMITTED BY ERIE RAILROAD COMPANY, NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY AND NEW JERSEY AND NEW YORK RAILROAD COMPANY.

In the summer of 1911, this Board, on its own initiative, called a hearing upon the justice and reasonableness of certain increased rates of fare embodied in tariffs filed by certain railroad companies operating in this State, and intended by them to become effective August 1st, 1911.

As a result of this inquiry all of the increased fares embodied in said tariffs were suspended before they became operative. Only the increases were suspended by the Board's order. As a result of the suspension of the proposed increases of fare, the companies withdrew the entire schedules which contained certain decreases as well as increases of fare.

In certain specific cases the Board's disapproval of the proposed advances of fare has been modified in particular instances, where, by agreement with the carrier, certain minor advances were allowed on condition that certain other decreases were simultaneously put in force.

The proposed schedules submitted by the Erie and affiliated roads were withdrawn upon the Board's refusal to sanction the advances of fare embodied therein. The Erie and affiliated roads have applied for reconsideration of the schedules they designed to make effective August 1st, 1911.

After consideration the Board has decided to rescind its disapproval of the schedules in question, so as to allow a trial of the said schedules, upon the assurance given by the

companies that if sixty days' trial of the new schedules develops complaints sufficient to satisfy the Board that said complaints are well founded, the companies on notice will restore the present scheduled rates of fare.

The reasons moving the Board to rescind its disapproval above referred to are as follows:

First: The new schedules apparently lessen the charges made in the aggregate for passenger transportation.

Figures compiled for the month of August, 1911, show that had the proposed schedules been operative for that month, the net effect on the revenues of the New Jersey and New York Railroad would have been a decrease of $5.40; on the New York, Susquehanna and Western of $497.80; on the Erie lines proper, an increase of $189.79.

Thus, the net decrease in gross revenue at the fares embodied in the new schedule would have been for the month $313.41.

On the New York, Susquehanna and Western the new schedule in said month would embrace 325 points at which fares are lessened and 21 points at which fares are raised. On the New Jersey and New York, there would have been 15 points at which decreases occurred and 12 at which fares increased.

On the lines operated by the Erie Railroad Company the decreases would have numbered 156; and the increases 85.

The changes in fare refer only to one way tickets and excursion tickets. They have no reference to commutation fares.

Second: The new schedules will establish greater uniformity in fares. There will be a closer approximation to the 2½ cent per mile rate. The excursion fare will more closely conform to 90 per cent. of the one way fare.

Third: Certain anomalies now existing in fares will be swept away. The reasons giving rise to such anomalies are

not now operative. Among such anomalies is the possibility under the present tariff of purchasing two tickets for two links of a journey at a less price than for the entire journey. In the greater number of cases, this is to be remedied by reducing the through fare so as to equal the sum of the fares on the two links. In other cases it has seemed proper to advance the through fare to cover the sum of the fares of the two links of the through route.

Fourth: Some of the reasons for these fare anomalies are no longer operative, such as water competition between Nyack and Jersey City. (See cases Nos. 1790 and 2768, Interstate Commerce Commission Decisions.)

Fifth: The advances in fares are small in every case. In two or three cases the increase in the excursion fare is ten cents, but practically every increase whether for an excursion fare or a one way fare is a five cent increase, whereas some of the decreases run as high as twenty-five cents.

The only cases where any appreciable increase in revenue will result from the new schedule are the fares from Rutherford to Paterson, and from Passaic to Paterson. In each case the increase is but five cents in the round trip fare. The present round trip fare from Rutherford to Paterson is 25 cents as against 20 cents for the one way fare. Based on mileage and other consideration the increase in the excursion fare to 30 cents seems reasonable.

Similarly the fares between Passaic and Paterson are 12 cents one way and 15 cents round trip. This gives rise to certain combinations on Paterson from Passaic (to Hawthorne and points beyond) which are improper. In both cases the increase in excursion fare will tend to align their excursion fares with other excursion fares.

Finally, since the company has agreed to reinstate the present schedule at the Board's request, if after sixty days' experience under the new schedule, complaint arising satis-

fies the Board that there is sufficient justification for the complaint; and since actual experience under the proposed schedule will demonstrate how the revenue arising thereunder compares with the revenue arising under the present rates for the same service, the Board has determined, and hereby determines and will order a suspension of its decision above recited to the extent that the proposed passenger schedules of excursion and one way fares submitted by the Erie Railroad Company, the New York, Susquehanna and Western Railroad Company and the New Jersey and New York Railroad Company may be put in force not earlier than October 15th, 1913, after due notice by the companies concerned, and on the conditions recited in their letter of September 5th, 1913, such Order to become effective October 15th, 1913.

Dated September 23rd, 1913.

APPENDIX.

There are no increases in one way fares on the Greenwood Lake Division or on the Newark Branch. The specific fares decreased are much more numerous than the specific fares increased.

Among typical decreases are the following:

Rutherford-Ridgewood, round trip from	$ .70	to	$ .50
Jersey City-Upper Montclair, round trip from	.65	"	.60
Jersey City-Closter, round trip from	.80	"	.75
Passaic-Ridgewood, round trip from	.50	"	.45
North Newark-Little Falls, round trip from	.60	"	.55
North Newark-Wanaque-Midvale, round trip from	1.20	"	1.10
Little Falls-Midvale, round trip from	.70	"	.60
Hackensack-Park Ridge, round trip from	.60	"	.55
Jersey City-Park Ridge, round trip from	1.10	"	1.05

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ON NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD.

Jersey City-Ridgefield Park, one way from	$ .30	to	$ .25
Jersey City-Pompton Lakes, round trip from	1.40	"	1.30
Jersey City-Sparta, round trip from	1.55	"	1.40
Little Ferry-Sparta, round trip from	2.40	"	2.15
Hackensack-Paterson, rond trip from	.40	"	.35
Paterson (Broadway)-Little Falls, round trip from	.45	"	.40
Paterson (Broadway)-Sussex, round trip from	2.25	"	2.05
Butler-Paterson, one way from	.50	"	.45
Blairstown-Delaware, round trip from	.60	"	.50

No. 135.

IN THE MATTER OF THE APPLICATION OF C. A. MCGLENNON TO CAUSE STREET RAILWAY TRACKS TO BE LAID ON CLAY STREET BRIDGE BY PUBLIC SERVICE RAILWAY COMPANY.

The annual compensation to be paid by the Public Service Railway Company for use of the Clay Street Bridge between the counties of Hudson and Essex fixed at $2,644.46. The amount so fixed takes into consideration interest on extra cost of construction, owing to design of bridge for use by the Public Service Railway Company, compensation covering annual depreciation on extra cost of construction, compensation covering shortened life of bridge by reason of its use by trolley cars and compensation for added cost of maintenance because of such use.

Benjamin F. Jones, for the Board of Chosen Freeholders of the County of Essex.

Joseph M. Noonan, for the Board of Chosen Freeholders of the County of Hudson.

Frank Bergen and *L. D. H. Gilmour,* for the Public Service Railway Company.

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The Public Service Railway Company operated its cars over the former Clay street bridge. This it did under a contract with the Freeholders of the two counties, paying annually for such use three hundred dollars ($300) a year for a term of years and six hundred dollars ($600) a year thereafter. When said bridge was replaced by the present Clay street bridge there was a long continued dispute as to the amount to be paid for its use. The absence of trolley service thereover was the subject of frequent complaint for a period of six years and more, but no agreement was reached permitting the resumption of such service. An Act of the Legislature, approved April 14th, 1913, was designed to apply to this and to similar situations. Said Act provided that certain designated public officials, or the street railway company concerned, or any taxpayer of a municipality in which such bridge or part thereof was situate, might apply to this Board for an authoritative direction to the company to lay tracks on the bridge and to operate across it. The statute empowered the Board upon notice, after hearing, to issue such authoritative directions, if in the Board's opinion, "the use of such bridge by the street railway company is a public necessity." The statute further empowered the Board to fix, within certain designated limits, the period of years for which the company should use such bridge as aforesaid. Furthermore, the statute empowered this Board to "fix the annual compensation, if any, to be paid by the street railroad company."

C. A. McGlennon, of East Newark, made to this Board an application such as the statute provided; and a hearing, after due notice, was held thereon at the Court House, in Newark, on May 9th, 1913, at which the applicant appeared in person, and at which the two counties concerned were represented by counsel. As a result of said application, and at a second hearing thereon held in Jersey City on

May 16th, 1913, it was agreed and stipulated, *inter alia*, that the laying of tracks on the bridge and the operation of cars thereover is necessary; and that by consent of the parties aforesaid, an order of the Board might issue directing the company to lay tracks on the bridge and to operate its cars thereover for a term of years to be fixed in said order, and that the fixing of the annual compensation, if any, might be embodied in a subsequent order, after completing the hearings upon matters relevant to such compensation. Accordingly, an order was made and issued on May 23d, 1913, directing Public Service Railway Company to lay tracks on said bridge and to afford service thereover, and fixing the period of such use at thirty-five years. Said order and the signed stipulation by virtue of which it issued prior to the fixation of compensation are by reference thereto herein made part hereof. As the outcome of said order and the company's compliance therewith, trolley traffic has been resumed across the Clay street bridge.

In fixing the annual compensation, if any, to be paid by Public Service Railway Company to the counties of Essex and Hudson, the Board's scope of action is limited by the particular statute (*P. L. 1913, Ch. 361*), under which the fixation is to be made. It is wholly beyond our competence to determine in general the nature and extent of the responsibility of municipal authorities in providing highways, including bridges. Whether such authorities are under obligation to make adequate provision of public highways, including bridges, for all sorts and conditions of traffic which may traverse such highways, or whether such authorities acquit themselves of their legal responsibility by providing only for the normal and ordinary use of public highways, and if so, what specific kinds of traffic at a given time and place are to be considered as normal and ordinary, it is not our function to consider or decide. It may well be that

"they are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in reference to the kind or character of animals led or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported" (*Gregory* v. *Inhabitants of Adams, 14 Gray (Mass.), 242*).

Equally foreign to the matter in hand is the question whether the responsibility for adequate highways and bridges belongs wholly to the municipal authorities, or in appropriate circumstances may be the joint responsibility of such authorities and a street railroad company incorporated under the Traction Act. The latter conclusion seems to be reached by Vice-Chancellor Emery in the Avenue C Case (*78 N. J. Equity 20*); but in the case before us it was stipulated that the company, prior to the issuance of the Board's first order, had no legal right to cross the Clay street bridge.

It is hardly necessary to add that the language of the statute authorizing the Board to "fix the annual compensation, *if any*, to be paid by the street railway company to the municipality or municipalities operating, owning or controlling such bridge" does not authorize the Board in its discretion to adopt as a matter of public policy either of the two alternatives, the one involving the payment for use of bridges, and the other their free use by street railroad companies. The evident intent of the statute in employing the words "compensation, if any," is to allow a finding that no annual compensation is to be forthcoming when there is no evidence that there has been any public outlay imputable to the use of a bridge by a street railway company.

In the hearing under the statute we hold it admissible as collateral evidence to learn what remuneration, if any, has been paid by street railroad companies for the use of other similar bridges. Similarly it is admissible to receive in evidence the tenders which have been made for the use of this particular bridge or other similar bridges. It is in evidence that the Public Service Railway Company in 1908 made a tender of four thousand dollars per annum for the use of the present Clay street bridge. In so far as the offer tends to throw light upon the question of the compensation to which the counties are entitled under the statute it is relevant as evidence. But it cannot be taken alone as determining the amount of compensation to be fixed under the statute.

The circumstances under which it was made, and which no longer exist, deprive it of the force of controlling evidence in this proceeding as to the minimum sum which would constitute just compensation.

The company was confronted, on the one hand, with an interruption of continuous service; its passengers were discommoded; the municipality served was demanding a speedy resumption of the former service. On the other hand, it was confronted by the Boards of Chosen Freeholders, withholding the requisite consent to the use of the bridge, seeking, naturally enough, to drive the most advantageous bargain possible, and seemingly not in accord as to when the limits of possible bargaining were reached.

Under such circumstances it may be that the sum tendered will exceed the sum representing just compensation as fixed by an impartial body, since the tender is prompted in part, at least, by the desire to resume service and meet the demands of the municipality to be served, and such desire can only be attained by terminating the controversy as to compensation.

Somewhat similar considerations in actions to assess damages resulting from the taking of lands by a railroad company through condemnation have led to the exclusion of offers made by the company to the owner as evidence of the value of the lands taken or damages inflicted by the taking.

(1851) *Upton et al.* v. *South Reading Railroad Co., 8 Cush. 600 (Mass.).*

(1899) *St. Louis & K. C. Rly. Co.* v. *Eby, 152 Mo. 606.*

(1906) *Metropolitan St. Rly. Co.* v. *Walsh, 197 Mo. 392.*

Like considerations have led to the refusal to admit in evidence offers made by one litigating party to another where the party making the offer was led to believe by the conduct of his adversary that a compromise might be effected.

(1866) *Den. ex dem. Crowther et al.* v. *Lloyd et al., 31 N. J. L. 393.*

(1899) *Richardson* v. *Int. Pottery Co., 63 N. J. L., 248.*

The situation in which the tender originated no longer exists. It was ended by the enactment of the statute under which this proceeding is brought. The compensation, if any, to be paid is by force of the statute no longer the subject of bargaining. Its fixation is now lodged with this Board and in such fixation it must follow the principle before stated.

Similarly the annual sum or sums accepted by county freeholders for the use of similar drawbridges, such as the Plank Road bridge over the Hackensack, where Hudson County accepts three hundred dollars a year (and Bergen County presumably the same amount—Testimony, June 27th, 1913, p. 150), is admissible as evidence, but only so far as it tends to throw light on the compensation in this case to be fixed under the statute. The compensation so to

be fixed under the statute is not identical with the total annual value of the use of the bridge to the company, but with the annual cost of the bridge to the counties by reason of trolley service thereover. A bridge at this point for trolley traffic alone would cost in the neighborhood of one hundred thousand dollars (Testimony, May 16th, 1913, p. 22); and it is clear that if trolley traffic required its construction for such traffic alone, anything less than the annual charge falling on the company by reason of such bridge construction and maintenance might be an advantageous arrangement for the company, although far in excess of the cost to the counties in case the latter provided a structure available for general traffic and incidentally for trolley traffic as well.

In certain cases it would appear that the use of county bridges has been accorded gratuitously to street railroad companies. This certainly could not be relied on to show that no compensation should be forthcoming in the present case. In certain cases, as at present on county bridges within Hudson and Essex counties, the sum accepted annually by virtue of contracts entered into between the company and the Boards of Freeholders, appears in no case to be over six hundred dollars. This cannot be taken as measuring the limit of the compensation that should be forthcoming in the present case. And, similarly, the tender made by the company in 1908 for the use of the Clay street bridge cannot be taken as conclusively measuring either the total compensation or the minimum compensation, to be fixed according to the statute governing the fixation of compensation in the present case.

The statute controlling in this case casts upon the Board the duty of determining first whether the public outlay by reason of provision for trolley traffic over the Clay street

bridge was greater than what the public outlay would otherwise have been; second, in case the first inquiry is resolved affirmatively, the amount of such additional outlay reasonably imputable to provision for trolley traffic over Clay street bridge, estimating such additional outlay as an annual sum due as compensation to the two counties.

Upon consideration of the testimony adduced, the Board finds and determines that the public outlay upon Clay street bridge, by reason of provision for trolley traffic across said bridge, was greater than such public outlay would otherwise have been.

For some years immediately prior to the replacement of the former Clay street bridge trolley cars had been operated across it. There would, in default of some announced plan to the contrary, be a presumption that, upon the completion of the substituted structure, trolley traffic would resume its former route and traverse the new bridge. This view is confirmed by the testimony of James Owen, who testified that:

"The Clay street bridge was originally designed for trolley service, except for details of the flooring; the strength of the bridge is adequate for the service that the Public Service Railway can put on it." (Testimony, May 9th, 1913, p. 11.)

He also testified at the same hearing (p. 16) as follows:

"Question. I would like to ask the County Engineer whether any special preparation was made in the bridge to accommodate the trolley service?"
"Answer. Yes."

Henry W. Hodge, bridge engineer, called by the counties, testified, on May 16th, 1913, that the bridge is designed for a live load of 125 pounds per square foot; that the ordinary pressure for bridge design is from seventy to one hundred

pounds; that the additional stability provided was made necessary to accommodate trolley service over the bridge. (Testimony, p. 11.) Asked specifically:

"Is that load excessive for trolley service over that bridge?"

He replied:

"It is heavier than any bridge I ever heard of, except with trolley service." (Testimony, May 16th, 1913, p. 13.)

Witness also testified that the increase in the provision for the load to be carried from 75 to 100 pounds up to 125 pounds was reasonably necessary for the accommodation of such trolley service as prevails in that section. (*Ibid.*, pp. 13, 14.)

Frederick A. Reimer, County Engineer for Hudson County, in answer to a question how the Clay street bridge compares with other bridges throughout the county over which no trolley cars are passing, testified on June 11th, 1913, that the highway bridges throughout the county are designed to carry 100 pounds per square foot (Testimony, p. 14). James Owen, recalled, testified on June 11th, 1913, that he designed the Clay street bridge, and designed it "not specifically but actually," for trolley service, and for that reason made it sufficiently strong to carry a load of 125 pounds per square foot (Testimony, p. 17); that the usual practice at that time was to design for 100 pounds per square foot, and that he would have adopted that plan had he not designed it for trolley service (*Ibid.*, p. 18); and that two years ago he had designed a city bridge for a load of 100 pounds per square foot (*Ibid.*, p. 22).

For the company, Otis E. Hovey, of the American Bridge

Company, on June 11th, 1913, testified that a design of 125 pounds per square foot, live load, would have been a proper design if it had not been expected that trolley cars would be run over the bridge (Testimony, p. 33). The company showed also that the State Commissioner of Highways has issued bridge specifications calling for a load of 125 pounds, live load, to the square foot; and that Mr. Owen, the designer of the Clay street bridge, had advised that standard for the future (Evidence, June 11th, 1913, p. 23).

Joseph J. Yates, bridge engineer, in the employ of the Central Railroad, testified that the Central Railroad in its building of highway bridges is conforming to the recommendations of the State Commissioner of Highways. (Testimony, June 11th, 1913, p. 64.) He admitted, however, that in New Jersey bridges designed for 125 pounds, live load, to the square foot are "pretty scarce" (*Ibid.*, p. 86); although recalled on June 27th, 1913, he cited several such bridges in this State, and several others in other states. (Testimony, pp. 128, 129, 130, *sq.*) Other instances of such bridges were given on June 27th, 1913, by Lincoln Bush, formerly bridge engineer on the Lackawanna (Testimony, p. 76 *sq.*); though two of the three are in Pennsylvania, and these two, as well as the one cited in Montclair, seem to have been quite recently designed or built.

O. E. Hovey, recalled, on June 27th, 1913, instanced bridge designs of 125 pounds to the square foot in Kansas City, Nashville, Denver and the District of Columbia. (Testimony, p. 108, *sq.*)

It appears to the Board that at the time the Clay street bridge was designed and built its live load specifications were unusually high; that it is overwhelmingly probable that its strength in this respect was provided in anticipation of trolley use; and that the excellence or desirability of such

specifications for the present or future of bridge designs is no evidence to disprove or weaken the conclusion that the counties of Essex and Hudson in the building of the present Clay street bridge made an outlay in provision for trolley service over said bridge greater than would have been probable or necessary if trolley service across said bridge had not been anticipated and provided for by them. We have next to inquire into the probable additional outlay made by reason of anticipated trolley traffic on said bridge.

The evidence on this point is conflicting. Henry W. Hodge, on May 16th, 1913, testified as follows:

"Question. Can you tell the Commission how much more cheaply that bridge might have been built if they were not anticipating trolley service over it?

"Answer. Quite closely, yes.

"Question. How much would it have been?

"Answer. Designed for 100 pounds to the square foot; it would take about one-fifth off the cost.

"Question. About $36,000?

"Answer. About $36,000." (Testimony, p. 14.)

There was no cross-examination upon this point. Otis E. Hovey, on June 11th, 1913, testified as follows:

"Question. Suppose a bridge was designed to carry 100 pounds to the square foot, and it was found it would cost, say, $144,000 to build it, and then the parties having the bridge in mind found it desirable to have the plans changed to carry a load of 125 pounds to the square foot; would that increase the cost of the bridge by twenty-five per cent. of $144,000?

"Answer. No, sir.

"Question. About what per cent. of $144,000 would that increase the capitalization called for?

"Answer. Probably somewhere around ten per cent., I should think.

"Question. Ten per cent. of $144,000?

"Answer. I should think it might, yes."

There was likewise no cross-examination upon this estimate. Mr. Hodge makes the increased cost about $36,000.

Mr. Hovey makes the increased cost somewhere about $14,400. An average of the two figures named is $25,200, although there seems no controlling reason to suppose such an average represents the actual excess of cost over the cost of a bridge undesigned for use by trolley cars. It may be observed, in passing, that the question first put to Mr. Hovey does not specify the dimensions of the bridge, nor its character as a drawbridge, though the failure so to specify ought, perhaps, not to weigh heavily to invalidate the answer returned. It may also be observed that Mr. Hodge specifically has the Clay street bridge in mind when computing the extra cost. He also declares he can estimate the difference in cost "quite closely," although later he says "about one-fifth off the cost," whereas Mr. Hovey guardedly characterizes his estimate as "probably somewhere about ten per cent., etc."

It would, therefore, appear that Mr. Hodge's estimate may be regarded as made with a shade more of exactitude than Mr. Hovey's. On the other hand, Mr. Hodge takes the cost at exactly $180,000, whereas the exact amount paid was $169,975, plus five per cent. for engineers' fees (Evidence of June 11th, 1913, p. 29). He is also probably naming not the least figure possible to cover the excess cost, but the outside figure. In the absence, therefore, of more definite data, we find and determine the excess cost of construction fairly imputable to provision for trolley service to be approximately thirty thousand dollars; this figure—$30,000—allows a margin for the shrinkage in value (by six years' depreciation on an outlay of more than $30,000). We also find and determine four per cent. thereon annually, or twelve hundred dollars ($1,200) per annum, to be the compensation to be paid annually by reason of said excess outlay made originally by the two counties. The bridge bonds, it was stated, carried this rate of interest.

To determine the amount annually due by reason of depreciation we must determine from the evidence the probable period for which the bridge will afford service. On June 27th, 1913, C. C. Sunderland, bridge engineer of John A. Roebling's Sons Company, a witness called by the company, testified that the "accepted life" of a steel bridge is thirty-five to fifty years. (Evidence, p. 34.) On June 11th, 1913, Otis E. Hovey testified that the bridge, if well taken care of, should last at least fifty years. (Evidence, p. 34.) Henry W. Hodge testified that without trolley service the bridge would last fifty years. (Evidence, May 16th, 1913, p. 14.) George H. Pegram contributed the only dissenting note, perhaps because he was estimating possible rather than probable durability, and testified he would expect the bridge to last one hundred years, if properly maintained, which, he added, was not now the case (Evidence of June 27th, 1913, p. 55).

The prevailing opinion seems fairly to indicate that the bridge when new would last fifty years, if well maintained. We take it that without trolley travel the bridge when new would have an expectation of life of 50 years. Of this term 6½ years have elapsed, leaving 43½ years of presumable service. The bridge has not had the best of maintenance. (Testimony, June 11th, 1913, p. 34.) It has needed painting, which hitherto has not been done when and as required. (Evidence, June 27th, 1913, pp. 34, 35.) The Commission's Bridge Engineer reported to the Board, although this is *obiter*, and does not appear in the record of the case, that his inspection of July 30th, 1913, showed that the wedges were not properly driven; that the ends of the bridge were 1½ inches below the roadway surface on the approach; and that the draw was entirely supported on the center drum, and was hammering badly under the traffic.

We find that by reason of inadequate maintenance to date 2½ years should be deducted from the 43½ years of expected life mentioned above, leaving an expectation of life of 41 years from date, on the assumption that there is no trolley travel over the bridge.

Upon the question whether subjecting the bridge to the use of trolley cars will shorten its life, and, if so, to what extent, the expert evidence is sharply conflicting. On the one hand, Henry W. Hodge is explicit in his testimony that without trolley service the likelihood of its life would be about fifty years, and that with trolley service over it,

"ten years less than that, not over forty years; with heavy trolley cars it might be less; it would depend on the weight of the trolley cars."

He testifies that:

"The main strain is a vibration, jar and shaking of passing traffic, and, of course, the lack of maintenance, if it is allowed to rust."

And that, as between wagons and trolleys,

"The trolley contributes mostly to it."

And that, as compared with a heavy automobile impact on the bridge, the trolley impact is "more destructive"; and that his testimony assumes the bridge is properly sustained by wedges. (Testimony of May 16th, 1913, pp. 14, 15, 16, 18, 27, 29, 30, 31, 32.)

The County Engineer of Hudson County corroborates Mr. Hodge's testimony generally, and compares the Johnson Avenue bridge built in 1874, which has not been subjected to trolley travel, and is still in good condition, with the Communipaw avenue bridge, built at the same time, but subjected to trolley travel, and which, in consequence,

required rebuilding two years ago. (Evidence, May 16th, 1913, p. 36.) James Owen, County Engineer of Essex County, testifies to a similar result upon the Central avenue bridge as compared with the Sussex avenue bridge, both in Newark. The former had its life reduced by "about ten years" by trolley traffic, according to his testimony (Evidence, May 9th, 1913, p. 17).

On the other hand, the expert witnesses produced by the company testified that subjecting the bridge to trolley use would produce either no reduction or but a slight reduction in its life. Thus Otis E. Hovey testifies that, if the bridge is properly painted, the running of trolley cars across it would cause no diminution in its life, as far as the steel work is concerned; and, apart from pavement disintegration, would not expedite the bridge's deterioration. (Evidence, June 11th, 1913, pp. 33, 34.) He also testifies that a trolley coming on a bridge puts no more impact thereon and causes no more vibration than a wagon or automobile of the same weight. (*Ibid.*, p. 41.) Being asked if the trolley car's impact would not loosen rivets and tend to disintegrate the bridge, he answers that "right at the end of the bridge that effect might come in." (*Ibid.*, p. 60.)

Similarly, Joseph J. Yates testifies that, with proper bridge maintenance, the traversing the bridge with 30-ton trolley cars would not affect the life of the bridge, apart from the life of the pavement. (*Ibid.*, p. 65.) The frequency with which such cars might operate over the bridge would, in his opinion, have no deleterious effect. C. C. Sunderland, explaining that the elastic limit of metal is the limit beyond which stress will result in a permanent elongation or set, testifies that where any given stress applied is within one-half of a bridge's elastic limit, the bridge may, without appreciable injury, be subjected to an indefinite number of such stresses. (Testimony, June 27th, 1913, p.

27 *sq.*) He speaks of a small "fatigue value" occasioned by constant stress (*Ibid.* p. 35), but apparently this is negligible. He minimizes any deteriorating effect produced by the trolley wheels jumping the gap between the abutment and the draw (*Ibid.*, p. 32); although he admits if the wedges were not in position there might be a deleterious effect thus produced (*Ibid.*, p. 32).

George H. Pegram testifies that trolley operation over the bridge would have no shortening effect on the life of the bridge structure, except in the local effect of the jump in the gap of the rails at the end (*Ibid.*, pp. 50, 51).

Most uncompromising of all is the testimony of Lincoln Bush. The use of the bridge by trolley cars, he testifies, would not reduce its life at all (*Ibid.*, p. 73); nor would the drop of the trolley wheels in the gap cause any injury to the bridge (*Ibid.*, p. 73); nor cause as much of an impact as an automobile truck loaded (*Ibid.*, p. 74). He corroborates Mr. Sunderland's testimony as to there being no deleterious influence caused by any number of successive applications of stress within the elastic limit (*Ibid.*, p. 79). On cross-examination he concedes that if the interval in the gap was as much as three inches, there might be a little jar caused (*Ibid.*, p. 86); and that a trolley car with flat wheels would give an additional pound (*Ibid.*, p. 91) but that a rubber tired automobile truck would jar the bridge more than a 30-ton trolley car (*Ibid.*, p. 92).

This evident divergence, not to say contradiction, of expert testimony makes difficult a determination of the question as to the influence of trolley travel upon the life of the bridge. The abstract scientific proposition that an indefinite number of successive applications of stress within the elastic limit of a metal rod produces no observable elongation or set in the metal rod may be admitted, however, without proving that trolleys traversing Clay street bridge will not shorten its service life. This is a riveted

structure. The middle section is a turning draw. There is no human probability that a trolley car will never cross at a speed of over four miles an hour. There will be occasionally a flat wheel car to cross it. The wedges will not invariably be driven with the utmost nicety, nor will the rails between the solid approach and the draw span be always set with absolute exactitude. The gap will vary in width due to the contraction caused by cold weather, and the jar at the end will admittedly have some local effect upon bridge aprons and upon the rivets in the neighborhood. Without attaching undue importance to the bridges whose service life, it has been testified, has been shortened by trolley use, we are of opinion that there will be some shortening of the life of this bridge under the trolley load. Mr. Hodge's estimate that the shortening of life would be twenty per cent., if applied to our estimate of the presumable duration of the bridge's future service life of 41 years, would imply a shortened duration of about eight years. This may be excessive. We incline to think that it represents the probable maximum shortening of the bridge's future service life. In the inevitable twilight in which the matter lies we incline to think that it may be too long by perhaps two years. As a result, we find and determine that the subjection of the Clay street bridge to trolley use will shorten its service life by a period of six years from the present time. Deducting this period from the estimated future service life of the bridge without trolley service of 41 years, we find and determine that 35 years is approximately the probable future service life of the Clay street bridge, carrying the extra burden of trolley cars.

In order at the end of thirty-five years to produce at 4 per cent. compound interest the amount of $30,000, the estimated present value of the original extra public outlay to provide for trolley service on the bridge, an annual contribution of four hundred and seven dollars and thirty-two

cents ($407.32) must be forthcoming.

Accordingly, we find and determine that annually Public Service Railway Company shall pay to the counties of Hudson and Essex, one-half to each county, four hundred and seven dollars and thirty-two cents, as compensation for depreciation upon the excess outlay made for rendering Clay street bridge fit for trolley service.

Upon our finding that the life of the bridge will be shortened by the operation across it of trolley cars by approximately six years, we compute the annual payment in compensation of the shortened life as follows: Assuming the bridge cost approximately $180,000 and had an expected life of fifty years, the final junk value being assumed equal only to the cost of removal, the yearly dissipation of original outlay would be $3,600 on the straight line basis. Assuming that nine years of its service life have expired, the value dissipated is $32,400, and the present worth is $147,600 without trolley use, this value will diminish by one forty-first annually, or by $3,600 per year. If the bridge's service life is reduced from forty-one years to thirty-five years by reason of its use by trolley cars, the yearly dissipation of the present value would be one thirty-fifth of $147,600, or $4,217.14 per annum. The difference is $617.14 yearly. Accordingly, we find and determine that annually Public Service Railway Company shall pay to the counties of Hudson and Essex, one-half to each county, six hundred and seventeen dollars and fourteen cents ($617.14) as compensation for the value of the shortened life of Clay street bridge imputable to the use of said bridge by trolley cars.

James Owen, on May 9th, 1913, testified that "about" one thousand dollars a year would be a fair amount to estimate for the wear and tear caused directly by the heavy traffic of the cars. (Testimony, p. 18.) This was only a tentative and proximate estimate, and was given subject to further inquiry on witness's part. He was not further examined

on this point. On May 16th, 1913, Henry W. Hodge, when asked at what figure he calculated the total wear and tear on the bridge caused by the trolley company, in excess of other wear and tear, replied in part:

"I should say the total roadway, structure, replacing creeping rails, fixing aprons and taking care of the jar and impact that might cause the loosening up of rivets, it might run to $1,000."

This figure was the annual cost, and was inclusive of roadways. (Testimony, p. 17.) Witness explained his estimate was based on comparisons of other costs of repairs given him by the engineers of Essex and Hudson (*Ibid.*, p. 28); and that it was based on

"* * * additional repairs to the wood block pavement and repairs to aprons on account of creeping rails, the necessity of removing wood block pavement every now and then to put down worn rails; the impact of cars coming off the trestle opening and pounding on the end of the draw that causes a checking up rigid (*sic*) and jarring the structure. The total wear and tear over the bridge due to heavy loads crossing." (*Ibid.*, p. 29.)

His estimate, he testified, would be reduced from $200 to $300, if the paving inside the rails and two feet outside were defrayed by the company. (*Ibid.*, p. 29.) For the company Otis E. Hovey, on June 11th, 1913, testified that the additional cost per annum for maintenance, provided trolley cars were run over it, apart from pavement costs, would be nothing at all. (Testimony, p. 34.) At the same hearing, J. J. Yates testified that the increased cost of bridge maintenance, if used as proposed for trolley cars, would, other than the roadway or pavement, be nothing. (*Ibid.*, p. 66.)

At the last hearing, on June 27th, 1913, George H. Pegram testified the annual cost of maintenance due to trolley travel on the bridge would, apart from rails on the bridge and pavement near the rails, not increase

"except what expense might be caused by adjusting the rails at this gap and possible injury to the end of the structure in case the gap was allowed to be too large, but that would be a local and very small amount." (Testimony, p. 51.)

Lincoln Bush, at the same hearing, testified the increased cost of maintenance

"would apply to the effect of vehicular traffic along the rail, which would cut out the pavement more rapidly than if those rails were not there. $150 a year, would keep up the repairs on that structure for the pavement." (*Ibid.*, p. 76.)

His paving estimate is given in some detail (*Ibid.*, pp. 105, 106). On cross-examination he testified that he had "not taken in maintenance or painting of the bridge" (*Ibid.*, p. 107).

It is our understanding that on the bridge the company is required to maintain the roadway and its own specific overhead structures to the same extent as along any other portion of its track. Our allowance for extra maintenance, therefore, is exclusive of such costs. We do not see that the cost of painting would be affected by the trolley use of the bridge. Deducting, therefore, $300 from Mr. Hodge's estimate would leave $700 as the annual extra cost of maintenance due to trolleys crossing the bridge. His estimate was inclusive and a maximum. It seems to include only items properly chargeable to the trolley use of the bridge. If we reduce the $700 estimate in the same proportion as we have seen proper to reduce his estimate of the lessened life of the bridge, or about 40 per cent., we obtain approximately $420 per annum as the excess cost of maintenance due to the additional use to which the bridge is put.

We accordingly find and determine that annually Public Service Railway Company shall pay to the counties of Hudson and Essex, one-half to each county, four hundred and twenty dollars ($420) as compensation for the added cost for bridge maintenance. This amount is exclusive of the maintenance of track and overhead structures, which properly falls on the company.

We disallow the claim made for additional service required on the bridge by reason of its use by trolleys. The

force now consists of nine men, three shifts working each eight hours a day. The draw is turned not oftener on an average than twelve times a day. (Testimony, June 27th, 1913, p. 97.)

A brief was submitted to the Board on behalf of the Boards of Chosen Freeholders of the Counties of Essex and Hudson by Benjamin F. Jones, wherein the annual compensation asked was set at $6,528.78. A supplementary brief for Hudson County was submitted by Joseph M. Noonan. A brief was submitted on behalf of Public Service Railway Company by Frank Bergen, wherein the annual compensation admitted as proper was set at $150.

Summarizing, we find and determine that the annual compensation to be paid by Public Service Railway Company to the Counties of Hudson and Essex, one-half to each county operating, owing and controlling Clay street bridge for the use of said bridge shall be as follows:

As compensation covering annual interest at 4 per cent on $30,000, approximate extra cost for construction	$1,200.00
As compensation covering annual depreciation on $30,000, approximate extra cost for construction	407.32
As compensation covering shortened life of said bridge by reason of its use by trolley cars	617.14
As compensation for added cost of maintenance of said bridge by reason of its use by trolley cars	420.00
As compensation for additional service rendered necessary by reason of its use by trolley cars	nothing
Total annual compensation	$2,644.46

An order to this effect will be entered. Such order to be effective October 20th, 1913, the first year to begin on the day on which the first car crossed the bridge.

Dated September 29th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report of its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

IT IS ORDERED that the Public Service Railway Company shall pay as compensation for the use of the Clay street bridge the sum of two thousand six hundred forty-four dollars and forty-six cents ($2,644.46), each year, one-half of such annual payment to be made to the County of Hudson and one-half to the County of Essex, the amount of two thousand six hundred forty-four dollars and forty-six cents ($2,644.46) to be paid by Public Service Railway Company at the end of each year the company operates its cars over the Clay street bridge under the Order of this Board made May twenty-third, nineteen hundred thirteen; the first year to begin with the fourth day of August, nineteen hundred and thirteen, on which day, under the order of this Board, the Public Service Railway Company began the operation of its cars over said bridge.

This order shall become effective October 20th, 1913.

Dated September 29th, 1913.

An appeal was taken from the above order. The decision of the Supreme Court follows:

PUBLIC SERVICE RY. CO. *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS *et al.*

(Supreme Court of New Jersey. July 10, 1914.)

An order of the Board of Public Utility Commissioners, fixing the compensation to be paid by the Public Service Railway Company for the use of the Clay street bridge over the Passaic river, made in pursuance of the provisions of P. L. 1913, p. 777, *held* not unreasonable.

Certiorari by Public Service Railway Company against the Board of Public Utility Commissioners and others to review an order of such Board. Order affirmed.

Argued February term, 1914, before GARRISON, TRENCHARD and MINTURN, JJ.

C. A. McGlennon *vs.* P. S. Ry.

Benjamin F. Jones, of Newark, for Essex County. Joseph M. Noonan, of Jersey City, for Hudson County. Frank H. Sommer, of Newark, for the Board. Frank Bergen, of Newark, for Prosecutor.

MINTURN, J. The question involved in this case is the reasonableness of the order of the Public Utility Commissioners, requiring the defendant to pay the sum of $2,644.46 annually, one-half to the county of Essex and the other half to the county of Hudson, for the use of the Clay street bridge spanning the Passaic river and connecting Clay street, Newark, with Central avenue in East Newark.

The authority to fix the compensation is contained in P. L. 1913, p. 777. The power of this court to review the order by certiorari, thus made, is contained in section 38 of the Public Utility Act (P. L. 1911, p. 388), and the power to set it aside so far as the facts are concerned is contained in the statutory limitation:

"When it clearly appears that there was no evidence before the Board to support reasonably such order, or that the same was without the jurisdiction of the Board."

In giving effect to that section we are not unmindful of the recent adjudication of this court in *Erie Railroad* vs. *Board of Public Utility Commissioners*, 89 Atl. 1001, filed February 24, 1914, vindicating the right of this court upon certiorari to review the facts under the provisions of the Certiorari Act; but we do not read that deliverance as in effect nullifying the legislative intent contained in the section of the Utility Act under consideration, since it is well settled that the ruling of a state railroad commission made in accordance with law, after an investigation of the facts, may be made final by legislation as to the facts. *Butfield* vs. *Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349. 48 L. Ed. 525; *Bates Co.* vs. *Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894.

Since at common law the writ of certiorari was intended to review only the regularity and legality of the record of the lower tribunal, and not to settle disputed facts (1 Tidd. Pr. 390; *Wilson* vs. *Hudson*. 32 N. J. Law, 365), the Legislature, in conferring the power to review the facts by the eleventh section of the Certiorari Act. must be held not to have conferred an inextinguishable or irrepealable power of review. The eleventh section of the Certiorari Act (1 Comp. St. 1910, p. 405) and the thirty-eighth section of the Utility Act must therefore be read as in pari materia.

Such, in effect, was the construction given to these sections in a case involving the exercise of the power of mandamus by this court. *Eastern Telephone, etc., Co.* vs. *Board of Public Utility Commissioners* (Sup.), 89 Atl. 924.

We are persuaded, therefore, to conclude that what the Legislature intended in the enactment of both sections was essentially similar, i. e., to concede to this court a power to review the facts. but to set aside the order only upon concluding that the evidence upon which the order rested is not such as will reasonably support it. thus placing the appeal by certiorari upon the same status, relatively. as a district court appeal. Where in such case there is evidence upon which the lower tribunal may reasonably infer the result attained, we will not disturb it. *Warren* vs. *Finn*, 84 N. J. Law, 206, 86 Atl. 530.

But whether we review the facts in this case under the eleventh section of the Certiorari Act, or under the language contained in the thirty-eighth section of the Utilities Act, our conclusion in this case must be identical.

The question presented involved an inquiry into the mooted proposition whether the added weight, and use of the trolley car, upon the bridge, tended to shorten the life of the structure. and what financial return to the counties, if such were ascertained to be the fact, would be fair and equitable as compensation for the superimposed loss.

The Board heard testimony as to the facts, and considered the testimony of eminent experts, and worked the problem out upon a basis which allowed a certain sum for interest on the extra cost of construction made necessary by the added service, another sum for depreciation, due to the shortened life of the structure in use, and a final item for cost of maintenance, based upon this use, making a total of $2,644.46.

We are unable to accede to the contention that this sum is unreasonable in the light of the testimony, and we think it is entirely supportable by the facts and the testimony.

The contention of the defendant denying the jurisdiction of the Board to impose payment of compensation upon the defendant, we are not required to consider, since the act of 1913 specifically confers that power upon the Board, and the defendant has by its stipulation in this case admitted that it "has no legal authority to lay its tracks on such bridge or cross the same," thus conceding to the Board the necessary jurisdiction to make the order under review.

The order of the Board of Public Utility Commissioners will therefore be affirmed.

No. 136.

LITTLE FALLS TAX PAYERS' AND BUSINESS MEN'S ASSOCIATION
VS.
ERIE RAILROAD COMPANY.

To justify the Board in substituting its judgment for that of the railroad company as to the location of stations along its route, there should be no doubt as to the benefit to be obtained from the change. In the present case it does not appear that the benefit to be obtained from the change proposed in the location of the station at Little Falls would be general and of such character as to warrant the Board making an order requiring it. The Board finds that the present station facilities do not afford safe, adequate and proper service. The company is ordered to submit plans for better station facilities.

Gustav A. Hunziker, for the petitioners.

Theodore H. Burgess, for the respondent.

William I. Lewis, for certain residents of Little Falls.

This application is made for an order requiring the Erie Railroad Company to furnish adequate station facilities at Little Falls in the County of Passaic.

Several hearings were had and argument was heard on the eighteenth of July, nineteen hundred and thirteen.

The burden of the petitioners' claim for the removal of the station to a new site rested upon the use of the station by commuters living in the territory to the northeast of the present station site. There are approximately one hundred and sixty commuters. From the testimony it appears that almost one-half of this number would not be benefited by a change of location as to the distance to be traveled by them from their homes to the station. A change to the site proposed would result in lessening the distance to be traveled by a little more than one-half of the regular commuters. The utmost saving to such commuters would be ten hundred and twenty-five feet and many would not be benefited to that extent. It was estimated that of the one hundred and sixty-one commuters in April, forty-two would be benefited by a change to the extent of two hundred and twenty-five feet; thirty-eight would be benefited to the extent of ten hundred and twenty-five feet, and fifty-four would be required to travel a greater distance than at present by over nineteen hundred to twenty-eight hundred and fifty feet, and the balance would not be benefited by the change. It would not appear, therefore, that the change of location would be of material advantage to the body of regular, daily patrons of the road from this community.

It would appear no objection is made by the other patrons as to the location of the station, and that those traveling from the trolley-road, would be considerably inconvenienced by a change of location. Residents of Singac would also be very considerably inconvenienced by the proposed change of location.

There appear also to be difficulties in operation which would have to be seriously considered before this Board concluded that it should require the Railroad Company to change the location. The land upon which the present station is located was given to the company for that purpose, and the claim is made by both the donor as well as the railroad company that the removal of the station would result in a reversion of the title to such lands to the donor. The company does not own the land of the proposed site. It will, therefore, be seen that the proposed change might involve a considerable financial loss to the railroad company, particularly in view of the fact that its buildings, to the value of many thousands of dollars, are located upon the donated land. It appears from the testimony that the change of location would present troublesome operating questions, because of the heavy grade at the proposed site.

To justify this Board in substituting its judgment for that of the railroad company as to the location of stations along its route, there should be no doubt as to the benefit to be obtained from the change. In the present case it does not appear that the benefit to be obtained from the change proposed would be general and of such character as to warrant the Board making an order requiring it. The petition so far as it relates to a change of location of the station will be dismissed.

Testimony was taken on the question of the facilities afforded by the present station. It was not seriously controverted by the railroad company that the present station does not afford safe, adequate and proper service. Adequate and proper station facilities should be afforded without delay. The Board finds that the present station facilities do not afford safe, adequate and proper service, and an order will be entered that the railroad company forthwith submit detailed plans for better station facilities. The order will require the Erie Railroad Company

to submit such plans in duplicate by October 20th, 1913, and to notify the Board of the time it will require to complete the work in accordance with the plans. Upon receipt of such plans, copies thereof will be mailed to the representative of record of the petitioners who will be directed to file with the Board, within ten days from the date of mailing such copies, notice of objection, if any, which may exist to the approval by the Board of the plans for better stational facilities.

Dated September 29th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

IT IS ORDERED that the Erie Railroad Company shall submit to the Board by October 20th, 1913, detailed plans for improved stational facilities at its station at Little Falls, in the County of Passaic, said plans to be submitted with a duplicate of each drawing, and the said Erie Railroad Company shall notify the Board of the time which, in its judgment, it will require to complete the work called for by the plans.

This order shall take effect October 20th, 1913.

Dated September 29th, 1913.

An appeal was taken from the finding of the Board in this matter, and at the time of printing the same was under review by the Supreme Court.

No. 137.

BOARD OF EDUCATION OF PEQUANNOCK TOWNSHIP, POMPTON LAKES BOROUGH, POMPTON TOWNSHIP AND THE BOROUGH OF OAKLAND

vs.

THE ERIE RAILROAD COMPANY.

G. Cornelius, District Clerk, for the Board of Education of Pompton Lakes Borough.

F. M. Prescott, for the Board of Education of Pequannock Township.

C. P. Benten and *George O. Nelson,* for the Board of Education of Pompton Township.

W. B. Romaine, for the Board of Education of the Borough of Oakland.

T. H. Burgess, for the Erie Railroad Company.

The complaints filed by the various municipalities above mentioned were identical, although they are not located upon the same branch of the Erie Railroad. The relief sought in each case is additional train service for the transportation of school children going from various points in said municipalities to Butler, New Jersey.

A hearing was held upon the complaints at Jersey City on Friday, June 20th, 1913, when all the parties interested were present.

The request of Pequannock Township is that train No. 507, leaving Jersey City at 7.24 A. M., arriving at Pompton Junction at 8.52 A. M., should be advanced so that it will arrive at Pompton Junction at 8.40 A. M. This would indicate that the train should leave Jersey City at least twelve minutes earlier than at present. It appears from the testimony that about twenty-five or thirty school children will use this train going to the Butler High School daily. The railroad company contends that this change of schedule would interfere with other connections, particularly on the Caldwell Branch, and would probably delay several hundred people, should connection not be made. A change in the schedule of this train seems to the Board to be objectionable because the schedule has been maintained for many years to the apparent satisfaction of a large number of passengers. Some sixty-five workmen use the train daily in going to the Tiffany works at Forest Hill from Brooklyn and other places, and, further, eighty to ninety pupils use the same train in going to the Normal School at Montclair Heights. There may be others who are accustomed to take this train who would be discommoded. The number of pupils who would be convenienced from Pequannock Township would be in the neighborhood of thirty—while about one hundred and seventy-five people would be discommoded. Hence, the Board does not feel warranted in ordering a change of schedule for train No. 507, and the complaint of Pequannock Township will be DISMISSED.

With respect to the complaints of Pompton Lakes Borough, Oakland Borough and Pompton Township, the Board, after hearing the testimony, caused investigation to be made by its inspectors of the conditions of the railway service in this neighborhood. As the Board did not feel

warranted in making an order to run an additional train from Oakland in the morning, because of uncertainty as to the number of school children who would patronize such a train, a suggestion was made to the Erie Railroad Company that the crew of train No. 951, which arrives at Butler at 7.56 A. M., run back to Oakland, leave there again at 8.30 A. M., run westerly to Butler, stopping at Pompton and Pompton Junction, and receive at Pompton Junction passengers from Midvale to Haskell; also that the company stop train No. 518 at Pompton Junction, scheduled to arrive there at 8.26 A. M., so as to bring the children to Butler at 8.35 A. M. In answer to this suggestion the following offer was made by the Erie Railroad Company:

"New York, Susquehanna & Western Railroad Company will as an experiment furnish train service from Oakland to Butler to accommodate the school children attending school at the latter place on five days each week for a period of two months as an experiment, with the understanding that the company reserve the right to withdraw this service if the results of the experiment do not justify its continuance, and that if the service is so withdrawn, the company's position is not to be prejudiced by its having tried the experiment. We feel it necessary to have an understanding because we apprehend that the use thereof will be less than estimated, but of course hope that this apprehension will prove unfounded."

The Board has accepted this offer of the company, and this train was installed at the beginning of the school year, and the company has been asked to report at the end of the period mentioned in the above letter as to the number of children and others carried by said train, and until such time the matter will be held in abeyance, contingent upon the outcome of the report from the railroad company.

Dated September 30th, 1913.

No. 138.

JAMES CHITTICK

vs.

NEW YORK TELEPHONE COMPANY.

If wholly through the failure of a telephone company, service to a subscriber is interrupted, the company is bound to make allowance therefor. The enforcement of such a regulation tends to make for efficient service. If wholly through the subscriber's failure, service is curtailed, and allowance therefor is made, promptitude of payment is retarded, the costs of notification, etc., are thrown upon subscribers as a whole, and a door is opened by which discriminatory rates and rebates may be introduced. The enforcement of this regulation tends to make for economy in rendering service.

Complainant did not appear.

Robert V. Marye, for the respondent.

By letter received May 13th, 1913, complainant averred that his telephone service had been temporarily cut off for failure promptly to pay bills rendered; that upon his attempting to make settlement the respondent demurred to a pro rata deduction for the period during which service was curtailed.

The matter was referred originally to the Chief Inspector of Utilities. He inclined to uphold the complainant in claiming a deduction from the bill for the period of curtailed service, and recommended that the respondent company modify its practice accordingly.

His recommendation was forwarded to the company which, by letter dated May 26th, 1913, demurred to the recommendation aforesaid. The company's objection to

complying with said recommendation was made the subject of a hearing held on September 12th, 1913, at the Chancery Chambers, Jersey City. The complainant, though notified of the hearing, did not appear. The company introduced testimony upon their practice with reference to curtailment of service in case of deferred payment of bills rendered. The Board's Chief Inspector was also heard in the matter.

The company evidently stands upon its rights with the subscribers under the contract between them. Said contract provides that service is to be furnished upon payment in advance, for ordinary service at the first of each month and upon payment for toll calls at the first of the month after that in which said toll calls have been made. The service for which advance monthly payment is to be made according to the contract is evidently construed by the company as an indivisible whole, not a service which if partly curtailed by reason of the subscriber's failure to comply with the terms of the contract may be settled by a *pro rata* payment for the term of its actual enjoyment within said month.

Conceding that the company has properly construed its rights under the contract, the question remains whether the rights thus secured to the company under its interpretation of the contract are unjust or unreasonable, or require modification under provisions of P. L. 1911, Ch. 195, 18, (a).

The testimony discloses that the company's practice after notification of a delinquent subscriber is to curtail service between the 10th and 15th of the month on the first of which payment was due. During these days incoming calls are transmitted to the subscriber, but outgoing calls, except emergency calls, are not transmitted. After the 15th, all service is denied, and the removal of the station follows thereafter within a short period.

The practice of the company in gradually curtailing the service seems to be optional with them under their contracts, and is employed in the double hope of receiving payment past due, and of not inconveniencing unnecessarily subscribers who intend to continue service but are negligent in making payment as agreed.

Any service thus afforded after the 10th under conditions specified above would seem to be service to which the subscriber under the contract has no actual right; and if after a period of partial or complete denial of service within the month, the subscriber desires to recontinue service, it would appear that he is obliged to pay for the month as an entirety.

If *wholly through the company's failure,* service to a subscriber is interrupted, the company is bound to make proper allowance therefor. The enforcement of such a regulation tends to make for efficient service.

If wholly through the subscriber's failure, service is curtailed, and allowance therefore is made, promptitude of payment is retarded, the costs of notification, etc., are thrown upon subscribers as a whole, and a door is opened by which discriminatory rates and rebates may be introduced. The enforcement of this regulation tends to make for economy in rendering service.

For these reasons we are not, as at present advised, disposed to disturb the wording of the company's contracts or their practice thereunder in respect of refusing allowances for a part of a month during which there may have been a partial denial of service by reason of the subscriber's failure to pay bills when and as agreed to by said subscriber.

The complaint involved will be DISMISSED.

Dated September 30th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

IT IS ORDERED that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated September 30th, 1913.

No. 139.

RALPH S. KELLY

VS.

MIDDLESEX WATER COMPANY.

Ralph S. Kelly, appeared in person.

Frank Bergen, for the Middlesex Water Company.

ORDER.

The complainant in this matter alleges that he is and has been unable to obtain from the Middlesex Water Company a supply of water at his residence in Woodbridge, New Jersey. To this complaint answer was made by the Middlesex Water Company. On the complaint and answer hear-

ing was held on the third day of October, one thousand nine hundred and thirteen.

After such hearing the Board finds and determines that the Middlesex Water Company does not furnish service to the complainant, Ralph S. Kelly.

The Board further finds and determines that the Middlesex Water Company may reasonably be required to supply safe, adequate and proper service to said complainant, and that to that end the said company may reasonably be required to establish, construct, maintain and operate the requisite extension of its existing facilities. In the judgment of the Board such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and the financial condition of the said Middlesex Water Company reasonably warrants the original expenditure required in making and operating such extension.

The Board HEREBY ORDERS and directs the Middlesex Water Company to establish, construct, maintain and operate such extension of its existing facilities as is necessary in order that the premises of Ralph S. Kelly in Woodbridge, New Jersey, may be supplied with water, and

FURTHER ORDERS and directs the said Middlesex Water Company upon the completion of such extension to supply the said Ralph S. Kelly, in Woodbridge, New Jersey, with water at the same rate and under the same conditions that other consumers of water residing at premises in the City of Woodbridge are supplied.

The Board hereby directs that this order shall become effective Thursday, October 9th, 1913, the Middlesex Water Company having at the hearing in this matter agreed to waive the provision of the statute, which provision requires that all orders other than those to continue service or rates in effect at the time an order is made, shall become effective

at the date specified therein which shall be at least twenty days after the said order.

Dated October 7th, 1913.

No. 140.

CITY OF SOUTH AMBOY

vs.

THE NEW YORK AND LONG BRANCH RAILROAD COMPANY.

Frederic M. P. Pearse, for the City of South Amboy.

George Holmes, for New York & Long Branch Railroad Company.

This matter was heard upon the complaint of the City of South Amboy that insufficient protection was afforded the public at certain street crossings over the tracks of the respondent in said city. The railroad company made answer to said complaint, and a hearing was ordered.

It appeared from the testimony that gates are maintained at all of said crossings, but were operated only from 7 A. M. to 7 P. M., except that, after the filing of this com-complaint, gates have been operated at John street at all hours of the day and night, and at First street, Augusta street, David street and Henry street from 7 A. M. to 8 P. M. No other means of protection is afforded at said crossings. A census taken during the latter part of June showed considerable travel over all of said crossings between the hours of 6 A. M. and 10 P. M. and during the balance of the night very little travel of any kind. Almost no vehicular

travel was recorded between 10 P. M. and 6 A. M. over any of the crossings. At some crossings there did not appear to be any travel whatever for several hours between 10 P. M. and 6 A. M. During the summer months trains pass over the streets quite frequently between 6 A. M. and 10 P. M. There are few trains after 10 P. M. There are likewise not many trains passing between 7 P. M. and 7 A. M., during the winter months.

After considering the testimony taken at the hearing, the Board is of the opinion and finds that at the crossings of the tracks of the New York and Long Branch Railroad and the public highways known as John street, First street, Augusta street, David street and Henry street in the City of South Amboy, conditions make it necessary that provision for the protection of the traveling public be afforded at such crossings.

The Board further determines and finds that the protection hereinafter mentioned will be reasonable protection, at said crossings: namely, the maintenance of gates at John street crossing, and the operation of such gates each day in the week at all hours of the day and night; the maintenance of gates at First street, Augusta street, David street and Henry street crossings and the operation of such gates each day of the week from 7 A. M. to 7 P. M. except from the first day of May to the first day of October, both inclusive, of each year, during which period gates should be operated from 6 A. M. to 10 P. M. each day of the week; the placing and maintenance at First street, Augusta street, David street and Henry street crossings of electric alarm bells of such construction and so connected that said bells will, by operation of track circuit, give warning of the approach of trains.

An order will so enter.

Dated October 14th, 1913.

ORDER.

This case being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

IT IS ORDERED that the New York and Long Branch Railroad Company maintain crossing gates at the John Street crossing and operate such gates each day in the week at all hours of the day and night, and

IT IS FURTHER ORDERED that the said New York and Long Branch Railroad Company maintain crossing gates at the First street, Augusta street, David street and Henry street crossings and operate such crossing gates each day of the week from 7 A. M. to 7 P. M., except from the first day of May to the first day of October, both inclusive, of each year, during which period gates shall be operated from 6 A. M. to 10 P. M. each day of the week, and

IT IS FURTHER ORDERED that the said New York and Long Branch Railroad Company maintain and operate at First street, Augusta street, David street and Henry street crossings electric alarm bells of such construction and so connected that said bells will, by operation of track circuit, give warning of the approach of trains.

This order shall become effective October 27th, 1913.

Dated October 14th, 1913.

No. 141.

IN THE MATTER OF PROTESTS OF THE CITY OF WILDWOOD AND INDIVIDUAL CONSUMERS THEREIN AGAINST APPROVAL OF RATES OF THE WILDWOOD WATER WORKS COMPANY.

HELD—That a rate of forty cents per thousand gallons, which the company seeks to establish, is, under all the circumstances, unjust and unreasonable. A rate of thirty cents per thousand gallons is just and reasonable. The company is ordered to establish a rate of thirty cents per thousand gallons, grading down therefrom for excess consumption. The determination of a minimum charge, by the number of rooms contained in a dwelling house is not regarded as unreasonable. If the number of rooms is the criterion of the consumers' requirement, the aggregate number of rooms contained in all structures upon the premises should determine the minimum.

ORDERED—That the cost of the meter box be paid by the company upon installation, and only the risidual apparatus charged to and collected from the consumer.

H. H. Voorhees, for the City of Wildwood and individual consumers.

H. C. Chalmers, for the Borough of North Wildwood.

Ernest Watts and *Edward H. Hall*, for the Wildwood Water Works Company.

By petition filed with this Board on June 9th, 1913, the Commissioners of the City of Wildwood requested that before approval was granted to the rate schedule filed by the Wildwood Water Works Company, "the city officially and the inhabitants thereof" be granted a public hearing to remonstrate against what were termed the unjust, oppressive, exorbitant and excessive rates embodied in said schedule.

After due notice, hearings were held at the State House in Trenton on the following dates: June 24th, 1913; July 8th, 22nd and 29th, 1913. Both parties were represented by counsel; testimony was taken; exhibits were submitted and briefs have been filed.

The allegation of exorbitant rates covered (1) the increase from 25 cents to 40 cents per thousand gallons for all water consumed in excess of the minimum allowance; (2) the basis upon which under the proposed schedule the minimum charge is to be set; (3) the amount of the minimum wherever in excess of ten dollars; and (4) the charge made by the company for furnishing and installing the meter casing with appurtenances.

The hearings also disclosed the fact that the company's proposed rule whereby the company in the first instance determines the size of the meter and service pipe to be installed is impugned as unreasonable. Inasmuch as this report finds that the fixation of minimum charges by the number of rooms contained in structures upon the consumer's premises is proper, the question of size of meter and service pipe ceases ordinarily to be of moment.

To determine the base on which the respondent is entitled to obtain a fair return, it is necessary first of all to find the fair value of its property used and useful in serving the public. The structural, or physical, property as indicated by the company's books, December 31st, 1912, when deduction from property account is made of $250,000 stock, and of bond discounts and capitalized deficits amounting jointly to $62,061, is $451,782.

The cost of reproduction, new, of the physical property as of July 15th, 1913, as estimated by the company's engineer, J. W. Ledoux, is $465,483. The cost of reproducing, new, the physical property, as of July 19th, 1913, as estimated by Allen Hazen, is $428,663. The cost of repro-

ducing, new, the physical property, as of July 12th, 1912, as reported by the Board's Chief Inspector of Utilities, was $429,997.

Disregarding the difference in date, the estimates are as follows:

Company's books	$451,782.00
Ledoux	465,483.00
Hazen	428,663.00
Betts	429,997.00

The petitioner's expert witness, George Pfeiffer, Jr., while making no estimate of the reproduction cost of the company's entire extant plant, insisted that a plant without the mainland extension to Rio Grande, could be built for approximately $230,000, capable of affording the same supply as the company's present plant. He, accordingly, made estimates of the cost of the distribution system in Wildwood as given in Mr. Betts' inventory of July 12th, 1912. A comparison of typical unit prices taken for important elements of the system will serve to show the differences between the various calculations.

	Pfeiffer.	Betts.	Hazen.	Ledoux.
Fire hydrants	27.50	26.74	33.00	34.50
½" meters	.....	.....	10.00	15.00
4" pipe per foot	.40	.60	.65	.60
6" pipe per foot	.58	.80	.85	.91
10" pipe per foot	1.00	1.40	1.40	1.60
12" pipe per foot	1.30	1.80	1.75	2.03
Total pipe and main		$221,882.00	$233,398.00	$250,845.00

The fairly close correspondence of the estimates by Betts and Hazen and their common divergence from Pfeiffer on the one hand, and from Ledoux on the other, lead us to conclude that the preceding estimate by Hazen

(being most nearly to date) of $428,663 as the cost of reproducing the company's physical property, new, may be taken as coming within the necessary approximation to fact in inquiries of this kind.

It is by this time well understood that since the Supreme Court decision in the Knoxville Water Company case, a deduction must be made in rate cases from the cost of reproduction, new, for depreciation accrued.

The two estimates of depreciation in the present case are:

	Accrued Depreciation.	Annual Depreciation.
Hazen	$68,510.00	$6,801.00
Ledoux	49,213.00	7,670.00

We again accept Hazen's figure, on the ground that it is the estimate of an outside party, rather than of the company's engineer; also on the ground that it is somewhat anomalous that the greater annual depreciation should coincide with the lesser aggregate, or accrued depreciation, as in Ledoux's figures.

Deducting from estimates of cost of reproduction of physical property, new, the accrued depreciation as estimated, we obtain the following residues:

	Hazen.	Ledoux.
Reproduction cost, new	$428,663.00	$465,483.00
Accrued depreciation	68,510.00	49,213.00
Present depreciated cost of physical property	$360,153.00	$416,270.00

The estimate put upon the physical property *supra* does not include certain overhead costs involved in its construction. To Hazen's estimate of cost of physical property $64,299.51, or 15 per cent. of the estimated cost, new, is allowed by him for engineering and contingencies; and a separate allowance of $9,859.27, for interest during con-

struction at 2% is also allowed. These all combined make his allowance for overhead costs amount to $74,158.78, or approximately $74,000. Ledoux's allowance for similar overhead items of costs covers $12,734 for interest during construction; $10,000 for promotion expense; $10,000 for organization expense; $20,000 for engineering, designing and superintendence. This is a total of $52,734. To this certain minor items of a similar nature are added, legal expense, insurance, etc., which amount to $6,975. Ledoux's aggregate is approximately $59,000.

We accept Hazen's estimate of intangibles costs as the more reasonable of the two. It is based on a fairly common percentage (15 per cent.) for engineering and contingencies, and on a moderate allowance for interest. Ledoux's estimate for overhead costs appears to be a bit arbitrary for all items except interest.

When the estimated elements of overhead cost are added to the present cost value of physical property, we have

	Hazen.	Ledoux.
Present depreciated cost of physical or tangible property	$360.153.00	$416,270.00
Overhead costs	74.000.00	59,000.00
Total	$434,153.00	$475,270.00

We find and determine the figure of $434,153 to be the proper estimate for the items summed.

It is now well established that the base upon which a public utility is entitled to a fair return includes not only its legitimate investment in its property, both tangible property and overhead costs; but also its legitimate investment in the business acquired or the patronage attached. This so-called "going value" Hazen estimates at one

year's proper gross revenue (Testimony of July 29th, 1913, pp. 66, *sq.*); in this case at around $50,000.

Ledoux estimates this "going value" at 15 per cent. of the reproduction cost of physical property, new, plus the first four items of his intangible costs recited above. This amounts roughly to $77,000. Apparently, it is arrived at somewhat arbitrarily by an exercise of engineering judgment which cannot be further explained. (Testimony of July 29th, 1913, p. 22.) For this reason we reject it. The total basis on which earnings are to be predicated, according to these two witnesses, are:

	Hazen.	Ledoux.
Total present value of property, including both items of tangible cost and overhead costs)	$434,153.00	$475,270.00
Going value, or value of business attached	50,000.00	78,000.00
Grand totals	$484,153.00	$553,270.00

We are not clear that Hazen's estimate for going value is correct for the purposes of this case. His explanation of how it is arrived at is interesting and ingenious. (Testimony of July 29th, 1913, p. 66, *sq.*) It assumes, however, a knowledge of one year's proper gross revenue. That is the item we are in quest of. Moreover, the business at seaside resorts is obtained by water companies more rapidly and with less relative cost than ordinarily. (Testimony of July 22nd, 1913, p. 40, *sq.*, also p. 68.)

We may, for the purpose of our preliminary inquiry, conclude, that *exclusively on the basis of cost,* the base on which the company would be entitled to earn a fair return, *were there no countervailing considerations,* would be in the neighborhood of Hazen's estimate, or $484,153. As he has estimated the proper gross revenue of the company in excess of what the company computes its gross revenue

would be under its proposed system of rates, and inasmuch as patronage at summer resorts is acquired more rapidly than in other places, we may without impropriety reduce his total to the even figure of $475,000.

It is evident that such an aggregate investment of $475,000 seems to be anomalous to supply a place with approximately 2,000 customers. Some of the causes for the large investment may be specified.

As at other seaside resorts the difference between summer and winter consumption of water at Wildwood is very great. Thus in 1912 the pumpage in December was 5,610,000 gallons; in July it was 20,147,000 gallons. It is common to find the heavy consumption of water overrunning the average by 15 or 25 per cent. (Testimony, July 29th, 1913, p. 56.) In Wildwood in 1912 the July consumption was about three and one-half times the December consumption. The plant of a water company must at all times be adequate for the maximum demand. The expenses, except for pumping, do not decline in the period of small consumption. These facts indicate why the plant required at Wildwood is so much greater than for other places of the same permanent population; and incidentally why the fixed charges are relatively so high.

Another factor in explaining the high investment in the Wildwood plant is the character of the water that the island wells afford under heavy draft. The percentage of chlorine from the infiltrating seawater is much higher than at any other of the Jersey seaside beaches. Analysis made by the State Board of Health of the Wildwood water show something over one per cent. of seawater therein. This is about the limit of toleration. (Testimony of July 22nd, 1913, pp. 46, 47.) The Anglesea wells, as tested by the company, yielded 105 parts chlorine on January 25th, 1913. (Testimony of July 22nd, 1913, p. 13.) The wells at Wild-

wood, when tested showed even a more serious condition, containing something like 200 parts of chlorine. The Cape May Wells, when analyzed, are the next highest on the Jersey shore in chlorine, and yet disclose only from 7 to 9 parts thereof as against 200 for the Wildwood wells. (Testimony of July 22nd, 1913, p. 50.)

This condition explains the building of a long pipe line of five miles or more to Rio Grande, and the bringing in of water from off shore. The surface water there obtained is less impregnated with chlorine; and the slackened draft on the island wells allows them some opportunity to freshen by reason of the influx of fresh water. As though to emphasize the ill-starred character of this water supply project, the water from Rio Grande has recently proved to be rich in iron. This, it is said, has necessitated the construction of a filtration plant, which will cost in the neighborhood of $20,000.

It is perfectly clear from the record that the high investment is largely traceable to the cost of the double source of water supply. The company, if it had to build the plant over, would sink no wells on the island, but go direct to the mainland (Testimony, July 29th, 1913, p. 52). The complainant's expert would never have gone to the mainland, but would have made a different distribution of wells on the island (*Ibid.*, p. 80). The company has acquired both the island wells and the off-shore supply, and has enlarged its investment accordingly.

Another reason for the ample scale on which the system is built is that most of the structures on Five Mile Beach are of frame construction, and hence require adequate fire protection. This explains why the pumping capacity and the system of feed mains must be built on a generous scale. Should the City of Wildwood proceed to build or acquire a municipal water supply plant, these factors, the unusual

summer consumption, the danger of ruining island wells by overdrafts thereon, and the need of adequate fire protection, would all have to be given careful attention, and due provision would have to be made on their account.

It is also worthy of remark that when a holding company is also a construction company, and builds extensions to a plant whose securities the holding company takes in payment, there is hardly present the same solicitous care to prevent costs from exceeding the lowest figure compatible with workmanlike construction that may be inferred where the owners of the plant are distinct from the contractors who build extensions. The unit prices of Mr. Ledoux may be taken as an indication that the holding company has not failed to obtain an adequate payment for the work it has done for the defendant company.

As indicated above, the company would be entitled, at the present time, to a fair return on a base of $475,000, *only in the absence of countervailing considerations.* Countervailing considerations are, however, present.

The most important of these are: (1) The plant as constructed has involved an unusual expense much of which is not attributable to, nor for the benefit of, the present watertakers; (2) the plant as constructed is measurably in excess of current requirements; (3) the company is attaching new customers with considerable rapidity, and under conditions of increasing returns per unit of expense on the company's part; (4) the financial history of the company indicates that up to date a net return on the actual investment has been forthcoming; (5) an immediate return such as the company contends for would involve metered rates above those current in localities similarly circumstanced with Wildwood. It is necessary to canvass these considerations, and so far as possible to allow for them, in

setting the rates that may be justly charged for water in Wildwood.

The unusual outlay upon the plant has been explained *supra*. The original Anglesea plant was constructed at a low cost. It promised to afford the supply requisite for the period following its construction. It was a profitable undertaking, and was paying returns upon a base of $60,000. The defendant company took it over upon this basis, paying therefor $10,000 in cash and $50,000 in bonds. Defendant company knew at the time that the structural value was only about $45,000. (Evidence July 22nd, 1913. p. 31.) The Anglesea wells seem to afford even now in the time of maximum demand something like one-quarter of the total supply. However, the growth of the community bade fair to outstrip the capacity of the Anglesea wells and the other wells on the island. The company believed that the draft upon the island wells would render their water non-potable. Accordingly, the company procured at very considerable expense an off-shore supply. It may have been a situation that could not be foreseen, but the outlay to cope with the changing situation is hardly chargeable in its entirety to the present consumers.

If an ordinary commercial venture had projected works that proved inadequate, and was forced for the protection of its earlier works and business to build an enlarged plant, it could hardly avoid having to pocket some loss, at least temporarily, upon the unforeseen greater outlay. We see no reason why a public utility should be guaranteed against a similar misadventure. The company's own expert witness, Allen Hazen, testified on July 29th, 1913, that a plant at Wildwood could probably be devised and built that would furnish an equal quantity of water as the present plant for less than his estimate of the reproduction cost of the present plant (p. 51). He testified also that a

plant could be established at Wildwood where 25 cents per thousand gallons would be a reasonable price for the people to pay (pp. 55, 56). It is not certain that this last quoted testimony applies to a plant having the excess capacity of the present Wildwood plant required for summer consumption at a seaside resort. But it is perfectly clear that the cost of duplicating the present plant exceeds the cost of building a plant that would afford the present supply. It is perfectly clear that if the company had to construct *de novo* it would expend less than it has expended. And it seems not unjust that they should not throw at once upon the consumer the whole charge upon an investment greater than necessary, where the greater outlay was due in part to the company's failure to forecast accurately the future conditions of demand and supply.

The extant plant is in excess of current needs. For ordinary purposes the maximum consumption daily appears about 1,500,000 gals.; the capacity of the plant 2,600,000 gallons daily. (Testimony of June 24th, 1913, p. 40.) Even allowing for fire protection, the supply would seem more than adequate so far as quantity is concerned. Of course, the danger of spoiling the wells on the island by overdrafts upon them modifies the conclusion as to present provision being grossly in excess of present requirements. But there is no dispute that the present plant is adequate and available for future customers between Rio Grande and Five Mile Beach on the mainland where there is much undeveloped territory, and upon many unimproved lots upon Five Mile Beach itself where the supply of many future customers will not require a corresponding increase in investment. (Testimony of July 29th, 1913, pp. 42, 43.)

The company is attaching new customers with considerable rapidity. Thus on December 31st, 1911, there were 1,904; and December 31st, 1912, there were 2,090; and be-

tween December 31st, 1912, and July 22nd, 1913, 100 additional consumers had come on. With the present plant, and with distribution mains practically covering the island, the addition of new consumers adds to the company's revenue far more rapidly than to the company's expenses. The growth in the company's gross receipts has been constant, though fluctuating from year to year. The increase in 1912 over 1911 was $442.08; in 1911 over 1910 was $7,460; of 1910 over 1909 was $4,196. The average has been over $4,000 a year. With this average maintained the company seems likely to obtain a revenue capable in the not distant future of covering all expenses including depreciation, and affording an adequate net return on the investment.

The financial history of the company indicates that returns in the past have not been lacking. Upon the stock issue of $250,000 no dividend has ever been earned or paid. As the stock was practically all water when issued, there is no particular reason to regard such failure to pay dividends as any injustice to the company.

Upon the bonds, interest has been regularly paid. When it is recalled that the American Pipe and Construction Company has constructed the greater part of the plant, at prices which there is reason to believe afforded a profit, and has taken in payment five per cent. bonds at a discount and has regularly received interest at five per cent. on the face value of the bonds, and has in addition out of water rates practically met operating charges for many years, except for the accruing depreciation, it is evident that it has obtained a return upon the total cash investment. Even the current rates are far from being vulnerable as confiscatory.

Allowing for an accrued depreciation figured by the two expert witnesses for the company at $68,510, and $49,213,

respectively, an annual return not far from four per cent. has been received upon an outlay more extensive than necessary, if greater accuracy of forecast had been practiced, and more extensive than requisite for present and legitimately prospective needs.

It is true that the annual report for 1912 disclosed a deficit. Mr. W. H. Roth on July 22nd, 1913, (Testimony, p. 25, *sq.*), testified that for 1912,

The gross earnings were	$35,885.20
And operating expenses, exclusive of depreciation were	17,573.22
Leaving available	$18,311.98

to meet an interest charge of $20,850, thus producing a deficit of $2,538.02. To this the annual depreciation, figured respectively by Allen Hazen and J. W. Ledoux at $6,801 and $7,670, if added, gives an annual loss of $9,339.02 in one case, and $10,208.02 in the other.

This situation does, in our opinion, warrant some increase in gross revenue. However, the operating expenses for 1912 include an item of "miscellaneous general expenses" of $5,183.01. (Testimony, July 22, 1913, p. 27.) This is exclusive of legal expense and includes "telephone, stationery, stamps, lighting, electric lights, travelling expenses, and numerous other items," none of which are further indicated than the expenses incident upon "hearings of one kind and other." (*Ibid.*, p. 28) Further detail ought properly to be forthcoming, if the item is to be passed as entirely above criticism.

While a fair return upon the value of property used and useful in serving the public is a dictate of equity in the setting of rates, the rates to afford such a return must not be so high as to exceed the fair value of the service to the consumer. In the opinion recently handed down by the

Supreme Court (*Public Service Gas Company* vs. *Board of Public Utility Commissioners and others*) Mr. Justice Swayze remarks:

"In determining the justice and reasonableness of rates, perhaps no better test can ordinarily be found than the rates customarily charged in localities similarly situated, although we do not say that even the test is infallible."

There is no evidence that a meter rate of 40 cents per thousand for water in seaside resorts of this State comparable to Wildwood is in vogue. To increase the present rate of 25 cents to 40 cents is an extreme and sudden change. In Ocean City, whose general situation most nearly conforms to Wildwood's, the rate is 30 cents per M. We believe this affords a fair comparison for the case in hand.

We, therefore, find and determine that the rate of 40 cents which the company seeks to establish is under all the circumstances unjust and unreasonable; and we find and determine that a rate of 30 cents per thousand gallons is just and reasonable, and in the accompanying order to issue we shall fix said rate in place of the proposed rate of 40 cents. Wholesale rates to be graduated downward from the thirty cent basis rate.

Assuming the continuance of existing rates, the company may be expected to attach 200 additional customers yearly. This would imply about $3,000 increase in gross revenue. For the past three years the yearly average increase has been over $4,000. Last year's gross receipts were $35,885. The gross revenues for 1913, 1914 and 1915 may be roughly calculated at $38,885; $41,885 and $44,885. Last year's outgo for operation was $17,573. We believe that is somewhat in excess of what necessity requires. If miscellaneous general expenses are cut, as we have reason to

think they could be cut, by $2,000 per annum, we may roughly calculate the annual operating costs (including taxes) for 1913, 1914 and 1915 at $15,000; $16,000 and $17,000. The residues would be $23,885, $25,885 and $28,885. Interest last year was $20,850. For the present year and for the two years to come bond interest should fall within $24,000. The prospect, therefore, even at present rates is fair for meeting actual outgo, and for gaining on the annual depreciation.

We conclude that a moderate advance in the metered rate is all that equity requires in the premises, and that the company ought to acquiesce in a more gradual increase in gross revenue than it aims to secure by a change in rates which in a single year will raise its gross receipts from $35,000 to $45,000.

The second issue presented in this case is the basis on which the minimum charge is to be fixed. We are not disposed to regard as unreasonable the determination of the minimum charge by the number of rooms contained in a dwelling house. This method prevails in some places, in Denver, Colorado, and in Waukesha, Wisconsin. It seems *a' priori* to be as accurate an index of the consumers' requirements as the floor area, or the cubic contents of the house, though these measurements also are employed in some places. This index of consumers' requirements seems more practicable than the tax valuation of properties, inasmuch as the tax assessment is not within the province of the water company. The index proposed must be employed, however, with reasonableness. There was shown to be no reason or equity in the proposed rule of the company whereby "in every case where two or more houses are located on the same lot, a ¾" meter will be installed for not exceeding 20 rooms" (Testimony of June 24th, 1913, pp. 63, 64; July 8th, 1913, p. 4). If the number of

rooms is the criterion of the consumer's requirement, the aggregate number of rooms contained in all structures upon the premises should determine the minimum. An order to this effect will be entered, and will abrogate the impropriety of the company's proposed rule above cited.

It does not appear to us reasonable to change the 12-*room limit which* the company has set as the maximum number to be accorded service at the ten dollar minimum. (Testimony of July 29th, 1913, pp. 68, 69.)

On the other hand, it does appear affirmatively from the company's expert witness, Allen Hazen, that the rise in the minimum from ten dollars for houses of 12 rooms or less to eighteen dollars for houses containing from 13 rooms up to 20 rooms is unduly abrupt (Testimony of July 29th, 1913, pp. 68, 69); and so likely to produce undue discrimination. We do accordingly find and determine that the failure to allow an intermediate minimum between $10 and $18 is an undue and unjust discrimination. In order to abate this anomaly and properly to temper the rigor of the company's proposed rule, we shall by order interpolate a minimum of $14 for properties containing from 13 to and including 16 rooms.

The interpolation of an intermediate minimum requires some disposition of the disputed practice of the company in requiring the installation of ¾" meters to supply properties containing over 12 and under 20 rooms. There was no evidence presented by the company to show that a ½ inch service pipe failed to afford an adequate supply of water to ordinary properties with a small bungalow in the rear for summer occupants. (Testimony of June 24th, 1913, pp. 59, 60.) The attention of the company was called to this point at the first hearing, and their subsequent silence is at least not wholly without significance. Indeed, it would seem that the company's policy of meter installa-

tion had been made somewhat mechanically to allow them to qualify under the proposed rule of exacting the new *minima*, rather than on grounds of adequate service. The meter itself is but a small fraction of the plant held in readiness to serve the individual consumer. Moreover, the determinant of the size of the minimum is hereafter to be the number of rooms in the property supplied. Unless complaint is made of inadequate service, it would seem that there is no necessity of replacing ½" meters with ¾" meters in properties having 16 rooms or less. For properties having 17, 18, 19 or 20 rooms, the installation of ¾" meters may remain optional with either the consumer or the company.

The accompanying order to be entered will so stipulate. The rules of the company should explicitly state the present amount of water allowed under the minimum. Such a statement is only just and reasonable. The accompanying order will require the inclusion in the company's rules of such a statement.

In applying the rules as modified by the accompanying order to issue, questions of fair interpretation, as to what constitutes a room, etc., as to what constitutes a single and what a double house, capable of partition by separate ownership, will be determined by this Board, should complaint arise.

There appears from the record to be a special contention by the Borough of North Wildwood, that by virtue of a contract concluded between said borough and the company all private consumers in said borough are entitled until 1917 to the benefit of a minimum of ten dollars per annum. (Testimony of June 24th, 1913, p. 41 *sq.*)

This contract the respondent contends has been superseded by a later contract with said borough for municipal supply, omitting all mention of rates to private consumers.

A uniform schedule of rates applicable throughout Five Mile Beach is eminently desirable, inasmuch as the place is now essentially one community. The evidence before us, however, is not sufficient to determine the validity of the issue raised by North Wildwood.

The orders to issue in conformity with this finding will not, therefore, be applicable to North Wildwood, until and unless a special hearing to be called upon the contention put forth by said borough shall satisfy us that no legal obstacle prevents the uniform application of rates to said borough. The hearing thereon will be called by an order to issue forthwith.

A charge ordinarily of $6.50 for the meter box and appurtenances is made by the company when a meter is installed and water introduced into the consumer's premises. Generally there are no cellars under buildings at Wildwood. In consequence, the meter is commonly set near the curb. The arrangement from the plumbing standpoint is not open to criticism. It appears, also, that the consumer in Wildwood owns the entire service pipe connecting with the supply mains. The meter attached to the service pipe is the company's property. The dispute arises about whose duty it is to provide and pay for the meter casing. The petitioners claim that they should not be asked to make an outlay for the protection of the company's property, viz., the meter. The company claims that as the consumer cannot house the meter, as is done ordinarily in the basement or cellar, the box or casing is a necessary appurtenance to the service pipe, and should be paid for along with the cost of installing the service pipe itself.

It appears to us that the box casing or the meter is properly to be regarded as a part of the company's permanent property; that it should be accounted as part of the

meter; installed at the company's expense and capitalized by them as is the meter itself. Their own witness, Allen Hazen, testifies that the arrangement he would recommend would be for the company to furnish the meter and the meter box, and put it in their scheduled property. (Testimony of July 22nd, 1913, p. 59.) He said that this company had from the start adopted another policy, and that it was, therefore, a mere matter of arrangement, implying that it was equitable, because the cost is not capitalized by the company.

It appears that the accessory apparatus installed along with the meter box is essentially a part of the service pipe, and physically separable from the meter box itself. As the practice in Wildwood involves the consumer's ownership of the entire service pipe, we are of opinion that he may justly be called upon to pay only for the accessory apparatus (valves, etc.), installed when the meter and meter box are installed; and that the casing box itself should be installed by the company at the company's cost, scheduled in their property and become part of the plant on which they are entitled to a fair return. We find and determine that the charge upon the consumer for the meter box is an unjust and unreasonable regulation.

This Board has no legal power, however, to order reparation. Where the company has exacted from the customer payment for the meter box, we are not empowered to order a refund. Only such meter boxes, however, as are installed hereafter at the company's cost may be listed in their property or included in their property account in reports filed with this Board.

We shall order that hereafter the cost of the meter box be paid by the company upon installation, and only the residual apparatus charged to and collected from the consumer. The division of the present ordinary charge of

$6.50 for the box and appurtenances we shall require the company to make equitably as the contracted cost of the box and the other appurtenances require.

The company calculated under the new rate schedule proposed by them to obtain a gross revenue of about $45,000. The company's estimate of sources of revenue under the old and new schedule was virtually as follows: (Testimony of July 22nd, 1913, p. 25 *sq.*)

	Old (1912) Schedule.	New (1913) Schedule.
Hydrant rentals,	$5,136.00	$5,136.00
Minimum charges,	23,485.00	29,950.00
Consumption in excess of minimum allowance,	7,200.00	10,000.00
Total,	$35,821.00	$45,086.00

The company also estimated that while the total increase in revenue might be about 25 or 30 per cent., less than 14 of this 25 or 30 per cent. would fall on old customers, the residue being expected from new consumers. (Testimony of June 24th, 1913, p. 54.)

It will be noticed that the company's proposed increase in the rate for excess metered consumption from 25 to 40 cents was calculated to produce but little over one-quarter of the additional revenue.

It is impossible to estimate just how far the intermediate minimum of $14.00 will reduce the company's gross income. We shall, however, prescribe the intermediate minimum with the expectation that its allowance will not so diminish the company's expected gross income, so as to preclude for the present a proper and adequate return. The facts disclosed in the pending case show the former rates to have afforded a net return upon the actual but extensive investment (even allowing for depreciation) of practically four per cent. The probability is that as new customers aug-

ment the gross revenue, a higher rate of return will eventually accrue. In view of all the circumstances the company may justly be required to acquire additional net returns somewhat gradually, instead of by a single drastic readjustment of its rate schedule.

It is not out of place to remark in conclusion that the present case is one in which considerable acute disaffection has been manifested on the part of the complainants and petitioners. It is not impossible that at times the company's employees may have been somewhat ruthless in their dealings with consumers. It is possible that the fault has laid in part on both sides. The attorney for the city assures us that a municipal water plant is certain in the City of Wildwood. (Testimony of June 24th, 1913, p. 10.) It is not the province of this Board to comment upon the future policy of the municipality in this matter. But it is proper for the Board to indicate that if disaffection is so acute with the present company's administration, the proposed bond issues by the company to provide additional fire service in the parts of the city and in North Wildwood in particular must be considered in the light of the probability that such additional mains are not likely to be a permanent source of income to the company. If the water supply in future is to be in municipal hands, adequate fire protection must be provided at public cost; if the present company is to be looked to for such adequate fire protection as additional mains and hydrants would afford, a return must be made to the company for such additional investment in mains and hydrants.

Dated October 14th, 1913.

ORDER.

This case having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the Board now hereby finds and determines that the practice, rule and regulation of the Wildwood Water Works Company requiring the payment by the consumer of the cost of meter boxes is unjust and unreasonable and hereby

ORDERS that from and after the date this order becomes effective the Wildwood Water Works Company shall pay the cost of meter boxes upon the installation of such boxes and that only the remaining apparatus shall be charged to and collected from the consumer which practice, rule and regulation said Board hereby determines to be and fixes as just and reasonable.

The Board FURTHER ORDERS that the said Wildwood Water Works Company shall make an equitable division of the charge for the boxes and appurtenances, based on the cost to it of such boxes and appurtenances. And the said Board hereby further finds and determines that the existing rates and charges of said company are unjust and unreasonable, and hereby fixes and determines the following as just and reasonable rates and charges and

FURTHER ORDERS that from the time this order becomes effective the said company shall make the following charges:

1. Minimum yearly charges shall be as follows:

For properties containing 12 rooms or less,	$10.00
For properties containing 13, 14, 15 or 16 rooms,	14.00
For properties containing 17 to 20 rooms,	18.00

For properties containing 20 rooms or over, supplied by 1" meter, .. 30.00
For properties supplied by 1½" meter, ... 40.00
For properties supplied by 2" meter, ... 65.00
For properties supplied by 3" meter, ... 100.00
For properties supplied by 4" meter, ... 160.00
For properties supplied by 6" meter, ... 200.00

2. Except as affected by the minimum charge, all excess water shall be charged for at rates beginning for the first 100,000 gallons in the year at thirty (30) cents per thousand (1000) gallons, and grading down therefrom for excess consumption.

3. The company's rule reading "Provided that in every case where two or more houses are located on same lot a ¾" meter will be installed for not exceeding twenty rooms" shall no longer be applicable.

This order shall become effective December 1st, 1913.
Dated October 17th, 1913.

No. 142.

IN RE APPLICATION OF FARMINGDALE LIGHTING COMPANY FOR APPROVAL OF ISSUE OF STOCK IN THE AMOUNT OF THREE THOUSAND DOLLARS AND OF BONDS IN THE AMOUNT OF TWENTY THOUSAND DOLLARS.

Amount for which approval is asked held to be excessive for purposes named in petition. Should petitioner modify or amend the present petition or draft a new petition, showing with some reasonable particularity the items of expense to be incurred in building the plant, and similarly the items of annual income and outgo, and request an amount not in excess of $16,000, the Board would be inclined to grant approval.

William J. Lansley, for the petitioner.

This petition was filed with the Board April 15th, 1913. By reason of clauses in the franchise that required altera-

tion before approval could be given, the final hearing on this application was not held until September 30th, 1913. This final hearing was held in the State House at Trenton.

It appears that organization stock in the amount of one thousand dollars has already been issued. This application asks for approval of additional stock in the amount of three thousand dollars, and for bonds in the amount of twenty thousand dollars.

The stock at par is to yield	$ 4,000.00
The $20,000 bonds at 80 are to yield.....	16,000.00
Total proceeds will thus be.....	$20,000.00

The attached estimate of expenditure to be met from said $20,000 contains items which the board, as at present advised, is not disposed to allow. The working capital required is estimated at $2,222. This amount is excessive. It is admittedly excessive. William J. Lansley on September 30th, 1913, stated:

"As a matter of fact, I don't think the company will need any working capital, because they pay for current only after they collect the bills. Probably a nominal amount of a couple of hundred dollars will be sufficient for the actual working capital." (Record of hearing, Sept. 30th, 1913, p. 1.)

As the estimated total annual expense submitted by the company is but $2,780, it is apparent that the estimate for working capital of $2,222 is unduly high. We are of opinion that $300 is ample working capital, and accordingly reduce the estimate of $2,222 by $1,922.

The engineering charges estimated by the petitioner amount to $1,500. The incidentals similarly estimated amount to $2,319. Said incidentals are estimated at 15 per cent. of the base which covers construction cost. This implies a construction cost of $15,460. The work contem-

No. 146.

POSTAL TELEGRAPH-CABLE COMPANY

VS.

THE NEW YORK TELEPHONE COMPANY.

The demand of the Postal Company for reduced tolls on calls designated to deliver telegrams over the telephone, without assumption on the Postal's part of any of the contractural burdens in consideration of which the reduced toll rates are accorded in the contract offered alike to all commercial telegraph companies would appear to involve an undue and unjust discrimination in favor of the Postal, both as against the Western Union and as against the public generally. The Western Union obtains the special rates by assuming special obligations. The public, assuming no special obligation, pays the regular toll rates. The Postal, offering no counter equivalent to justify special rates, asked for what is practically a system of rebates. Petition ordered dismissed.

William W. Cook, for the Postal Telegraph-Cable Company.

Robert V. Marye and *John L. Swayze,* for the New York Telephone Company.

The petitioner, by letter dated July 17th, 1913, complained to this Board against the respondent. The ground of the complaint was respondent's denial to petitioner of certain reductions in tolls on telegrams delivered over respondent's telephone lines. The reduction in tolls claimed by petitioner and refused by respondent was alleged to be granted by respondent to the Western Union Telegraph Company. The aforesaid letter of complaint asked that

this Board order respondent to give to petitioner "a reduction on telephone rates charged the Postal-Telegraph-Cable Company of New Jersey in the State of New Jersey in the telephoning of telegrams by said company to its customers, such reductions to be 20% where the telephone rate is 10c. or 15c.; 30% where the telephone rate is 20c. or 25c., and 40% where the telephone rate is 30c. or more."

The complaint in question was duly forwarded to respondent, who declined, under date of July 31st, 1913, to accord the desired reduction in rates. The parties being at issue, a hearing on the matter was held on September 12th, 1913, at Chancery Chambers in Jersey City. Testimony was introduced by both parties, and briefs were subsequently filed by petitioner and respondent.

It appears that respondent stands ready to afford to commercial telegraph companies a special variety of service known as Telegram Toll Service upon certain conditions set forth in a certain contract providing for the service in question. The rates for this service apply only to telephone toll messages. The telegraph company, by the contract, obligates itself to designate certain telephone stations in the telegraph company's offices. These designated telephone stations (not more than one in any given exchange area or more than three in all) are to be named for each of the central office districts of the telephone company. At each of the telephone stations so designated the telegraph company must contract to keep stationed trained agents familiar with receiving and transmitting telegrams. The telegraph company is required also to adopt an appropriate call word to be used by telephone subscribers wishing connection with the telegraph company's office for the purpose of transmitting telegrams. When telephone subscribers using the appropriate call word connect over telephone toll lines with the telegraph company's designated telephone

stations, the toll rates are to be paid by the telegraph company to the telephone company. The toll rates to be paid, however, are reduced by the discounts indicated above in petitioner's letter of complaint.

Similarly, under the contract, the telegraph company originating calls for the delivery of telegrams to telephone subscribers, via the respondent's toll lines, agrees to pay toll charges to the telephone company on the same reduced scale as indicated in petitioner's letter of complaint.

The contract in question provides for according the reduced rates only in case the telegraph company accepts the contract in its entirety. It does not permit the telegraph company to obtain the reduced toll rates on inward telegrams only, or on telegrams for delivery only; but obligates the telegraph company to pay the telephone tolls on both inward telegrams and on telegrams for delivery.

Petitioner claims that the two kinds of service embraced in the contract are wholly distinct from each other; that the transmission of inward telegrams over telephone lines to telegraph offices is a type or class of service having no connection with the delivery of telegrams from telegraph offices over telephone toll lines to the addressees.

Petitioner avers that respondent's refusal to grant to petitioner the reduced telegram toll rates on the delivery service, while according the reduced telegram toll rates on the delivery service to the Western Union Telegraph Company, constitutes an unlawful discrimination. Petitioner avers also that said delivery service is part of a through route service, and demands the reduced telegram toll rates as a part of the proper charge for such through service. Petitioner also avers that the contract offered by respondent contains unnecessary and improper conditions prejudicial to petitioner's business and calculated to subject petitioner's business to detrimental espionage, and con-

trived to divert to its competitor certain inward messages that would normally go to petitioner. Moreover, petitioner indicated at the hearings, and avers in its briefs its willingness to pay the reduced telegram tolls on inward messages, as well as on delivery messages, provided such messages are forwarded as at present, and not concentrated upon stations to be designated as required by the contract offered by respondent. This request of petitioner to be accorded reduced telegram tolls on inward messages, if transmitted as at present and without the concentration of such inward messages upon designated stations only, is not, however, contained in petitioner's original letter of complaint to this Board.

The specific demand of the Postal, incorporated in their letter of complaint to this Board, asking for reduced tolls on calls designated to deliver telegrams over the telephone, without assumption on the Postal's part of any of the contractural burdens in consideration of which the reduced toll rates are accorded in the contract offered alike to all commercial telegram companies, would appear to us to involve an undue and unjust discrimination in favor of the Postal, both as against the Western Union and as against the public generally. The Western Union obtains the special rates by assuming special obligations. The public, assuming no special obligation, pays the regular toll rates. The Postal, offering no counter equivalent to justify special rates, asked for what is practically a system of rebates.

We are impelled to deny petitioner's specific request for the reasons given. We next inquire what justification there may exist for tying together in a single contract the proffer of reduced telegram toll rates on inward and delivery messages, and for refusing the proffer of a contract

whereby such reduced toll rates may be accorded on either inward messages alone or on delivery messages alone.

It appears from the testimony (p. 91, *sq.*) that the Telegram Toll Plan was devised with the idea of a more complete utilization of telephone toll lines, especially at hours when the ordinary commercial toll business is slack. The plan contemplated the creation of the possibility of affording to telephone subscribers in places without telegraph offices or in places during hours when telegraph offices are closed the opportunity of reaching a telegraph office at all times and without the delay incident upon the origination of the ordinary toll call.

As part consideration for the reduced telegram toll rate to be granted to telegraph companies accepting the plan was the increase of telephone business expected to result therefrom. This increase of telephone business is due in a greater degree to telegrams originating with telephone subscribers and transmitted over telephone toll lines to the telegraph offices than from the delivery of telegrams by telegraph companies over telephone toll lines to the addressees. The reason for the disparity in business originated by the two contrasted sources of telegram toll business was indicated by respondent's witness, T. P. Sylvan (Transcript of Testimony, p. 96). He there testifies:

"Deliveries by the telegraph company would be far less than others, because they had the right to deliver in the morning, if they pleased, from their office. They reserve the right in their night letter to possibly answer by mail; they have also the right and do withhold trivial messages at night hours until next morning when they deliver next morning."

It is evident that the volume of inward service is likely to be larger, and, therefore, more remunerative to the telephone company than the delivery service. It would seem to follow that the acceptance by a telegraph com-

pany of only that part of the Telegram Toll Plan which is least advantageous to the telephone company would not fairly warrant giving the telegraph company the same reduced toll rates which other telegraph companies obtain under the contract, only by assuring to the telephone company the benefits resulting from the outward service as well as from the inward service.

There is another respect in which the two contrasted services stand related, which gives some justification for their joint inclusion in a single contract.

To establish the alleged lack of connection between the two contrasted kinds of service, it does not suffice, in our judgment, to say that each consists of discrete and unrelated physical operations. To discover whether there is a connection between the two such as warrants the proffer of reduced telegram toll rates only as an entirety upon both inward and delivery messages, we must inquire into the normal effect of delivery of messages upon inward messages. That the delivery of messages usually leads to reply messages is testified to by respondent's witness, T. P. Sylvan (Transcript of Evidence, p. 93). The reply message thus evoked, especially when the reply is not sent until after an interval sufficient for hanging up the telephone receiver, while not a part of the original message, is its frequent and normal consequence. If the handling by the Telephone Company of the reply evoked is facilitated by the telegraph company's designation of a station at which the telegraph company obligates itself to accept an answer, and this result is testified to and explained by respondent's witness (Transcript of Testimony, p. 99), then it appears to us that the two contrasted types of service are not wholly unrelated, but in a sense mutual and reciprocal. It follows that a contract is not unduly or unjustly discriminatory which ties the two kinds of service

together, and which accords the reduced telegraph toll rate only in case a plan is accepted making such reduced telegram toll rates apply to both inward and delivery service.

We conclude that it has not been shown that the two contrasted sets of telephone operation are wholly unrelated, but that, on the contrary, the evidence goes to establish such a relation between the two as would seem to justify their inclusion in a single contract. So far as this inclusion in a single contract is concerned no undue or unjust discrimination has been proved.

We have next to inquire whether the terms of said contract, or any of them, are unfair or unduly or unjustly discriminatory, even though the petitioner should agree to accept both classes of service at the reduced telegram toll rates.

We do not hold ourselves debarred from scrutinizing the terms of a contract offered by a public utility to other public utilities desiring special service. Where there is, in some large degree, a community of financial interest between two utilities of different classes, it is certainly possible to attempt undue discrimination by such a formulation of a contract for service as will make the acceptance of the contract by certain other public utilities precarious to the latter. If, for instance, a telephone company offered a reduced telegram toll rate only to such telegraph companies as had a certain specified number of offices, the telephone company offering the reduced toll rate to all applicants coming within the designated class, might thereby work or seek to work an undue or unjust discrimination. It would be no bar to the alleged discrimination for the telephone company to urge that it offered the contract alike to all who complied with the contract's requirements.

In the case at bar we believe ourselves justified in scrutinizing the contract for clauses, if any, unfairly prejudicial to petitioner. We have above intimated that the contract's requirement that a telegraph company shall agree to accept both kinds of service, if it is to enjoy the reduced telegram toll rates, is not unfair, unreasonable, or unduly or unjustly discriminatory. We now proceed to canvass petitioner's objections to other phases of said contract.

The objections made by petitioner to the conditions annexed to the contract cover:

(1) The required designation by number or numbers of stations in the telegraph company's offices, with which stations telephone subscribers calling by the chosen call-word shall be connected (clause 2);

(2) The assumption by the telegraph company of the obligation to pay all toll charges on calls made by telephone subscribers using the chosen call-word (clause 3); and to pay all toll charges on calls originated by the telegraph company for the purpose of delivering telegrams to addressees who are telephone subscribers (clause 4).

As to (1), *supra,* contractural requirement is that in each central office district of the telephone company the telephone stations to be designated by number or numbers shall not be more than one in any exchange service area or more than three in all. The concentration of calls thus provided for will, it is alleged, enable the respondents to exercise an espionage over the business of petitioner which would not otherwise be exercised with equal economy, simplicity and ease, if the petitioner, as at present, should continue to exercise "its discretion in selecting what particular telephone to use to deliver telegrams" (Petitioner's Brief No. 1, p. 28). Inasmuch as under the present arrangement a record is kept of all toll messages to the Postal as well as every other subscriber, it is not very

easy to see how the mere concentration of such messages through certain designated offices would very greatly add to the respondent's ability to exercise the espionage feared by petitioner.

While the point is not specifically covered in the briefs, it appears to us that the concentration of messages does not apply to telephonic delivery of telegrams. Clause 4 of the contract implies that the telegraph company shall be entitled to the reduced telegram toll rates "on calls originated by it * * * from the said specified number or numbers *or other telephones* of the Telegraph Company or its agents in the same exchange service areas," etc.

In other words, the concentration of calls appears to apply mainly, if not wholly, to calls from telephone subscribers inward to the designated telephone stations in the offices of the telegraph company. In regard to such calls petitioners, on page 28 of their first brief, remark:

"* * * that the call-words * * * are to be 'Western Union' and 'Postal,' which the Commission will notice are the present call-words for miscellaneous telephone messages. Hence, the central district scheme with these same call-words would not assist at all in separating the telegrams on which a reduced telephone rate is given from telephonic messages not involving a telegram."

If the same call-words would not assist in the ready separation of telegrams on which a reduced toll rate is allowed, the concentration of such inward messages does not seem very well contrived to allow the maximum of effective espionage which petitioner alleges. This point is urged by respondents in their brief (p. 26) and certainly not without weight. So long as business of a telegraph company, or of any other person or company for that matter, passes through the hands of a telephone company, a possibility is open for the telephone company to learn something of the telegraph company's patrons and to seek

to detach their patronage. There is no evidence, however, before this Board that respondent now attempts to detach patronage from the Postal to the Western Union.

When it is also remembered that the Postal may under the contract designate in this State a large number of telephone stations upon which messages from telephone subscribers inward to the telegraph company are to converge, the allegation of a contrivance for hostile espionage is largely bereft of plausibility.

The positive grounds for requiring the designation of telegraph stations for the collection of telegrams from telephone subscribers outward-bound appear in respondent's testimony. (Manuscript of Testimony, p. 97, *sq.*) It simplifies and expedites the routing of calls for the telegraph company. It economizes the time of a telephone company's operators. It delimits the telephone company's option as to the routing of calls for a telegraph office. It standardizes the price of communication between two given points, whereas with different telegraph stations called by different telephone subscribers in a given place, a variation in telephone tolls would cause the price of through communication to vary accordingly.

These considerations tending, *prima facie*, to expedite telephonic exchange work and lessen its cost would seem to warrant an abatement from the regular toll rates.

Moreover, petitioner's allegation that the abatement is excessive is parried by respondent's proffer of the same rates to petitioner and all other commercial telegraph companies.

As to the second objection brought by petitioner against clauses incorporated in the contract, where said clauses impose on telegraph companies the obligation of paying for toll charges on calls made by telephone subscribers using the designated call-word, and imposing on the telegraph

company the obligation of paying for calls made by the telegraph company for the telephonic delivery of telegrams, it seems sufficient to say that it is, *prima facie,* a fair consideration demanded for obtaining the advantage of being accorded the reduced toll rates.

Petitioner, in case it obtains the rebate it asks for, lays particular emphasis on its willingness to reduce its telegraph rates at exclusive telephone points where neither it nor the Western Union has a telegraph office. The reduction promised at such points, and at such points only, is to equal the rebate it desires to obtain from the standard telephone tolls. In other words, while not contemplating accepting any reduction in its receipts for telegraphic work as such, and while not willing to accord any counter consideration for the reduction in rates which it seeks, it is willing at points exclusively reached by telephone, and at such points only, to hand over to its customers the rebate it is first assured of obtaining from respondent. At other points petitioner would benefit by the amount of the rebate, and would at these points maintain its present telegraph rates.

In this connection it is urged that as the Postal has fewer offices in this State than its chief competitor, it is at a disadvantage in that it must reach Western Union points by accepting the extra burden of the telephone toll necessary to reach these points where there are no Postal telegraph offices. We cannot see that the Postal's non-establishment of local offices in certain places is any good reason for a mandatory lessening of their competitive disadvantage by according them reduced and preferential telephone toll rates to which on other grounds the Postal does not appear entitled.

In these proceedings the petitioner insisted upon the community of financial interest between the New York Telephone Company and the Western Union Telegraph

Company. Such community of interest does, of course, exist, and particularly through the relationship of the two companies above named, to the American Telegraph and Telephone Company. This common financial interest warrants a careful scrutiny of contractural arrangements entered into between the respondent and the Western Union. But it is not sufficient to urge that a motive may exist to prompt them to conclude agreements that may be prejudicial to the competitors of either or both. Neither the contract herein examined nor the practical operation thereof is shown to work undue or unjust discrimination against petitioner; and the latter's petition, on the grounds recited above, will be DISMISSED.

Dated November 17th, 1913.

ORDER.

This case being at issue upon complaint, and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

IT IS ORDERED that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated November 17th, 1913.

No. 147.

IN THE MATTER OF THE PETITION BY PUBLIC SERVICE RAILWAY COMPANY FOR APPROVAL OF ISSUE OF NORTH HUDSON COUNTY RAILWAY BONDS IN THE AMOUNT OF $620,000.

By petition filed November 12th, 1913, Public Service Railway Company asked approval of the issue of North Hudson County Railway bonds in the amount of $620,000, Said bonds are part of the five per cent. consolidated mortgage bonds of the company last named. The proceeds of said bonds were to be used in retiring $620,000 of six per cent. first mortgage bonds of the North Hudson County Railway bonds maturing January 1st, 1914. The intention expressed by petitioner was to sell the bonds to the Fidelity Trust Company of Newark, New Jersey, at 97 per cent. of their par value.

On Friday, November 21st, 1913, at Chancery Chambers, Jersey City, a hearing was had on such petition, and the matter went to conference. On November 22d, 1913, J. S. Rippel, of Newark, New Jersey, sent a letter to the Board, protesting that he had been denied an opportunity to bid for this issue, and alleging favoritism in their sale and allotment.

While the Board has no interest in what particular purchaser may secure the bonds, the Board feels charged under the statute to see that the price to be brought by security issues involves no infringements of the rights of shareholders of the company or its patrons. Accordingly, on November 24th, 1913, at the Board's offices in Newark, the petitioner was asked to appear, and did appear by counsel, L. D. H. Gilmour, at which time and place J. S.

Rippel reiterated the objections he raised to the proposed sale. Friday, November 28th, 1913, was set as the time and the Court House in Newark as the place for a hearing upon the objections raised to the sale as proposed. At this hearing petitioner was represented by L. D. H. Gilmour as counsel. The objector appeared in person. Evidence was introduced by both, and briefs have subsequently been filed by both parties.

From the evidence it appears that J. S. Rippel in the past has been accorded opportunity to bid on various bond sales made by Public Service Railway Company; that he has upon occasion bought large blocks of such securities offered; that in the summer of this year he made inquiry of the treasurer of the company as to the company's intentions with regard to the sale of bonds to refund the issue maturing January 1st, 1914; that on this occasion the treasurer told J. S. Rippel that no definite plan had been arranged, but that there was no reason why he (J. S. Rippel) should not bid on such bids if he (J. S. Rippel) wanted them; that on a subsequent occasion upon J. S. Rippel's inquiring of the treasurer in regard to the sale of refunding bonds, J. S. Rippel was informed that said bonds would be sold to the Fidelity, and that competitive bids would not be asked, and that this action was due in part to an obligation which the petitioner herein felt by reason of the Fidelity's financing earlier security issues of petitioner.

From the evidence it appears also that the financial officers of the petitioner felt that a price of 97 flat, with accrued interest, was a fair price for the entire block, and that the Fidelity had earlier suggested a price of 95. It also appears that in this sale the Fidelity acted with Clark, Dodge & Company and with W. E. R. Smith & Company, both of New York, each party assuming one-third of the

undertaking. A letter dated October 31st, 1913, from the Second Vice-President of the Fidelity (said letter being in evidence) shows the Fidelity's confirmation of the purchase of the entire block for itself and associates. Another letter introduced in evidence, dated November 13th, 1913, and signed by Clark, Dodge & Company, shows that the entire amount of bonds had been re-sold by purchasers. From the evidence it appears also that they had been sold at a profit. The sales were, of course, made, subject to the Board's subsequent approval.

Under Chapter 195, P. L. 1911, the Board is charged with certain duties in respect to the sale of securities of public utilities. The statute prescribes that

"It shall be the duty of the Board, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said Board."

This section was judicially construed by the Supreme Court in February Term of 1913, *in re Interstate Telephone and Telegraph Company, prosecutor and relator,* vs. *Board of Public Utility Commissioners.* In the syllabus to the opinion, it is said:

"The effect of said legislation was also to impose upon the Board of Public Utility Commissioners the duty of investigating the purpose of a proposed issue of bonds payable in more than one year from the date thereof, and if in its judgment the purpose of such bond issue will be of doubtful benefit to the applying corporation, and ultimately may result injuriously to the investing public, the Board may withhold its power of approval."

In the same opinion, it is also said:

"Therefore, the word 'purpose' in this connection must be accorded a meaning which will enable the Board to investigate not only the object of the proposed bond issue, but the conditions under which it is to be made, and the entire environment of the company with its antecedents," etc., etc.

And again:

"Such we conceive was the legislative inquiry when it reposed the power in and imposed the duty upon this administrative Board to investigate, not only the legality, but practically the public policy and equity of a proposed bond issue, which in its far-reaching effects concerns not alone this prosecutor and its bondholders, but the welfare of the investing community and the public conscience of the State, upon the approval of whose delegated agency the bonds will be offered for sale."

The question which arises is, therefore, this, Was the petitioner's decision to sell the entire block at 97 and accrued interest to the Fidelity and its two associates, excluding competitive bids and omitting to sound other possible purchasers, one of whom had indicated a desire to be accorded the privilege of bidding, a matter fairly within the elastic limits of the company's discretion, or did such financing in the concrete circumstances constitute a departure from a sound and safe rule of action whereby the company would obtain less than the utmost possible or probable by the sale of its securities?

The Board is of opinion that if a novel and unseasoned security were being floated in a large amount, the returns on which were experimental or problematical, the company's decision to accept a bid at what seemed to the company a reasonable price, without subjecting itself to the risk of failing to obtain by competitive bids a market broad enough to absorb the entire issue, might, under appropriate circumstances, be wholly unobjectionable.

But the bonds to be issued for this refunding belong to a class of closely-held, high-grade, thoroughly-seasoned and well-secured bonds. The recent quotations upon these consolidated mortgage bonds have been commonly at par bid. (Evidence Nov. 28th, 1913, p. 3.) Under such circumstances the omission to assess the market value of the refunding issues by sounding possible buyers, and especially

where it was known that there was at least one competent buyer desirous of bidding, seems to the Board to be a questionable policy.

Inasmuch as any amount received for the refunding bonds less than par must be amortized during the life of the bonds, an additional burden by just this amount is imposed upon the patrons of the company, and an additional barrier by just this amount is interposed between the company's shareholders and their dividends.

Moreover, it appears that when the financial officers of the petitioner agreed upon a price to be accepted, they did not definitely know what specific price might be obtained from the intervening party, and admittedly disposed of the issue, influenced in part by intangible obligations to one of the three associated purchasers for past accommodation.

P. S. Ry. for Approval of Issue of Bonds of North Hudson County Ry. Co.

In the concrete circumstances we are of opinion that the sounding of other possible or probable bidders was a necessary part of the proper course to pursue; that departure therefrom in similar circumstances even admittedly made without consciousness of improper motives, is a policy that may lead to unwarrantable prejudice to shareholders and to customers; and that a sense of special obligation would warrant nothing more than the sale to the preferred bidder at as high a price as offered by another responsible party.

The purpose of the proposed issue and sale embraces not only the use of the proceeds to refund the maturing issue, but a method of disposing of the bonds to issue which is subject to serious objection and fraught with possible or probable prejudice to the petitioner's stockholders and patrons.

We, therefore, find and determine upon the considerations herein adduced, that we are not satisfied that the purpose of such proposed issue is in accordance with law; nor, in the judgment of the Board, on the matters adduced before it, can the Board approve either such proposed issue or the purpose thereof.

Dated December 5th, 1913.

No. 148.

IN THE MATTER OF ESTABLISHING STANDARDS AND REGULATIONS, TO BE FOLLOWED BY UTILITIES ENGAGED IN THE GENERATION, TRANSMISSION, SALE OR DISTRIBUTION OF ELECTRICITY AND BY ALL UTILITIES OWNING OR USING POLES AND WIRES.

ORDER.

The Board of Public Utility Commissioners having this day adopted Rules, Regulations and Recommendations for electrical supply utilities and for all utilities owning or using poles and wires, a copy of which Rules, Regulations and Recommendations is by reference thereto herein made part of this Order.

The Board of Public Utility Commissioners, after due hearing, hereby ascertains and fixes the Rules, Regulations and Recommendations referred to herein as establishing adequate and serviceable standards and reasonable regulations to be observed by such companies, and

HEREBY ORDERS that the Rules and Regulations so fixed shall be observed and followed by each and every utility

engaged in the generation, transmission, sale or distribution of electricity or owning or using poles and wires.

The Rules and Regulations referred to herein shall be and have the full force and effect of an order of this Board, except in so far as the text of the copy of the Rules and Regulations is underlined. Where such text is underlined, the part so underlined should be regarded as the recommendations of this Board for the guidance of the utilities to whom said recommendations are applicable, which recommendations should, in the opinion of the Board, be observed and followed by such utilities.

This order shall become effective January first, nineteen hundred and fourteen.

Dated December 9th, 1913.

Rules, Regulations and Recommendations

FOR ELECTRICAL SUPPLY UTILITIES AND FOR ALL UTILITIES OWNING OR USING POLES OR WIRES.

I. Each utility generating, transmitting, distributing or selling electricity for light, heat, power or other purposes, shall have and maintain its entire plant and system in such condition as will enable it to furnish safe, proper and adequate service.

II. The construction of buildings, machinery and generating plant of the utility must be in accordance with the requirements of the "National Electrical Code" of the edition of 1913.

III. The distribution system, including:

(a) Transmission lines;
(b) Sub-stations;
(c) Overhead system, poles, lines, transformers, etc.;
(d) Underground system, manholes, conduits, etc.;
(e) Street lighting system;
(f) Service wires and attachments;
(g) Meters, etc.

must be constructed in accordance with good standard practice. It is expected that all pos-

sible care will be exercised by each company to reduce the life hazard to which employees, customers and others may be subjected by the presence of overhead wires in the public streets and ways. It is also expected that each company will so conduct its affairs as to cause the least possible danger or loss to other public utilities which make use of the streets and roads. Standard practice for electrical construction work is indicated in various specifications, the names of some of which are given below. The specifications referred to are not to be considered part and parcel of the rules and regulations, but are to be considered as indicative of good standard practice.

1st.—Specifications covering methods of overhead line construction for 2,300 volt distribution. and for street lighting circuits, and specifications for material.

2d.—Specifications covering methods of overhead line construction for secondary voltages, including pole wiring for street lighting work.

3d.—The specifications attached to "Intercompany agreement form and specifications for the joint use of poles by lighting and telephone companies."

4th.—Specifications for overhead crossings of electric light and power lines.

NOTE—Numbers 1, 2, 3, and 4 are set forth in the four sections of the "Report of Committee on Overhead Line Construction," approved by the National Electric Light Association, May 29th to June 2, 1911, and Section 4 as approved by the Committee representing the American Institute of Electrical Engineers, American Electric Railway Association, American Railway Engineering Association, the Association of Railway Telegraph Superintendents and the American Railway Association.

5th.—Report of the Committee on Power Distribution read before the American Electric Railway Association, October 13, 1913.

6th.—Report of the Committee on Joint Use of Poles read before the American Electric Railway Association, October 13, 1913.

7th.—National Electrical Code.

By National Electrical Code is meant the code which is described as follows:

The National Electrical Code was originally drawn in 1897 as the result of the united efforts of the various insurance, electrical, architectural and allied interests which through the National Conference on Standard Electrical Rules, composed of delegates from various National Associations, unanimously voted to recommend it to their respective Associations for approval and adoption; and presented by the National Board

of Fire Underwriters with the various amendments and additions which have been made since that time by them.

The National Conference has disbanded, the work of the Underwriters' National Electric Association and of the National Conference having been taken over by the National Fire Protection Association.

The following associations, formerly members of the National Conference, are represented on the Electrical Committee of the National Fire Protection Association:

American Electric Railway Association.
American Institute of Electrical Engineers.
Association Factory Mutual Fire Insurance Cos.
National Board of Fire Underwriters.
National Electric Light Association.
National Electrical Contractors' Association.
National Electrical Inspectors' Association.

IV. POLE IDENTIFICATION.

(a) Each utility owning poles supporting wires along or over public highways, this to include each railroad, street railway, telephone, telegraph and electric light and power utility, shall, on or before January 1st, 1915, stencil each pole, post or other structure similarly used with

(1) The initials of its name, abbreviation of its name, corporate symbol or other distinguishing mark by which the owner of each such structure may be readily and definitely determined;

(2) A number by which the location of each such structure may be described.

(b) The manner of making such stencils shall be with paint, and the characters of the stencil shall be of such size and so spaced and hereafter maintained as to be easily read from the surface of the ground at a distance of ten feet from the structure.

(c) In the case of two or more utilities jointly owning any such structure, the distinguishing mark of each utility shall be placed on such structure, but not more than one number necessarily shall be placed thereon.

(d) In the case of such structures carrying or supporting overhead trolley wires where there is a double line of structures, one on each side of the railroad track, such stencil need be affixed to but one line of such structures.

(e) In the case of such structures erected upon private rights of way or on the public highways of such character that the construction may be deemed to be a through or trunk line, such stencil need be affixed only to every fifth structure; provided, however, that each and every such structure situated within the limits of any built-up community shall be stenciled, except as otherwise provided in paragraph (d).

(f) The requirements herein shall apply to all existing and future erected structures and to all changes in ownership.

(g) Every such utility shall file with the Board of Public Utility Commissioners, in duplicate,

on or before March 1st, 1914, a statement showing:

1. The initials, abbreviation of name, corporate symbol or distinguishing mark.
2. The means of stenciling to be employed.
3. The method intended to be followed in numbering structures, to wit, within the limits of cities, towns, or other built-up communities, and upon through or trunk lines.

V. POLE INSPECTION.

Each pole, post, tower or other structure used for the support or attachment of wires, guys or lamps must be inspected by the utility owning or using it with sufficient frequency and comprehensiveness to determine in each specific case the necessity for replacement or repair.

The inspector shall be guided by the specifications referred to in Article III of these rules, and also for the guidance of the inspector reference is hereby made to the general rules for Pole Replacement Inspection of the American Telephone and Telegraph Company.

VI. FLUCTUATION IN VOLTAGE ON LIGHTING CIRCUITS.

Each utility supplying electrical energy on constant potential system shall adopt and maintain an average value of voltage as measured at any customer's cutout, and the fluctuations as measured by a standardized indicated voltmeter

shall not vary between sunset and eleven P. M.. for periods exceeding five (5) minutes, more than three per cent. (3%) above nor more than three per cent. (3%) below the standard voltage for said location in force at the time; provided, however, that variations in pressure, caused by the operation of apparatus on customer's premises in violation of the utility's rules, the action of the elements, or other causes beyond the utility's control shall not be considered a violation of this provision.

VII. Each utility furnishing electric service shall keep a record of the time of starting and shutting down power station equipment and feeders, together with the indication of the several switchboard instruments at frequent intervals, and shall maintain a record of all interruptions of service upon the entire system or major divisions of its system, and include in such record, time, duration and cause of each interruption.

VIII. Each utility shall keep a record of "complaints" received at its office in regard to service, which shall include the name and address of the customer, the date, nature of complaint and the remedy. The record shall be available for inspection at any time within one year by duly accredited representatives of the Public Utility Commission.

IX. Each utility supplying electrical energy for incandescent illumination shall inspect in a general way the incandescent lamps of each con-

sumer, to whom free lamp renewals are supplied, at least once every two years, and render its consumers reasonable assistance in securing incandescent lamps best adapted to the service furnished.

X. Each utility supplying electrical energy for incandescent ilumination shall specifically inform each of its customers, where unusual conditions prevail, as to the conditions under which efficient illuminating service may be secured from its system.

XI. Each utility shall furnish to any prospective customer, on request, a statement of the kind or kinds of service available, giving the adopted voltage, nature of current, and, if alternating current, the frequency and number of phases. Where one class of service is available through only a part of the district served, this should be stated in connection with any such application. Where service is available only at certain times of day or night, full information must be readily available to all prospective customers or their representatives.

Where unusual conditions prevail, each utility supplying electrical energy for power shall specifically inform each of its customers as to the conditions under which efficient and satisfactory service may be secured from its system. When, on account of its size and character, the apparatus desired to be connected to the lines of the utility is so unusual as to affect the adequacy of the service furnished to other customers,

prospective or otherwise, conditions may require special provision for the load in question. This applies particularly to such connections as grounded signal system, medical apparatus, welding machines, large motors, large capacity arc lamps, furnaces, moving picture machines, wireless telegraph apparatus, &c. In all cases, however, it is understood that the utility is merely a supplier of its commercial standard electrical energy deliverable at the customer's service cutout under certain conditions as to pressure, continuity and regularity.

XII. Whenever any transformers, high tension insulators or other appliances are removed from the system for any reason, they must be inspected before being re-installed in the same or other location.

XIII. A utility may refuse to connect with any customer's wiring when it is not in accordance with the provisions of the National Electrical Code of 1913, or when the certificate of the underwriters or of the local inspection bureau has not been issued, or when the wiring is defective under the rules of the utility.

XIV. The rules contained in the 1913 edition of the National Electrical Code regarding grounding of secondaries are hereby adopted FOR ALL NEW CONSTRUCTION. Each utility shall adopt a plan whereby existing services will be changed to conform to the rule, and submit the same to the Board for approval by July 1, 1914.

XV. The utility shall, without charge, furnish each customer supplied with energy on a measured basis, with an electric meter and such service appliances as are customarily furnished by the utility in order to connect the customer's equipment with its mains.

NOTE.—Any utility now furnishing service through meters owned by customers must arrange to take over the same by January 1st, 1915, and thereafter own and maintain all service meters.

XVI. All meters hereafter placed in buildings should be located in the cellar or first floor, as near as possible to the point of entrance of the service in a clean, dry, safe place, free from vibration, not subject to great variation in temperature, and the top of the meter board should not be more than six feet nor the bottom less than four feet above the floor, or above a suitable platform placed underneath the meter, where it will be easily accessible for reading and testing.

Under no circumstances should meters be placed in coal or wood-bins or on the partitions forming the same, nor on any flimsy partitions or supports.

In cases where buildings have no cellar, or have very damp cellars or cellars that are not

easily accessible, the meter should be installed on the first floor.

Unless absolutely unavoidable meters should not be installed in attics, sitting-rooms, bath-rooms, bed-rooms, restaurant kitchens, over doors, over windows, or any location where the visits of the meter reader or tester will cause annoyance to the customer.

The installation of meters and connections shall be strictly in accordance with the rules of the National Electrical Code of 1913 and the utility furnishing the service.

XVII. TESTING OF WATT-HOUR METERS.

(1) All utilities supplying electricity within the State of New Jersey shall provide and properly maintain suitable apparatus and facilities for testing and proving the accuracy of watt-hour meters.

(2) All portable standards shall be tested and proved as to their accuracy as often as is necessary to insure their maintenance in proper condition for testing of watt-hour meters. Portable standards, if not tested and calibrated in the laboratory of the electrical utility owning the same, shall be tested and calibrated in any properly equipped laboratory of recognized standing. Each standard shall at all times be accompanied by a certificate giving the date it was last checked, the corrections to be applied at

various loads, and signed by the proper authority. These certificates, when superseded, shall be kept on file in the utility's office.

(3) All direct current meters installed upon consumer's premises shall be periodically tested according to the following schedule:

Meters up to and including 25 amperes rated capacity shall be tested at least once in every 18 months.

Meters exceeding 25 amperes, up to and including 500 amperes rated capacity, shall be tested at least once in every 12 months.

Meters exceeding 500 amperes rated capacity shall be tested at least once in every 6 months.

(4) All types of alternating current induction meters shall be periodically tested as follows:

Single phase meters, up to and including 25 amperes rated capacity, shall be tested at least once in every 30 months.

Single phase meters exceeding 25 amperes rated capacity shall be tested at least once in every 24 months.

Polyphase meters, up to and including 150 amperes rated capacity, shall be tested at least once in every 24 months.

Polyphase meters exceeding 150 amperes rated capacity shall be tested at least once in every 12 months.

(5) A complete record shall be kept of all complaint tests, office and periodic tests of watt-

hour meters installed on consumer's premises. Such record shall include:

Owning utility's number;
Manufacturer's name and number;
Type, rated volts, amperes and wire;
Date of each installation, removal and test;

The average of the readings at full load, at light load and at normal load as found at each and every test.

A record of tests of each meter shall be continuous for a period of not less than five years, and in any event of sufficient length to cover three consecutive periodic tests.

(6) Every direct current meter in service at the time these rules are adopted, for which there is on file at the utility's office no complete record of a satisfactory periodic test made within the period of eighteen months, or twelve months, or six months, as above prescribed in paragraph (3) of this rule, next preceding the adoption of these rules shall be tested prior to July 1st, 1914.

(7) Every alternating current meter, up to and including 25 amperes rated capacity, in service at the time these rules are adopted, for which there is on file at the utility's office no complete record of a satisfactory periodic test made within the period of thirty months, as above prescribed in paragraph (4) of this rule, next preceding the adoption of these rules, shall be tested prior to January 1st, 1915.

(8) Every alternating current meter over 25 amperes rated capacity in service at the time these rules are adopted, for which there is on file at the utility's office no complete record of a satisfactory periodic test made within the period of twenty-four months, or twelve months, as above prescribed in paragraph (4) of this rule, next preceding the adoption of these rules, shall be tested prior to July 1st, 1914.

XVIII. An electric meter may be considered correct when it does not show, in comparison with standards approved by the Commission, an error which is greater than 4 per cent. on the light load or heavy load. Definition: Light load shall be between 5 and 10 per cent. of rated capacity of the meter for an induction meter and between 10 and 15 per cent. of rated capacity of the meter for a commutator meter. Heavy load shall not be less than 60 per cent. of full rated capacity of the meter.

XIX. The average accuracy of a meter shall be the average of the accuracy of light load and at heavy load as found above, but in all cases, except residences, where meter is found more than 4 per cent. fast tests shall be made at light load, at normal load and full load, and the average of these tests shall be obtained by multiplying the result of the test at normal load by 3 and adding the results of the tests at light load and full load and dividing the total by 5.

Definition.—The normal load shall be considered as the following percentage of full connected load:

(a) Residence and apartment lighting, 25%;

(b) Elevator service, 40%;

(c) Factories (individual drive), churches and offices, 45%;

(d) Factories (shaft drive), theatres, clubs, entrances, hallways and general store lighting, 60%;

(e) Saloons, restaurants, pumps, air compressors, ice machines and moving picture theatres, 70%;

(f) Sign and window lighting and blowers, 100%.

XX. No electric meter which registers upon "no load" shall be placed in service or allowed to remain in service.

XXI. Each utility supplying electricity shall equip itself with a rotating standard test meter of suitable range, and shall fasten permanently on the wall of the meter shop, a house or switch-board type meter or meters of suitable capacity to be used only for checking the rotating standard. This check should be made at least every week when standard is in service. Utilities supplying direct current or having already other test apparatus, or small utilities having less than 100 meters may apply to the Commission for a modification of this rule. Each wall standard shall be tested at least once a year and certified by the Board and furnished with an inspection tag or plate. Rotating standards will not be sealed, but wall standards will be sealed and are to be considered the reference standard for the utility.

Where a utility is maintaining a standardizing laboratory, inspection will be made of the instruments in use in this laboratory, and if the instruments and methods are approved, certification of rotating and wall standards may be made by such laboratory.

XXII. Each electric meter shall be tested and adjusted for accuracy before installation or within thirty days after being set.

XXIII. Each meter after being tested as found shall be adjusted to record within 2 per cent. of correct at heavy load, and not more than 2 per cent. fast nor 4 per cent. slow at light load. This periodic test is to be made by comparing the meter while connected in its place of service with an approved standard at light load and at heavy load. Meters removed from service are to be tested and adjusted in the meter room before being put in service again.

XXIV. Complete records shall be kept in the local office of all periodic tests and tests on old meters brought in. These records shall be available for examination at any time by the inspectors of the Board. A report shall be made to the Board at stated intervals giving a summary of the tests. Each utility having more than 500 meters shall report monthly. Utilities having less than 500 meters shall report quarterly. Blank forms will be furnished by the Board on which reports are to be made.

Electric Standards.

XXV. Each electric utility shall, without charge, make a test of the accuracy of a meter upon request of a customer, provided such customer does not make a request for test more frequently than once in six months. A report giving results of such tests shall be made to the customer, and a complete record of such tests shall be kept on file at the office of the utility.

XXVI. Upon formal application by any customer to the Board of Public Utility Commissioners a test shall be made of the customer's meter by an inspector employed by the Board. Such test to be made as soon as practicable after receipt of the application. For such test a fee of $1.00 shall be paid by the customer at the time application is made for the test; this fee to be retained if the meter is found to be slow or correct within the allowable limits. If the meter is found to be fast beyond the allowable limits, the amount of $1.00 will be refunded to the customer, and collected from the utility owning the meter. The utility owning the meter will be notified that such test is to be made, and should have a representative present to open the meter and seal it after the test.

XXVII. Meter dials should read directly in kilowatt hours. If not, the dial constant must be clearly indicated where it can be seen without disturbing the case of the meter or the connections. Bills rendered periodically by the utility shall designate the readings of the meter at the beginning and end of the time for which the bill is ren-

dered, and give the dates on which the readings were taken. Bills shall also show the gross amount charged, and the net amount after deducting the rebate, if any, allowed for prompt payment. Where prepayment meters are in use, the meter reader at the time of reading same shall leave with the customer a slip showing the readings as well as the amount of money collected from the meter.

XXVIII. No utility shall make any charge for replacing a meter where such replacement is requested by a customer, unless the meter first referred to has been in use less than one year, in which case a charge, which in no case shall exceed $1.00, may be made to cover the actual expense of making the change.

XXIX. Each utility supplying electrical energy shall adopt some method of informing its customers as to the reading of meters either by printing on bills a description of the method of reading meters or a notice to the effect that the method will be readily explained on application. It is recommended that an exhibition meter be kept on display in each commercial office maintained by the electric utility.

XXX. The utility should have the right of access to customer's premises, and to all property furnished by the utility at all reasonable times, for the purpose of reading meters, or inspecting or repairing appliances used in connection with the

supply of service, or for the removal of its property at the time service is to be terminated. The customer should obtain, or cause to be obtained, all necessary permits needed by the utility in giving it access to the appliances referred to. The customer should not permit access to the meter and other appliances of the utility except by authorized employees of the utility, or properly qualified State or local inspectors. In case of defective service, the customer should not interfere with the apparatus belonging to the utility, but should immediately notify the proper parties to have the defects remedied.

XXXI. The utility will not be held responsible for resulting inadequacy of service if customers make additions or alterations to the electrical equipment on their premises without first having notified the utility of their intention so to do, and the installation must comply with the rules of the utility furnishing the service.

XXXII. Nothing herein contained shall require any utility to furnish service until the customer shall have conformed to the reasonable rules of the utility, not inconsistent with the foregoing regulations.

XXXIII. The foregoing regulations, with the exception of those referring to pole identification, shall not

be construed to require reconstruction in accordance with rules for equipment or construction from time to time contained in the Electrical Code or other standards referred to, not in force when such equipment was installed or construction made, but the Board reserves the right to deal with specific cases as the particular conditions require.

Adopted December 9th, 1913.

No. 149.

IN THE MATTER OF THE INVESTIGATION BY THE BOARD OF PUBLIC UTILITY COMMISSIONERS, ON ITS OWN INITIATIVE, OF THE JUSTICE AND REASONABLENESS OF CERTAIN RATES FOR INTRA-STATE COMMUTATION SERVICE, ETC., AND OF WHETHER SAID RATES ARE UNJUSTLY DISCRIMINATORY OR PREFERENTIAL.

Charles E. Gummere, for the Pennsylvania Railroad Company.

M. M. Stallman, for the Delaware, Lackawanna and Western Railroad Company.

H. A. Taylor, for the Erie, New York, Susquehanna and Western, and the New York and New Jersey Railroad Companies.

Stewart C. Pratt and *F. E. Hammond,* for the Lehigh Valley Railroad Company.

Roy M. Robinson and *John W. Zisgen,* for the New Jersey Commuters' Association.

Borden D. Whiting, for the Board of Trade of the City of Newark.

Frank H. Sommer, for the Commission.

Hearings as follows:

January 23d, 1912, at the State House, in Trenton.
February 13th, 1912, at the State House, in Trenton.
March 29th, 1912, at the Court House, in Newark.
May 10th, 1912, at the Chancery Chambers, Jersey City.
June 21st, 1912, at the Chancery Chambers, Jersey City.
July 3rd, 1912, at the Chancery Chambers, Jersey City.
September 6th, 1912, at the Chancery Chambers, Jersey City.

During the summer of 1911, upon the Board's initiative, an inquiry was made to discover whether the failure of carriers to grant commutation or special rates for intra-state journeys having Jersey City, Hoboken or Camden as one terminus, resulted in prejudice or disadvantage to individuals or commuters, and required remedy. As the outcome of the investigation an order was entered, effective December 1st, 1911, requiring each railroad company carrying passengers in intra-state journeys to or from Jersey City or Hoboken to publish rates for such journeys, and upon request and proper tender of payment, to sell such special rate tickets, designating thereon both termini specifically, and to file schedules of such rates with the Commission.

The carriers affected by the order applied to the Supreme Court for a stay thereof. The stay was refused, although a writ of *certiorari* was granted. The carriers accordingly proceeded to put on sale tickets as the order required, and filed the schedules of these rates with the Commission. The rates named in said schedules were the same as the rates quoted and previously in effect between the various stations and New York City.

Thereupon, the Board of Public Utility Commissioners, on its own initiative, instituted a second investigation. This second investigation inquired into the reasonableness and justice of the rates quoted by the carriers in compliance with the order effective December 1st, 1911, and also into the matter whether the rates aforesaid were unjustly discriminatory or preferential. In pursuance of this second inquiry, hearings were held as indicated above. At these hearings, evidence was introduced by the various parties in interest, and briefs were eventually filed by the counsel for the New Jersey Commuters' Association, by the counsel for the Erie lines, and by the counsel for the Delaware, Lackawanna and Western Railroad Company.

While the second investigation was in progress the *certiorari* proceedings were pressed before the Supreme Court. On July 15th, 1912, an opinion of the Supreme Court was handed down sustaining the Board's order under review. The Court, speaking through Mr. Justice Trenchard, sustained the position taken by this Board, that the carriers afforded commutation service to Jersey City and Hoboken, though they quoted no rates therefor specifically. The Court held, also, that the failure to quote such rates specially was a regulation or practice which deprived the passenger, who would end his journey at either point, of the protection which the law of the State throws around him as regards the justice and reasonableness of rates, and

of other regulations and practices involved in intra-state travel. The Court's decision also upheld the Board's contention that the quoting of such rates was proper, in that it would permit the segregation of receipts in intra-state commerce from receipts in inter-state commerce.

The matter at issue eventually narrowed down to the Erie and Lackawanna, the Commuters' Association and the Board. The change of the Lehigh Valley's terminal from Jersey City to Communipaw, at which last place there has been no profession of affording local service to Jersey City, practically took the Lehigh Valley out of the range of the inquiry. The arrangement existing between the Pennsylvania and the Hudson and Manhattan, whereby the tube service of the latter is put at the service of the Pennsylvania's patrons, differentiated the case of the Pennsylvania from that of other carriers and the counsel for the Commuters' Association, Mr. Roy M. Robinson, assented to the dismissal of the proceedings so far as the Pennsylvania was concerned.

The two principal carriers affected, the Erie and the Lackawanna, after the adverse decision by the Supreme Court, carried the matter up to the Court of Errors and Appeals. The Board, in the meantime, issued no finding in the second inquiry, inasmuch as it was not yet certain whether the Court of Errors and Appeals would affirm or reverse the opinion of the Supreme Court.

The opinion of the higher court was delivered on June 18th, 1913, by Chief Justice Gummere. This opinion, in part, says:

"It is further contended that both the order under review and the judgment of the Supreme Court are based upon an erroneous assumption of a previously existing 'commutation service to Jersey City and Hoboken over the road of the appellant company.' The Supreme Court, after a consideration of the proofs submitted by the parties, reached the conclusion that such service was shown to exist. We do not think that this question was properly before

the Board of Public Utility Commissioners for determination in the proceedings instituted by it, and which culminated in the making of the order now complained of. The proceedings were in the nature of a general investigation not directed against any particular railroad company; and neither the present appellant, nor any other railroad company, was called upon by the Board to defend itself against any charge made against it of subjecting any of the municipalities which it served, or the inhabitants thereof, to any prejudice or disadvantage in the failure to grant commutation and other special rates for journeys to and from Jersey City, Hoboken or Camden. Before such an issue is determined against the appellant, or any other railroad company of the State, it is entitled to have that specific charge made against it, and an opportunity afforded to defend itself against such charge."

The opinion further says:

"But it does not follow from this that the order under review is objectionable. It is not directed against any of the railroad companies of the State except those which, at the time of making it, were affording commutation service from points in New Jersey to Jersey City, or to Hoboken. If the Delaware, Lackawanna and Western Railroad Company was not at the time of making the order, and if not now, affording such service, the order is not applicable to it, and it is not affected thereby. Whether or not it is within its scope is a question to be settled when that specific issue is raised and presented for determination."

The Lackawanna, under date of June 23d, 1913, addressed a letter to this Board, by G. A. Cullen, Passenger Traffic Manager, saying:

"We hereby notify you that we shall not sell sixty-trip commutation, fifty-trip family, or ten-trip tickets between Hoboken and points in the State of New Jersey, because under the opinion of the Court of Errors and Appeals in the case of the Delaware, Lackawanna and Western Railroad Company vs. Board of Public Utility Commissioners, we do not consider the order of the Commission, entered October 3d, 1911, as applicable to us."

A communication of the same date, and similarly worded, was received from R. H. Wallace, General Passenger Agent of the Erie. The Board replied to theses two communications under date of July 1st, 1913, stating that

"As at present advised, it is of opinion that its order entered October 3d, 1911, to which you refer, is applicable to you. Upon this basis the

Board will proceed to the adjudication in the pending proceeding before it, as to the justice and reasonableness of existing intra-state commutation rates, and other special rates, charged by the companies you represent."

The Board believed that the Erie and the Lackawanna were furnishing commutation service to Jersey City and Hoboken, respectively, and were consequently subject to the order requiring the quoting of rates and the selling of tickets to and from these places.

The record of the original investigation seemed to us to fully substantiate this opinion. In that investigation the general passenger agent for the Erie was asked by counsel for the Commuters' Association:

"Then as I understand you the ticket (from Ramsey to New York) is good for commutation between Ramsey and Jersey City, monthly commutation?"

He replied: "Yes, sir."

And on being asked: "And you want to stand on that answer, do you?"

He replied: "I do."

(Minutes, Sept. 7th, 1911, pp. 288, 289.)

On the face of the record, it appeared to the Board that the subsequent allegation by the carriers that they did not furnish commutation service to Jersey City or Hoboken, could not be regarded otherwise than as a technical evasion, controverting a fact which had been previously admitted by their own witnesses. The Board proceeded with its consideration and analysis of rates with a view to announcing its finding. At that time the Board had not received an analysis of the financial and other data submitted by the companies, which analysis was being made for the Board by expert accountants specially employed for this purpose. The analysis of these accountants made evident that additional testimony, particularly a comparison of commutation rates on other roads leading to New York, ought to be introduced before a final conclusion was reached. This

fact, combined with the doubt suggested by the opinion of the Court of Errors, and the companies' action thereunder causes the Board to take such action as is indicated in the close of this memorandum.

The Erie and the Lackawanna have taken advantage of the decision rendered by the Court of Errors and Appeals. They have withdrawn the commutation tickets sold to the Hudson River terminals, and cancelled the rates applicable to these points. The Public Utility Act (Chap. 195, P. L. 1911) provides (II, 16 (c)) that the Board shall have power,

"(c) After hearing, upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility as herein defined, whenever the Board shall determine *any existing* individual rate, joint rate, toll, charge or schedule thereof, or commutation, mileage or other special rate to be unjust, unreasonable, insufficient, or unjustly discriminatory or preferential."

Evidently, since the companies' withdrawal of their tickets and schedules there is no *existing* commutation rate between the various interior points and Jersey City or Hoboken, except as the New York rate may be held applicable. There is no intra-state commutation rate to these points upon which an order of the Board can at present operate. It will be necessary, therefore, in conformity with the opinion rendered by the Court of Errors and Appeals, to bring specific proceedings against these carriers, charging each with undue and unjust discrimination by reason of the failure of each to quote rates and sell tickets to these points. Should the carriers' practice be found to be illegal and discriminatory, an order requiring the quoting of rates and the selling of tickets may be entered. Should such rates by reason of such determination become "existing rates," there will again be presented the opportunity to

pass on their reasonableness and justice. The whole process, briefly put, is that the companies have utilized the opinion of the Court of Errors and Appeals to render necessary further proceedings on the part of this Board to determine whether each company falls within the scope of the original order of the Board in the premises. Until this new proceeding has been had, and a determination thereunder reached, it is impossible for the Board to pass upon the central issue in the present investigation, to wit, the reasonableness and justice of charging the same commutation rates to Hudson River terminals as the two carriers charge to New York City. The formal upholding of the Board's order by the decision of the Court of Errors and Appeals has not resulted in making the order specifically effective as against the two companies in question, each of which by the terms of the decision is entitled to have the specific charge made against it, to wit, that it is practicing unjust discrimination, and until each has had an opportunity to defend itself against such charge.

The Board has instructed its counsel to initiate further proceedings, as speedily as possible, in order that the preliminary question indicated by the Court of Errors and Appeals shall be brought before this Board for determination.

Dated December 16th, 1913.

No. 150.

IN THE MATTER OF THE COMPLAINT OF THE MAYOR AND ALDERMEN OF JERSEY CITY AGAINST THE ERIE RAILROAD COMPANY.

Thomas G. Haight, for the City of Jersey City.

H. A. Taylor, for the Erie Railroad Company.

The Mayor and Aldermen of Jersey City petitioned this Board to make an order directing the Erie Railroad Company to cease from burning as a fuel, in its locomotives or engines while operating them through the limits of Jersey City, soft or bituminous coal, and to order said company to burn either coke or anthracite coal; or to use some motive power other than steam locomotives which will prevent it from violating certain ordinances of the city of Jersey City relating to the abatement of "nuisances arising or resulting from the escape or discharge of dense smoke, dust, gas or cinders."

The petitioners rest the authority for bringing this action upon Paragraph (a), Section 17 of Chapter 195, P. L. 1911, which provides that the Board shall have power to require every public utility:

"To comply with the laws of this State and *any municipal ordinance relating thereto* and to conform to the duties imposed upon it thereby or by provisions of its own charter whether obtained under any general or special law of this State."

The petitioners herein have not urged that any law of this State is being violated by the defendant company in respect to the subject matter of this complaint, nor do they contend that said company fails to conform to the duties imposed upon it by the provisions of its charter respecting the same. This claim for relief is, therefore, based entirely upon the power of this Board to require the defendant company to comply with the ordinance above referred to.

Before bringing this complaint the City of Jersey City had instituted a number of suits against the Erie Railroad and the Pennsylvania Railroad for violation of this ordinance, and the companies, being convicted, removed the

convictions to the Supreme Court of this State, where judgment voiding the ordinance was rendered. The city appealed and the case of the Pennsylvania Railroad Company was decided by the Court of Errors and Appeals. The decision is applicable to the case of the Erie Railroad Company. The opinion of the Court is as follows:

"The proposition presented is, has the city the power to enforce this ordinance against this defendant when the emission of dense smoke from its engines is caused by the consumption of fuel necessary in the exercising of its legislative grant to operate a railroad. All negligence or want of care on the part of the railroad company in the conduct of its authorized business is eliminated, for the ordinance applies to the emission of dense smoke from defendant's engines, whether it be the result of negligence or not. The defendant is authorized by the legislature to use engines in carrying on its business, and that cannot be done without the consumption of fuel and the consequent emission of smoke, which at times must fall within the description of dense, and so long as the conduct of the defendant is not negligent, it has the right to allow smoke to escape from its engines.

"To sustain the contention of the city we should have to assume that, notwithstanding its grant to the defendant, the legislature has delegated to the city a power, which practically amounts to a repeal of its former grant, for no railroad can be operated without creating smoke, and if the city can forbid the escape of dense smoke, it can also prevent the emission of all smoke, and thus deprive the railroad company of the right to burn fuel in the prosecution of its business, because the burning of fuel is not only necessary to operate a railroad, but must produce smoke.

"We are of the opinion that no such power is vested in the city, and therefore the ordinance, so far as it attempts to make unlawful the emission of smoke from defendant's engines, affords no lawful basis for the conviction of the defendant under the proofs in this case, and that as to it the ordinance is void and the convictions must be set aside. So far as the ordinance attempts to exercise the police power for the benefit of the public health, it is sufficient to say that that power is vested in the Board of Health, to which it has been delegated by the legislature.

"Where the legislature has seen fit to confer upon railroad companies the right to consume fuel and emit the smoke arising therefrom, in order to operate their railroads, and in so doing to be immune from liability for damage to adjacent property, provided such damage results, notwithstanding proper care is used by the company in operating its railroad, a municipality cannot, without at least express power delegated to it, make it unlawful to permit the emission of dense smoke from the smoke stacks of its locomotives, unless the escape of such smoke results from negligence or want of due care.

"This ordinance undertakes to punish railroad companies for permitting the emission of dense smoke from their engines in sufficient quantity to cause damage to property whether it results from negligence or not.

"We think no such power has been given to the city, and therefore the judgment of the Supreme Court should be affirmed."

The effect of this decision is that the ordinance is void in so far as it relates to the defendant company, hence the relief sought by the City of Jersey City before this Board cannot be granted, and the petition will be DISMISSED.

Dated December 16th, 1913.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigations of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

IT IS ORDERED that the complaint in this proceeding be, and it is hereby, DISMISSED.

Dated December 16th, 1913.

No. 151.

INVESTIGATION OF THE REASONABLENESS OF THE RULE OF THE WEST ORANGE WATER COMPANY REQUIRING THE PAYMENT OF METER RENTALS.

Resulting from an informal complaint by G. E. Scherer reciting among other matters that he was charged quarterly

62 cents as meter rental, a hearing was ordered by the Board on the reasonableness of the rule in question.

The hearing was held on Friday, November 7th, 1913, at the Chancery Chambers, Jersey City, where C. P. Bassett appeared and testified for the company. The hearing developed that the rule in question was in conformity with an arrangement made with the Council of the Town of West Orange: that the rescinding of the rule would raise the question of revising the existing schedule of water rates in West Orange: that the existing schedule, by comparison with rates charged in nearby municipalities, in particular the City of Newark, was not *prima facie* unreasonable; and that a revision of the West Orange water schedule would involve more extensive evidence than is now before the Board.

The Board is, therefore, of opinion that the existing meter rental need not be displaced by an order to that effect: but, at the same time, is not ready to acquiesce in the legality of the alleged contract made by the Town of West Orange with the company, purporting to fix water rates to private consumers.

And the Board expressly goes on record as indicating its opinion that when and as arrangements in future are made for rate schedules the company should plan to own the meters as part of its own property and apparatus, and not include in the rate schedule any separate charge under the head of meter rental.

Dated December 17th, 1913.

No. 152.

IN THE MATTER OF THE APPLICATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY FOR APPROVAL OF THE EXECUTION AND DELIVERY OF (1) A CONSOLIDATION MORTGAGE AND (2) OF A REFUNDING AND IMPROVEMENT MORTGAGE.

The Board's approval of the execution and delivery of the proposed consolidated mortgage accorded on the understanding that such approval does not commit the Board to the approval in advance of the issue of bonds thereunder, in exchange for or in redemption of the present 3½ per cent. collateral bonds. The approval shall not be taken as affecting New Jersey intra-state passenger or freight rates on railroads in this State now or hereafter subjected to this consolidation mortgage. The approval does not carry by implication approval of any rate or change in rates on intra-state New Jersey traffic, passenger or freight. No clause in the mortgage, delimiting responsibility of individual officers of the companies affected, in any wise impairs the force and effect of the statutes of this State, as such statutes, or any of them, duly applicable define and fix the legal responsibility of the individuals in question.

The relation of the proposed consolidation mortgage to the present funded debt of the petitioner may be indicated as follows:

A. The petitioner has outstanding a first mortgage for $100,000,000 ($94,000,000 issued), bearing 3½ per cent. interest. This mortgage is a first lien on the main stem and certain branch lines, and a junior lien on certain affiliated roads and other property.

B. The petitioner has also outstanding Lake Shore Company Collateral 3½ per cent. bonds ($90,578,400 issued) and Michigan Central Collateral 3½ per cent. bonds ($19,336,000 issued). These collateral bonds are secured by mortgage upon the stocks of said companies, pledged thereunder, and become a lien upon the New York Central prop

erties in case of the execution of a mortgage subsequent thereto.

C. The petitioner has outstanding debenture bonds (two series), bearing 4 per cent. interest. The amount of said debentures is $51,188,000.

As additional security for B and C, *supra* (the lien of B being prior to, and superior to, the lien of C), and as security for a proposed issue of 4 per cent. bonds, equal at par to B and C, *supra*, and designed to refund and replace B and C, *supra* (the lien of C being equal and co-ordinate with the lien of said proposed issue), this indenture pledges:

a. Certain railroads hitherto unencumbered.

b. Its main stem and certain branch lines now subject only to the lien of the first mortgage.

c. Affiliated lines and other property subject to the lien of the first mortgage as a junior lien and to other prior liens.

D. Included in "other property," mentioned in (c) *supra*, are:

1. The petitioner's leasehold rights in the West Shore Railroad Company —twenty miles of which, more or less, are in New Jersey—the term of the said lease being for 475 years from 1885, with an additional optional term of 500 years. (See Indenture, page 45.)

Said West Shore Railroad Company is itself subject to the lien of a $50,000,000 mortgage securing its four per cent. bonds maturing in 2361 A. D.

2. Rights in an agreement for the use of railroad property between Cornwall, New York, and Weehawken, New Jersey—said rights being subject to the prior lien of the first mortgage (a) *supra*.

Items 1 and 2, under D above, are by this indenture subjected to the lien of the proposed consolidated mortgage. By its terms they would become charged in part with the obligations arising under said consolidated mortgage.

These obligations include, among other things, a return of interest at four per cent. annually on the consolidated mortgage bonds when and as said consolidated mortgage bonds shall replace an equal amount of the above-described collateral bonds. This amount of interest annually would be, eventually, $550,000 more than the collateral mortgage bonds bear at present.

There is not now before this Board any petition to issue bonds under the proposed consolidation mortgage. The Board's approval of the execution and delivery of said mortgage, as evidenced by order of even date herewith, is accorded on the explicit understanding that the approval aforesaid in no wise commits this Board to the approval in advance of the issue of bonds thereunder in exchange for or in redemption of the present 3½ per cent. collateral bonds. In this connection this Board cites with approval the language of the report of the New York Public Service Commission, Second District, under date of November 19th, 1913, to wit:

"The Commission can see no reason why these 3½ per cent. bonds should be exchanged for 4 per cent. bonds under the new mortgage, unless under separate consolidation proceedings it shall appear that the consolidation is so desirable that the additional interest charge so involved constitutes a necessary detail for which compensation is fully shown in the plan of consolidation itself."

The consolidation alluded to in the above citation is the proposed future consolidation of certain other railroads, principally the Lake Shore and Michigan Southern and the Pittsburg and Lake Erie, and possibly the Michigan Central with the New York Central and Hudson River Railroad. Petition for the approval of 4 per cent. bonds under the consolidation mortgage in exchange for the outstanding 3½ per cent. collateral bonds need not be anticipated unless and until the consolidation of the Lake Shore and

Michigan Southern has first been sanctioned. What advantages may accrue therefrom, and their bearing upon railroad property in New Jersey pledged under this mortgage will have to be demonstrated before this Board would be warranted in approving 4 per cent. bonds in exchange for the outstanding collateral bonds bearing 3½ per cent.

This Board's approval of the consolidation mortgage is also given on the express condition cited in the order of approval of even date herewith. The said approval, therefore, shall not be taken as affecting New Jersey intra-state passenger or freight rates on railroads in this State now or hereafter subjected to this consolidation mortgage. The approval carries, by implication, no approval of any rate or change in rates on intra-state New Jersey traffic, passenger or freight, which, it might be alleged, ought to exist by reason of the obligations carried by said consolidation mortgage.

The approval of the consolidation mortgage is granted also on the distinct understanding that no clause in said mortgage delimiting responsibility of individual officers of the companies affected (as on page 29 or page 88 of the consolidated mortgage), in any wise impairs the force and effect of the statutes of this State, as such statutes, or any of them, duly applicable, define and fix the legal responsibility of the individuals in question.

The improvement and refunding mortgage whose execution is approved by an order of this Board, of even date herewith has, for its general purpose, the laying of a basis for the future financing of the New York Central's properties. In this connection we cite from the previously quoted report of the New York Public Service Commission, Second District, the following:

"The testimony is strong and convincing that a plan of financing in the future for the New York Central properties is necessary. Large expenditures

estimated to reach or exceed $400,000,000 in the next ten years are already foreseen as detailed in the testimony, and to many of these, aggregating very large sums the New York Central is committed, and there is also like commitment on the part of some of the allied lines."

Of the bonds proposed to be eventually issued under this refunding and improvement mortgage, something over $297,000,000, face value, are to be reserved to redeem the present first mortgage bonds, consolidation mortgage bonds and bonds securing sundry prior liens on particular affiliated roads.

Similar reservations of bonds to issue under this mortgage are to be made to redeem and replace bonds on railroads that may be subsequently acquired by the New York Central.

Not over $100,000,000 of bonds to issue under this mortgage are to be used to fund notes and unfunded debt incurred prior to January 1st, 1914.

Beyond the purposes above cited, bonds under this mortgage are intended to pay for construction and completion of railroads, for the acquisition of other roads, and for a variety of purposes practically co-extensive with such outlay as the New York Central or a successor corporation may lawfully make and charge to capital account.

These bonds mature in 2013. They are to bear interest at varying rates for different series thereof, the rates to be set by the company at the time of the authorization of each series. The bonds of the various series are redeemable before maturity as the company may determine, and are also convertible into stock at such times and at such rates as the company, with the requisite Commission approval, shall determine.

So far as this refunding and improvement mortgage concerns or affects railroad property in New Jersey or interests therein or thereto, to be pledged under said mortgage,

a question arises by reason of a provision in the mortgage which declares that the total bonds issuable under this mortgage are to be limited in aggregate amount to such a sum as with the outstanding prior debt (not counting reserved bonds to redeem said prior debt) shall not exceed three times the capital stock of the company. (See page 8 of Refunding and Improvement Mortgage.)

By Section 6 of the General Railroad Act of this State (Revision of 1903), it is provided:

"Every railroad company shall have power to borrow such sums of money from time to time, not to exceed in the whole its paid-up capital stock, as shall be necessary to construct, improve, extend or repair its road and furnish all necessary lands, chattels, engines, cars and equipments, and for such purposes to issue and sell its bonds secured by mortgage on its railroad, lands, chattels, franchises and appurtenances and such company shall not plead any statute against usury in any suit at law or in equity to enforce the payment of any bond or mortgage executed under the provisions of this section; in the case of any railroad company in this State the amount of whose mortgage debt shall have been limited by special law, the written consent of the holders of at least two-thirds in value of all its stock shall be obtained before any such mortgage shall be executed; any person who shall issue bonds of any railroad company to an amount greater than the amount authorized by this or any other act shall be guilty of a misdemeanor. Where a mortgage on a railroad right of way and franchises includes chattels, it shall be sufficient notice and evidence thereof to record the same as a mortgage on real estate."

The question arises whether the limitation in section 6 just quoted does not indicate the public policy of this State that railroad property shall not be pledged as security for debt to an amount greater than the company's capital stock. If this public policy is to be inferred from the section quoted, the further question arises whether leasehold or trackage rights in the property of a railroad company of this State may be pledged to secure a debt greater in amount than the capital stock of such New Jersey railroad. And the further question arises whether such rights in such railroad

property even when jointly pledged with other property, including railroad property not in this State, may be pledged to secure a debt where the leasehold or trackage rights in the property of a railroad of this State are pledged ratably to secure a debt in amount greater than permitted in said section 6.

Section 70 of "An Act Concerning Railroads" (Revision of 1903) has been cited by the petitioner herein to show that section 6 does not establish a general policy of the State applicable to consolidated companies or to railroad companies of this State leased to railroad companies of other States. Section 70 reads as follows:

"In all cases of merger or consolidation of the stock, property or franchises of any railroad company of this State with those of any other railroad company of this or of another State, the consolidated company shall have power and authority to borrow any amount of money, notwithstanding any limitation or restriction contained in this or any other act, sufficient to cover all the indebtedness of the companies so merged and consolidated, and to complete, extend, repair, improve and equip its railroad, and furnish all necessary lands, chattels, engines, cars and equipments, and to issue bonds for the money borrowed, secured by mortgage on its corporate property and franchises, or any part thereof; any railroad company which shall be authorized to lease its road to a railroad company of another State by special act sanctioning such lease shall, in addition to its then existing power to borrow money and issue bonds secured by mortgage, have power to borrow money and issue bonds, payable not more than one hundred years from the date thereof, to an amount sufficient to cover all its indebtedness, and for the other purposes in this section above mentioned, and may secure said bonds by mortgage on its property and franchises, and such bonds may be given in exchange for or in satisfaction of bonds or other debts of the company upon such terms as may be agreed on with the holders."

Doubt arises whether section 70 in enlarging the power of railroad companies of this State to incur debt as provided in section 6 does not confine the exercise of such enlarged power to the original effecting of such consolidation or to the original execution of such lease. Unless and until such doubt is resolved, the Board is of opinion that the statute

may be most safely construed by the Board by declining to authorize the indebtedness secured upon railroad property in New Jersey, or upon rights thereto or therein where such indebtedness, even though secured jointly upon other railroad property, would exceed the limit indicated in section 6 above quoted. Judicial determination upon the moot question may be properly invoked, in preference to action by an administrative board determining that the limitation in section 6 does not apply to the issuance of bonds in circumstances such as are here indicated.

The property or property rights in railroads in New Jersey, which it is proposed to subject to the lien of this improvement and refunding mortgage, are as follows:

(1) "All the right, title and interest of the Railroad Company (the New York Central and Hudson River Railroad Company) in and under a lease dated June 30th, 1886, executed by the New Jersey Junction Railroad Company to the New York Central and Hudson River Railroad Company, such lease covering the railroad of the lessor and continuing until July 1st, 1986, with the privilege of a further term of one hundred years. The railroad so leased is itself subject to the mortgage, dated June 30th, 1886, executed by the New Jersey Junction Railroad Company to J. Pierpont Morgan and Harris G. Fahnestock, Trustees, securing its 4 per cent. bonds, due February 1st, 1986, to the authorized amount of $4,000,000, of which $1,700,000 are now outstanding."

(2) "One hundred thousand (100,000) shares (being the total issue) of the capital stock of the West Shore Railroad Company, of the par value of $10,000,000." The southerly end of this road embraces lines, the property of a former railroad company, or of former railroad companies of this State.

(3) "Nine hundred and fifty (950) shares (out of a total issue of 1,000 shares) of the capital stock of the New Jersey Junction Railroad Company, of the par value of $95,000."

(4) "All right, title and interest of the railroad company in and under a lease, dated December 5th, 1885, executed by the West Shore Railroad Company to the New York Central and Hudson River Railroad Company, such lease covering the railroad of the lessor and continuing until January 1st, 2361, with the privilege of a further term of five hundred years. Such leasehold interest is now subject to the prior lien of the first mortgage and of the consolidated mortgage, and is subject also to the rights of the New York, Ontario and Western Railway Company in and under the agreement dated January 18th, 1888, * * * for the use of the railroad and property

between Cornwall, New York and Weehawken, New Jersey, which rights are excepted from the lien of this indenture. The West Shore Railroad Company is itself subject to the mortgage, dated December 5th, 1885, executed by the West Shore Railroad Company to Union Trust Company of New York, Trustee, securing its 4 per cent. bonds due January 1st, 2361, to the amount of $50,000,000."

Should these four properties, or the parts thereof constituting railroad property in New Jersey, or railroads of New Jersey, or rights therein or thereto, or capital stock thereof continue pledged under this Refunding and Improvement Mortgage, this Board in any application made to it for the approval of bonds secured in part by the pledge of the above properties, would hold itself at liberty, until the doubts suggested above regarding permissible debt limit are resolved, to act in the premises as the statutes of New Jersey or the declared public policy of New Jersey may require.

Dated December 19th, 1913.

IN RE REFUNDING AND IMPROVEMENT MORTGAGE.

ORDER.

The New York Central and Hudson River Railroad Company, having filed with this Board its petition praying that the Board give its approval to the execution by the petitioner of a refunding and improvement mortgage to Guaranty Trust Company of New York, trustee, and having filed with this Board a draft of such mortgage; and a hearing having been held by this Board on December 4th, 1913, at Chancery Chambers, in Jersey City, and again on December 17th, 1913, at the State House, in the city of Trenton, upon the aforesaid petition; and all pertinent matters and

things relating thereto having been duly inquired into, it is, after due consideration,

HEREBY ORDERED that the consent of this Board be and it is hereby given that the New York Central and Hudson River Railroad Company may enter into and execute and deliver said refunding and improvement mortgage in the form of the draft dated October 1st, 1913, and on file with this Board (clause seventeenth, on page 38 thereof, and clause nineteenth, (F) in said draft being first expressly exscinded therefrom), so far as said mortgage relates to or affects railroad property in New Jersey or rights therein or thereto, which may be now or hereafter included in and subject to said mortgage, or so far as said mortgage involves the pledge of the stock of the New Jersey Junction Railroad Company.

This order is made subject to the provision of section 6 of an act concerning railroads (Revision of 1913), if and so far as such section is applicable.

Dated December 19th, 1913.

IN RE CONSOLIDATION MORTGAGE.

ORDER.

The New York Central and Hudson River Railroad Company having filed with this Board its petition praying that the Board give its approval to the execution by the petitioner of a consolidation mortgage to Bankers Trust Company of New York, Trustee, and having filed with this Board a draft of such mortgage; and a hearing having been held by this Board on December 4th, 1913, in Chancery Chambers, Jersey City, and again on December 17th, 1913,

at the State House, in the city of Trenton, upon the aforesaid petition, and all pertinent matters and things relating thereto having been duly inquired into, it is after due consideration,

HEREBY ORDERED that the consent of this Board be and it hereby is given that the New York Central and Hudson River Railroad Company may enter into and execute and deliver said consolidation mortgage in the form of the draft dated October 1st, 1913, and on file with this Board, so far as said mortgage relates to or affects railroad property in New Jersey or rights therein or thereto which will be included in and subject to said mortgage. The making of this order shall not be taken as affecting New Jersey intra-state passenger or freight rates on railroads in New Jersey now or hereafter subjected to the lien of this mortgage.

Dated December 19th, 1913.

No. 153.

IN THE MATTER OF THE RECOMMENDATION OF INSPECTOR MCKELVEY TO THE ERIE RAILROAD COMPANY TO INSTALL MARKERS IN TRAIN SHED AT JERSEY CITY.

M. P. Pierce, for Erie Railroad Company.

Frank H. Sommer, for the Commission.

On August 2nd, 1913, a train of seven coaches was being backed into the train shed of the Erie Railroad Company at Jersey City. The crew had failed to test the air before leaving the yard, so that the conductor was unable to apply

the brakes and stop the train at the proper time. The engineer apparently was not aware of the position of train and did nothing to stop it until it had crossed the bumping block. The train was brought to a stop within two feet of the waiting room, and an accident that probably would have resulted in injury to passengers in the waiting room was narrowly averted.

The Chief Inspector of the Railroad Division of this Board recommended that markers or signals, indicating the number of cars tracks will hold, be placed at the entrance of the station, so that the engineer will be informed when a train has about reached its position in the train shed, and, at the same time, be put upon his guard to prevent running too far, should the brakeman or conductor on the first car of the train, fail or be unable to stop the train at the proper time.

A copy of the Inspector's report was sent to the Erie Railroad Company and notice of hearing thereon was given to said company. This hearing was held on September 16th, 1913, and the Erie Railroad Company was represented thereat.

It appears from the testimony taken at the hearing that the train shed of the Erie Railroad Company is not equipped with large concrete bumping blocks of approved design, nor are its rails equipped with "slippers" placed twenty or thirty feet from the bumping blocks. There is no device or signal to prevent the recurrence of an accident such as happened. Some precautions should be immediately adopted by the Erie Railroad Company to guard against such occurrences. If the company had slippers and large bumping blocks, this Board would feel that compliance with the Inspector's recommendation would be unnecessary. In the absence of such precautions, however, the Board concludes that markers, of the kind recommended, would be helpful to

prevent accidents, by warning the engineer of the approach to the place beyond which it may not be safe to back his train. The crew stationed at the front of the backing train will not be relieved of the duty to stop the train at the proper time. It will be a warning to the engineer to be on his guard to see that everything is working properly to stop his train, and to be on the lookout for a signal to stop, if, as in the case under consideration, the man on the front fails for any reason to stop it.

The Board finds that the markers or signals recommended are necessary to safe, adequate and proper service, and an order will issue directing the Erie Railroad Company to install same in its Jersey City station.

Dated December 23rd, 1913.

ORDER.

This case having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof,

The Board of Public Utility Commissioners HEREBY ORDERS the Erie Railroad Company to place and maintain at its terminal station in Jersey City, at the end of the train shed where the tracks of said railroad enter such shed on each of the vertical posts at such end of said train shed, a marker or markers, or signal or signals, which shall plainly indicate the number of cars for which there is room on each track in said train shed.

This order shall become effective January 16th, 1914.

Dated December 23rd, 1913.

No. 154.

BOARD OF TRADE OF SADDLE RIVER TOWNSHIP
vs.
PUBLIC SERVICE GAS COMPANY.

Before the Board is warranted in ordering an extension under the act, it must be reasonably certain that the net profit to accrue from the extension will be sufficient to warrant the outlay required. The prospect of profit which would justify the Board in ordering an extension must be more clear and unmistakable than the chance of profit which might warrant a public utility at its own risk and on its own initiative in extending into a similar territory hitherto unsupplied. These considerations apply to cases where the Board is petitioned to order extensions under the statute. Where, as a condition of its secondary franchises, a public utility is obligated to supply a certain territory, extensions not promising profit may be ordered by the Board under its power to make utilities comply with municipal ordinances relating thereto. Upon the facts disclosed in this hearing the Board stands ready to order the company to extend its service to the Dundee Lake section, provided the petitioners will certify to the Board that they have furnished bond or sufficient surety that they will pay to the company for each of the next five years such sum as added to the revenue received by the company for gas furnished to said section will accord a return of eight per cent. on the Board's estimate of plant investment and other costs necessary to supply said section.

Frank Fournier, for the petitioners.

L. D. H. Gilmour, for the respondent.

Under date of August 7th, 1913, Frank Fournier, Secretary of the Board of Trade of Saddle River Township, addressed a letter to this Board, asking information with respect to the Board's power to obtain for the locality of Dundee Lake a supply of gas. A request was made by the Board upon the company for an estimate of the cost of the extension of mains into this territory. At this time there were pending several similar requests before the

Board, all asking that certain extensions of gas mains be effected by order of the Board. Among the petitioners were the residents of Bergenfield, and the Borough of Dumont.

In the hope of devising some general rule or formula whereby any and all petitions for extensions of utility service might be gauged, the Board held a general inquiry on September 5th, 1913, at the Court House in Newark. To this inquiry representatives of various public utilities were invited, and explained to the Board their respective practices in acting upon requests for extensions. The Board is unable to devise any formula or general rule capable of being applied universally to petitions for the extension of utility service.

The Board also engaged Alfred E. Forstall, an expert gas engineer, to inquire into the conditions under which gas companies should be required to extend street mains to reach new customers. His report was submitted at the hearing held on October 31st, 1913, at the Court House in Newark.

On this last mentioned date the case of the petitioner herein was heard, and testimony and exhibits were introduced by petitioner and respondent, and also on behalf of the commission.

Prior hearings on September 5th, 1913, and on October 3rd, 1913, in Newark at the Court House, were held upon the petition of the Borough of Dumont vs. Public Service Gas Company, and upon the petition of certain residents of Bergenfield vs. Public Service Gas Company. As before recited, the hearing on September 5th, 1913, was transformed into a general inquiry upon the subject of extensions of service. On October 3rd, 1913, D. D. Zabriskie appeared for the Borough of Dumont, but the Borough's witnesses did not appear. The case was adjourned to No-

vember 14th, 1913, at which time the Board was advised that the Borough had determined not to press the complaint. The residents of Bergenfield have not as yet prosecuted their case by presentation of testimony.

As the case of Saddle River Township is the first case involving extension of gas mains which has been thoroughly canvassed by the Board, and may set a precedent for similar cases in future, the Board deems it advisable to indicate the general principles which should control in these cases.

Under the Public Utility Act (Ch. 195, P. L. 1911) the Board is given power, after hearing, upon notice, by order in writing, to require a public utility:

"To establish, construct, maintain and operate any reasonable extension of its existing facilities, where in the judgment of said board such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same, and where the financial condition of the said public utility reasonably warrants the original expenditure required in making and operating such extension."

It appears that before the Board is warranted in ordering an extension under the section of the act cited above, the Board must be reasonably certain that the net profit to accrue from the extension will be sufficient to warrant the outlay required.

It is also evident that the prospect of profit which would justify the Board in ordering an extension must be more clear and unmistakable than the chance of profit which might warrant a public utility at its own risk and on its own initiative in extending into a similar territory hitherto unsupplied.

It is also worthy of remark that there is generally some presumption that a public utility will be impelled by self interest to make an extension where the chance of profit is

at least as great as it is obtaining from the average of its business.

These considerations apply, of course, to cases where the Board is petitioned to order extensions under the section of the statute cited above. Under other circumstances, such as may exist where as a condition of its secondary franchises, a public utility is obligated to supply a certain territory, extensions not promising profit may be ordered by the Board under its power to make utilities comply with municipal ordinances relating thereto. P. L. 1911, Ch. 195, H, 17 (a). And similarly extensions not promising profit might be required by the Board's order where the extension is indispensable in order that the public utility may furnish "safe, adequate and proper service," P. L. 1911, Ch. 195, II, 17 (b).

The case before us, however, rests wholly, so far as the evidence shows, upon the comparative outlay involved, the increase in business therefrom likely to result, and the net profit to accrue.

The evidence shows that the Dundee Lake region into which the extension of mains is proposed, is a rapidly growing section; and that in the general neighborhood north of Market Street and east of Dundee Drive, embracing the railroad station of the New York, Susquehanna and Western Railroad, there are approximately one hundred two-story houses, whose occupants may be regarded as eventual patrons of the gas company. Of these houses, it appears that at present about twelve are piped for gas. (Minutes, p. 5.) There are two near-by real estate properties in process of development, but they do not appear to be involved intimately in this petition. As yet not more than half a dozen houses are built or are building on the tracts in question, and the requisite supply mains for Dundee Lake seem designed to connect with some five of the houses

on the real estate tract developing to the north. (Minutes, p. 19.)

The survey of the Dundee Lake field by the agents of the gas company discloses the likelihood of connecting with approximately one hundred houses eventually, and this seems to be a fairly liberal estimate.

The company's estimate of an average annual consumption per house of about 20.8 M. cubic feet is admittedly somewhat less than the average of the whole Passaic Division, but is based on the general character of the houses in this section. (Minutes, p. 36.) The amount consumed in 1912 in the Passaic Division by general consumers and prepayment consumers (as appears by the company's annual report for 1912 to this Board), was 1,095,000 M. Calculating roughly the meters at 50,000, it would appear that the average annual consumption by meter is 22 M. The difference in the estimate for Dundee Lake would appear not unfairly discriminatory against that section.

The company's main nearest to the Dundee Lake section supplies the National Silk Dyeing Company. This main would have to be extended to reach the houses of the petitioners, and there seems to be no good reason for questioning the company's estimate of the length of main necessary, some 12,958 feet in all, of which approximately 4,300 would be 6″ main, and the remainder 4″ main. The company's estimate of the cost involved is:

4293 feet of 6″ cast iron pipe @ 75c	$3,219.75
8665 feet of 4″ cast iron pipe @ 55c	4,765.75
101 meters @ $8.00	808.00
100 services @ $13.50	1,350.00
Total cost of extension	$10,143.50

The unit costs are fair, and the computed length of main we see no reason to revise.

The respondent contends that the entire investment in plant upon which a return should be forthcoming, if this installing mains and apparatus in the Dundee Lake territory; and this general contention must be admitted. Should the extension be made, the new consumers taken on would benefit not only by the use of the mains, services and meters throughout their own neighborhood, but also by reason of the transmission mains which convey the gas from its place of manufacture to the mains in Dundee Lake. They would also be served by the same central generating plant from which other consumers in the Division are served. The respondent proposes to estimate this plant investment on which an additional return should accrue as follows:

All mains 10" or over in diameter are regarded as constituting part of the Trunk Main System. These mains stand over against the mains of lesser diameter which are regarded as the apparatus for local distribution. The trunk main system is in value about 25 per cent. of the total valuation of trunk lines and mains made by this Board in 1911, or approximately $348,086.

To this is added the value of the company's land as found by this Board in 1911, or $111,160; and also the value of the manufacturing plant, similarly determined by this Board in 1911, to be $1,161,550.

The three items make a total of $1,620,796. This sum with a deduction of $31,000 for construction to July 1st, 1911, would give an aggregate of $1,589,796 as the value as of July 1, 1911, of the plant utilized by consumers generally.

These items whose use is assumed as of common service to all consumers generated and delivered during the year 1911, 1,050,000 thousand cubic feet of gas sold to said con

sumers. This implies a plant investment of almost exactly $1.50 for every thousand cubic feet of gas sold. The company calculating apparently on 101 consumers at about 20,000 cubic feet per annum (20,800 more nearly) per consumer computes the central plant investment on which a return should be made by the Dundee Lake section at $3,157.50.

As regards the above estimate, the Board is not prepared from any evidence before us to disallow it. In allowing it to stand, however, the Board reserves the right in subsequent cases to investigate whether a more precise determination cannot be made of the value of trunk mains which convey gas from the generating station to the local distribution system of a particular locality served.

Prima facie, the respondent company's contention is that the extension to the Dundee Lake tract would entitle them to a return on a base of $13,300. Of this sum, $10,143 represents the outlay on new mains, meters and services; and $3,157 represents the extant plant investment which would serve the same consumers. The value of the second item is based on the draft that would be made on extant plant, this draft in turn being computed on the average of central plant investment (land, generating station and trunk transmission mains) to the thousand cubic feet sold throughout the division.

Interest at 8 per cent. on the investment would equal $1,064 annually.

The company computes the other costs involved on the basis of actual costs in 1911. The "cost of service" covers prime manufacturing cost plus half the distribution cost per M. The "cost of service" of Dundee Lake consumption, estimated at 2105 M. would come, at 38.03½ per M., to $800 annually. The "customer charge" covering one-half of the distribution costs would come to $1.83

per customer, and in this extension would amount to $185.00 annually.

The company figures annual depreciation at 1½ per cent. per annum on the investment imputed to the Dundee Lake supply. This would amount at 1½ per cent on $13,300 to $199.50, or roughly to $200 per annum.

This method of calculating depreciation is not above criticism. There may be some justification for the respondent's contention (Minutes, p. 28) that the rule of 6 cents allowance for depreciation per thousand cubic feet, while proper for setting up the depreciation reserve, would be wholly inadequate to cover actual depreciation in this extension, if the actual consumption were to fall below the estimate.

On the other hand, if the consumption in this new tract exactly coincided with the company's estimate, and equalled 2105 M. per annum, the depreciation allowance, according to the rule for setting up the depreciation reserve would amount to only $126.30. When, moreover, it is added that the greater amount of plant subject to deterioration in this extension would consist of the new mains which are to gridiron Dundee Lake, the 1½ per cent. allowance seems excessive. An allowance of one per cent. would come to $133 per annum, a sum in excess of the allowance under the general rule,—and accordingly we find and determine that the company's estimate of approximately $200 for depreciation annually should be reduced to $150.

The company's claim on the score of taxes is based on a tax rate of one per cent. on the entire investment involved, or one per cent. on $13,300, amounting to $133 annually. This estimate also we believe somewhat excessive. It was conceded that if additional taxes were imposed on the company by reason of this extension, such additional taxes would be assessed only on the $10,143 representing the

cost of installing additional mains and other apparatus in Dundee Lake. (Minutes, pp. 28-32; also 54-55.)

If the tax rate were one per cent., the additional annual tax would be but $100 approximately. The company asks an allowance of approximately $133. The company's claim rests apparently on the contention that its excess generating capacity is lessened by taking on new consumers, and that, therefore, the installation by the company of new units of supply is hastened, and that this extension should not be relieved of contributing its quota against the eventual outlay the company must make in order to supply the increased future demand.

This reasoning appears to us too refined to stand in the necessarily empirical calculation involved in this case. If a telephone company extends its poles and wires to a distant hamlet, and thus subjects this additional plant to taxation, it would hardly seem just to argue that the subscribers in the hamlet must accord a return *on the score of taxes* not only sufficient to cover the increased tax bill, but something in addition thereto, on the ground that connecting the subscribers in the hamlet shortens the time in which an additional section of switchboard in the central exchange must be built.

If a trolley line built a road to an outlying village, it could hardly be urged that the traffic, *on the score of tax expense incurred by the trolley company,* ought to yield something more than enough to cover the actual additional taxes paid, because the company by devoting some of its equipment to service on said line must sooner replenish its stock of surplus cars.

A public utility such as a gas plant will ordinarily construct a plant with a capacity in excess of the normal draft expected. Such excess capacity, if not immoderate, is in the interest both of the company and the public. The fair

expectation is that the average return, beginning with the normal draft thereon and ending with a draft equal to the capacity of the original plant, will yield a fair return. Thereafter an additional unit of supply will be added, the returns on which may be expected to follow the same law as marked the plant originally constructed. It must not be overlooked that where excess capacity in supply units exists, the attaching of additional consumers up to the limit of the plant's capacity, lessens the company's investment per M. of send-out; and, other conditions remaining the same, correspondingly increases the ratio of return to investment.

We, therefore, cannot subscribe to the company's estimate as to the tax-expense to be charged against this extension.

Moreover, the assumption that the average tax rate is to be computed at one per cent. is excessive. Apart from the franchise tax which the company covers under "cost of service" separately allowed for the local and federal taxes imposed on the Paterson plant in 1911 appear from the company's report to this Board to have been a trifle more than $27,000.

Assuming the value of the company's property taxable on July 1st, 1911, to have been $4,750,000 less intangible elements valued at $1,025,000 or $3,725,000 the taxes paid, apart from franchise taxes, would be slightly more than two-thirds of one per cent. or more exactly .726 of one per cent.

Accepting this rate, and applying it to the new property that would be taxed because of the extension, the tax allowance would amount to $73.64, or roughly to $75 per year. This, too, is on the extreme assumption that the new property installed is to be taxed at its total cost new, an assumption belied generally in actual taxation.

The partial revision of the company's estimate of annual cost involved results in the following:

"Cost of service," i. e., prime cost of manufacture plus one-half of the distribution cost, at 38.03c per M. on an estimated consumption of 2105 M.	$ 800.53
Customer cost, $1.83 for each of 101 customers	184.83
Depreciation	150.00
Taxes	75.00
Interest at 8% on $13,301.00	1,064.08
	$2,274.44
Estimated revenue, 2105 M. @ 90c per M.	1,894.50
	$379.94

Estimated insufficiency of net revenue to afford 8%, $380.00.
Rate of return to be obtained, approximately 5.1%.

The counsel for the company (Minutes, p. 39) made the statement that if the company could be assured that for five years it would obtain a net return of 6 per cent., the extension would be made. His proffer was made, however, on the company's basis of estimate, and this Board is not able to order an extension on a basis of less than 8 per cent. To do so would mean that our determination that 8 per cent. is not an unfair return would be upset, it on the margin of present supply the company would be required to accept a less return, and thus dilute the 8 per cent. calculated on its entire business.

Upon the facts as disclosed in this hearing, the Board stands ready to order the company to extend its service to the Dundee Lake section, provided the petitioners will certify to us that they have furnished bond or sufficient surety that they will pay to the company for each of the next five years three hundred and eighty dollars per annum, or such part thereof as shall be necessary, in addition to the revenue received by the company for gas furnished to said section, to accord a return of 8 per cent. on the plant

investment and other costs as calculated by the methods approved herein. With a uniform rate for gas, or any other service accorded by a public utility, such a guarantee is apparently the only feasible means for hastening the introduction of the service into a section where the prospect of sufficient profit is not apparent.

The Board also thinks proper to put on record that in case a franchise should be granted to any gas company intending in good faith to supply this territory, such franchise would come before the Board with a favorable prospect of approval.

Dated December 30th, 1913.

No. 155.

IN THE MATTER OF THE APPLICATION OF OCEAN CITY ELECTRIC LIGHT COMPANY FOR APPROVAL OF TRANSFER UPON ITS BOOKS OF 1193 SHARES OF THE CAPITAL STOCK OF SAID COMPANY TO ATLANTIC CITY ELECTRIC COMPANY.

It is practicable to connect the plants of the Ocean City Electric Light Company. Economies in operation may be reasonably expected to result from the proposed tying up of the two plants. The purchase by the Atlantic City Electric Company of the shares of the capital stock of the Ocean City Electric Lighting Company held to be necessary for the business of the former company. The property owned by the Ocean City Electric Company is cognate in character and use to that used by the Atlantic City Electric Company in the direct conduct of its own proper business. There is nothing to indicate that the proposed purchase is for the purpose of restraining trade or commerce or acquiring a monopoly.

The Ocean City Electric Light Company is a corporation of this State, organized under the General Corporation Act. It operates an electric lighting plant in Ocean City which is situated upon the island next south of the island

upon which Atlantic City, Ventnor, Margate City and Longport are located.

The municipalities upon this latter island are furnished electric light by the Atlantic City Electric Company, also a corporation of this State existing under the General Corporation Act. The authorized and outstanding capital stock of the Ocean City Electric Light Company consists of 1,200 shares of the par value of $25 each. Application was originally made to the Board for permission to transfer 1193 of these shares upon the books of the Ocean City Electric Light Company to the American Gas and Electric Company, a so-called "holding company," a corporation of another state.

The transfer, if approved, would have vested in the American Gas & Electric Company, a holding corporation of another state, a majority in interest of the outstanding capital stock of a "public utility" of this State.

The application was made under Section 19 of the Public Utility Act. In so far as the section is pertinent it provides as follows:

"Nor shall any public utility as herein defined incorporated under the laws of this State * * * permit any transfer (of any share or shares of its capital stock) to be made upon its books to any corporation, domestic or foreign, the result of which * * * transfer in itself or in connection with other previous * * * transfers shall be to vest in such corporation a majority in interest of the outstanding capital stock of such public utility corporation unless authorized to do so by the board."

The Board determined to disallow this application.

Under our conclusion as to the effect of Chapter 18 of the laws of 1913, set forth in our report "In the matter of the petition of Monmouth Lighting Company for permission to transfer certain shares of capital stock, upon its books, to Eastern Utilities Corporation," that statute, if the American Gas and Electric Company was a corporation of this

State, organized under the General Corporation Act, would have precluded the purchase by it of the shares of the capital stock in question.

While Chapter 18 of the Laws of 1913 extends its prohibition merely to corporations of this State organized under the General Corporation Act and is inapplicable in its terms to corporations of another state, yet, in accordance with the state policy declared thereby, we deemed it to be our duty to withhold our approval of the transfer of shares of the capital stock of a public utility of this State to a "holding company" of another state, when the statute of this State prohibited the acquisition of such securities by a similar corporation of this State.

It seemed to us that comity did not require that we should sanction, by our approval, the acquisition of control by a corporation of another state of a public utility of this State through ownership of capital stock, when the acquisition of such control by like means by a like corporation of this State was prohibited by our statute.

Sec. (1902) *Coler* v. *Tacoma Railway and Power Co. 64 N. J. E. 117 (Ct.)* reversed in (1903) *Coler* v. *Tacoma Railway and Power Company 65 N. J. E. 347 (Ct. E. & A.)*

These conclusions were signified to the petitioner.

Thereafter, the petition was amended. As amended, it seeks authorization for the transfer of the shares to the Atlantic City Electric Company. As amended the petition falls within another provision of Section 19 of the Public Utility Act, which reads as follows:

"No public utility as herein defined incorporated under the laws of this State shall * * * make or permit to be made upon its books any transfer of any share or shares of its capital stock to any other public utility as herein defined, unless authorized to do so by the board."

The question now before the Board is, whether the request of the amended petition for approval of the proposed transfer to Atlantic City Electric Company should be granted.

Chapter 18 of the laws of 1913 amending Section 51 of the General Corporation Act, as before noted, prohibits any corporation organized under the General Corporation Act "*except as otherwise provided therein or thereby*" from purchasing the shares of the corporate stock of any other corporation of this or any other state and from exercising as owner of such stock any of the rights, powers and privileges of ownership, including the right to vote thereon.

Chapter 14 of the laws of 1913, amending Section 49 of the General Corporation Act, provides that any corporation formed under the act may purchase "the stock of any corporation necessary for its business," provided that "the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used, or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business," and provided further, that any corporation which shall purchase the stock of any other corporation for the purpose of restraining trade or commerce or acquiring a monopoly, and the directors thereof participating therein, shall be guilty of a misdemeanor.

To determine the effect of these amendatory enactments consideration of the adjudications and legislation declaring and establishing the law of the State at the time of their enactment is necessary.

In (1903) *Warren* v. *Pinn, 66 N. J. E. 353* (*Ct. E. & A.*) Mr. Justice Dixon stated the rule generally adopted in this country to be

"That one corporation cannot become a stockholder in another corporation unless authority therefor is clearly granted by statute."

In (1908) *State* v. *Atlantic City & Shore Railroad Company, 77 N. J. L. 465, (Ct. E. & A.)* Chancellor Pitney said:

"It is undoubtedly the general rule that one corporation may not become a stockholder in another unless authority is clearly granted by statute, and this is but a corollary of the principle that corporations possess only such powers as are specifically granted by the State and such incidental powers as are necessary for carrying these into effect."

With this as the general rule we come to the examination of the legislation of the State as it stood at the time of the enactment of the amendatory acts of 1913. Section 51 of the General Corporation Act (P. L. 1896, p. 294) as it stood before its amendment by Chapter 18 of the laws of 1913 provided that

"*any corporation* may purchase * * * the shares of the capital stock of * * * any other corporation or corporations of this or any other State, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The scope of this section was not as broad and all embracive in the power granted as might be inferred from a reading of it standing alone.

The adjudications in which the section is considered make this apparent.

In (1903) *Robotham* v. *Prudential Insurance Company, 64 N. J. E. 673,* it was held that the section did not repeal the limitations on the power of an insurance company as to the investment of its funds contained in its charter and P. L. 1896, p. 129, relating to insurance companies "created by special charter or otherwise."

In (1908) *State* v. *Atlantic City and Shore R. R. Co., 77 N. J. L. 466 (Ct. Errors and Appeals)* it was held that the

power conferred by this section of the General Corporation Act, to purchase, etc., stock, *etc.*, of other corporations is to be exercised subject to the limitations imposed by section 2 of the act (P. L. 1896, p. 278), that is to say, the power exists as a primary power only when the purpose to exercise it as such is expressed in the certificate of incorporation and otherwise it exists as an incidental power only so far as necessary or convenient to the attainment of the objects that are set forth in the charter or certificate of incorporation.

Section 49 of the General Corporation Act (P. L. 1896, p. 293), as it stood before its amendment by Chapter 14 of the Laws of 1913 provided that any corporation formed under the act might purchase "the stock of any company or companies owning, mining, manufacturing or producing materials or other property *necessary* for its business." This section (49), in terms, limited power to purchase stock to the stock of a company owning, mining or manufacturing or producing materials or other property *necessary* for the business of the purchasing company.

Chapter 18 of the Laws of 1913, by amendment, converted section 51 of the General Corporation Act from a section granting authority into a section prohibitive of the exercise of the very power granted thereby before amendment, "*except as otherwise provided*" by the General Corporation Act.

It, therefore, abrogated the power granted by the section before its amendment even as limited by the construction placed upon it in *State* v. *Atlantic City & Shore R. R. Co.* The section of the General Corporation Act in which the exception to section 51 as amended is to be found and in which it is "otherwise provided" is section 49 which, as before noted, was amended by Chapter 14 of the laws of 1913.

This section, as amended, confines the corporation formed under the General Corporation Act to the purchase of the stock of any corporation, *"necessary for its business."* It further confines such purchase to the stock of a corporation the property owned by which is "cognate in character and use to the property used or contemplated to be used by the purchasing company in the direct conduct of its own proper business."

To determine, therefore, whether the purchase by the Atlantic City Electric Company of the capital stock of the Ocean City Electric Company is authorized by section 49 as amended, we must find:

(1) That the purchase of the stock is *"necessary"* for the business of the Atlantic City Electric Company.

(2) That the property owned by the Ocean City Electric Company is cognate in character and use to the property used or contemplated to be used by the Atlantic City Electric Company in the direct conduct of its own proper business, and

(3) That the purchase is not for the purpose of restraining trade or commerce or acquiring a monopoly.

The words "necessary for its business" as used in the statute are applicable to the purchase of property, real and personal, as well as stock. This fact alone suffices to indicate that the words were not employed in the sense of "indispensable for its business." It was clearly not the legislative intent to confine the corporation to the purchase of property, real and personal, indispensable for its business. If this is true, it follows that it was not the legislative purpose to confine the corporation to the purchase of stock "indispensable" for its business.

If the term "necessary" was used in the sense of "indispensable" the further limitation imposed by the statute that "the property purchased or the property owned by

the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing company in the direct conduct of its own proper business" would be superfluous and without force.

In our opinion the words "necessary for its business" are used in the statute to indicate the intent to confine the power of the corporation to the acquisition of property real and personal, and of stock "suitable and proper" to the conduct of the business in which the corporation is at the time engaged, and the accomplishment of the purposes for which the corporation was formed.

(1874) *State, Morris Canal and Banking Co.* vs. *Love, 37 N. J. L. 60.*

In this proceeding we have before us as indicating that the capital stock proposed to be acquired is necessary for the business of the purchasing corporation on the formal action of its Board of Directors declaring their judgment to that effect. This action, while not controlling with us is entitled to weight in the determination of fact which we must take. The facts support the judgment so declared. The Atlantic City Electric Company is the result of a consolidation effected under the General Corporation Act by an agreement dated October 3rd, 1907, which brought together

(1) Atlantic City Electric Company,
(2) Atlantic Electric Light & Power Company,
(3) The Electric Light Company of Atlantic City, and
(4) New Jersey Hot Water Heating Company.

The statute under which the consolidation was effected provides that upon the consummation of the consolidation all and singular the

"rights, privileges, powers and franchises of each of said corporations shall be vested in the consolidated corporation and shall thereafter be as effectually

the property of the consolidated corporation as they were of the several and respective former corporations."

The agreement of the consolidation provided that the company might do business and hold property anywhere without as well as within the State of New Jersey. Under P. L. 1896, p. 322, the consolidated corporation is empowered to use the public roads, etc., in this State for the purpose of erecting poles, etc., upon first obtaining the consent in writing of the owners of the soil and a designation from incorporated cities and towns of the streets in which the same shall be placed and the manner of placing the same.

It appears, therefore, that the corporation is not restricted in the conduct of its business to any specified municipality or municipalities. Its business may be extended on compliance with the statutory requirements, and with the approval of this Board into any municipality which those in control of the corporation may in their judgment select.

As before noted, the plants of the two companies are located on neighboring islands. It is practicable to connect them, and the making of such connection is purposed. By this means a field for the present use of the surplus capacity of the Atlantic City Electric Company will be provided. Economies in operation may reasonably be expected to result from the proposed tying up of the two plants. The plan of physically connecting the plants has in it, therefore, elements of advantage to each of the companies. In our opinion, on the grounds stated, the purchase by the Atlantic City Electric Company of the shares of the capital stock of the Ocean City Electric Lighting Company as proposed is necessary for the business of the former company. Each of the corporations exists under the General Corporation Act of this State. Each is en-

gaged in the business of generating and providing electric light, heat and power.

If, as we believe, the word "cognate" as used in the statute is to be taken as signifying "same," "similar," or "related," the property owned by the Ocean City Electric Company is cognate in character and use to that used by the Atlantic City Electric Company in the direct conduct of its own proper business.

There is nothing to indicate that the proposed purchase is for the purpose of restraining trade or commerce or acquiring a monopoly. Whatever restraints upon trade or elements of monopoly may be present are due to the nature of the business and to the conditions under which it is conducted, involving as its conduct does special rights in the public highways. After the acquirement of the shares of capital stock as before, two distinct corporate entities will exist, each will continue under the jurisdiction of this Board, and be subject to the regulative power of this Board over future capitalization, over service and extension of service, and over rates.

It, therefore, appears (1) that there is statutory authority for the purchase by the Atlantic City Electric Company of the capital stock of the Ocean City Electric Light Company, (2) that the purchase is necessary for the business of the Atlantic City Electric Company; (3) that the property owned by the Ocean City Electric Company is cognate in character and use to the property used or contemplated to be used by the Atlantic City Electric Company in the direct conduct of its own proper business; and (4) that the purchase is not for the purpose of restraining trade or commerce, or acquiring a monopoly.

Further questions, however, remain to be considered. The American Gas and Electric Company, before referred to, a holding company of another state, now controls

through ownership of capital stock, the Atlantic City Electric Company. The latter company in consequence of the proposed acquisition by it of the capital stock of the Ocean City Electric Light Company will come into the control of the latter company. By this indirect means the control of the latter company will pass to the American Gas and Electric Company and what could not, under our prior ruling, be accomplished directly will in effect result by indirection. We recognize that this result is anomalous, but see no escape from it.

The statute, as we have construed it, prevents the purchase of the stock of the Ocean City Company by the American Company. It does not, however, prevent the purchase of the stock of that company by the Atlantic City Company. It expressly authorizes such purchase where the statutory prerequisites exist.

If we deny the present application upon the ground suggested, then, since we have declined to distinguish, in the application of the statute, between "holding" corporations of this and other states, we would be obliged to decline to permit any electric lighting corporation organized under the General Corporation Act, the captial stock of which is controlled by a holding corporation, to acquire the stock or property of another electric lighting company, no matter how advantageous to the corporation in the conduct of its own proper business, and to the public served, the intercorporate relationship so created might be.

For such a position we find no support in the words of the statute. Nor do we find, in the statute the declaration of a state policy to vest in an electric lighting company organized under the General Corporation Act which is not controlled through stock ownership by a holding corporation, the right to purchase the capital stock of a like corporation under given circumstances and to withhold such

right from a similar corporation solely on the ground that it is lawfully controlled through stock ownership by a holding corporation.

The price proposed to be paid by the Atlantic City Electric Company for the capital stock of the Ocean City Electric Lighting Company is $305,000.

An appraisal of the property of the Ocean City Company made by our Engineering Staff indicates that:

The cost to reproduce new the physical property of the company, including materials and supplies, would amount to....	$249,328.00
(The sum includes no allowance for organization or promotion expenses, nor does it include any allowance for cost of procuring franchises.)	
From this sum accrued depreciation must be deducted.....	51,365.00
Present value of structures	$197,963.00
To this sum should be added working capital represented by the difference between bills receivable and bills payable.....	12,500.00
	$210,463.00
To this sum may be added an allowance for all allowable elements of intangible value here tentatively reckoned at 25 per cent. of the cost new of physical property	62,500.00
	$272,963.00

It appears, therefore, that on the above described basis, the proposed purchase price, three hundred and five thousand dollars ($305,000) exceeds by thirty-three thousand dollars ($33,000) the value of the property tangible and intangible of the Ocean City Company.

In this situation we cannot now grant the approval asked for. If we granted approval now, we would not later be justified in withholding approval of an application by the Atlantic City Company to capitalize the sum of three hundred and five thousand dollars ($305,000) the proposed purchase price.

Nor would we be justified later in a proceeding involving an inquiry as to the justice and reasonableness of rates in refusing to allow in the base upon which earnings should be calculated the sum of three hundred and five thousand dollars ($305,000) as representing the fair value of the property now owned by the Ocean City Company.

An opportunity will, of course, be afforded the companies to question the appraisal so made and to introduce testimony to establish that the apparent excess of the purchase price over value does not in fact exist.

Dated December 30th, 1913.

No. 156.

IN THE MATTER OF THE PETITION OF THE COMMONWEALTH WATER AND LIGHT COMPANY FOR APPROVAL OF THE ISSUE OF $150,000 FIVE-YEAR SIX PER CENT. NOTES.

The petitioner, a holding and operating company, seeks by the purchase of certain bonds of the Point Pleasant Traction Company to obtain control of the Point Pleasant Light, Heat and Power Company.

HELD—That unless the purchase of the bonds can be justified on the ground that it is a temporary investment the Board's approval of the investment should be withheld.

The roadway and equipment of the Point Pleasant Traction Company are not cognate in character and use with the water or electric property used by the petitioner.

Carroll P. Bassett, for the petitioner.

This petition was formally filed with this Board on October 15th, 1913. Hearings thereon were held at Trenton at the State House, on October 28th, 1913, and on November 11th, 1913; after the matter had first gone to conference the case was re-opened, and on December 12th, 1913, a final hearing thereon was held at the Court House in Newark.

The petitioner is organized under the general corporation act. It is both a holding and an operating company. It operates electric plants in different sections of the State. It also does a water-supply business, in some places, acting through companies having local franchises; in some places delivering a supply to water main systems; in other places, such as Millburn township, apparently operating water works and doing business as a water company, with what statutory warrant this Board is not advised.

It appears that at a stockholders' meeting, held January 23d, 1907, it was resolved to declare and pay thereafter, from the net earnings of the company, dividends of five per cent. on the preferred stock outstanding; four per cent. on the common stock outstanding, and to apply all surplus earnings to surplus account as working capital.

This procedure appears to have been followed, so that after the stockholders, in July of this year, authorized the transfer of $30,000 out of the corporate net earnings of the first six months of 1913 to surplus, the amount of the surplus, as of August 31st, 1913, was $153,427.38. This surplus for the most part was represented by and embodied in extensions and additions to the physical property of the petitioner.

The company proceeded to convert the surplus, or the greater part thereof, into liquid assets, by contracting a short time loan for $135,000 of H. M. Payson & Company. In accordance with a vote of the stockholders passed July 8th, 1913, the company proceeded to utilize the proceeds of said loan by purchasing therewith bonds of the Point Pleasant Traction Company in the amount of $175,000 par value. This purchase the petitioner justifies as a temporary investment of surplus permissible under Chapter 18, P. L. of 1913.

The pending petition asks for the Board's approval of $150,000 five-year six per cent. notes to fund the $135,000 of

notes issued as above recited, and to capitalize expenditure to the approximate amount of $15,000, properly chargeable to capital account.

The admitted object of the purchase of the Point Pleasant Traction bonds was to secure control of the property of the Point Pleasant Light, Heat and Power Company. All the stock of the latter company is held by the Point Pleasant Traction Company. The petitioner's object in securing control of the Point Pleasant electric property is to amalgamate it into a single system with the electric property at Lakewood, already owned by the petitioner.

The essential matter to be determined is whether Chapter 18, of the Laws of 1913, whose primary object is to curtail or annul powers exercised hitherto by so-called holding companies, permits such a purchase as has been accomplished in the first instance by the petitioner through a loan which converted its surplus into liquid assets.

Chapter 18, P. L. 1913, after laying down the general rule whereby companies incorporated under the general corporation act are forbidden hereafter to

"purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of any other corporation or corporations of this or any other State, or of any bonds, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other State, etc."

Provides that nothing in the act shall operate

"to prevent any corporation or corporations created under the laws of this State from purchasing as a temporary investment out of its surplus earnings, reserved under the provisions of this act as a working capital, bonds, securities or evidences of indebtedness created by any non-competing corporation or corporations of this or of any other State * * *."

It is quite clear that unless this purchase of the traction company's bonds can be justified on the ground that it is a

temporary investment, the Board's approval of said investment should be withheld. Chapter 14, P. L. 1913, provides that a company organized under the general corporation act, if it is to purchase either property of another corporation or the stock of another corporation, may do so only when

"the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business."

Clearly the roadway and equipment of the Point Pleasant Traction Company are not cognate in character and use with the water or electric property used by the petitioner.

The petitioner herein may, therefore, we believe, be required, as a condition precedent to the Board's approval of the note issue sought, to enter into a stipulation to dispose of said traction bonds at or before a date to be named by this Board.

The Board is of opinion that with such a stipulation guarding and guaranteeing the *bona fide* character of the investment as a temporary investment, and with other necessary provisos, approval may properly be given to the security issue sought.

In reaching this determination the Board is influenced by the petitioner's avowal that it seeks to effect a disintegration of various utility properties now held together by means of the holding company's control; and that it purposes to effect a complete corporate segregation of the various properties now under petitioner's control. In the northern end of the State all the water properties controlled by the petitioner will be consolidated into one water company. Similarly all the electric companies in the same section will be consolidated into a single electric company. In the Lakewood section it is the petitioner's intention to bring under

the ownership of the Lakewood Water Company the water and sewer properties, and under the ownership of the Lakewood Electric Company the electric properties in Lakewood and Point Pleasant. The electric company's power plant at Lakewood will furnish current for that vicinity and for Point Pleasant. This arrangement, whereby economies will be effected by reason of power generated from the Lakewood power house, will afford a supply for the heavy summer load at the shore at Point Pleasant, and a similar supply for the heavy winter load inland at Lakewood and vicinity. The Commonwealth Water and Light Company as such will cease to exist, and the traction property at Point Pleasant will be entirely detached from each of the companies above mentioned.

On condition, therefore, that the petitioner herein stipulates to part with all ownership or control of the Point Pleasant Traction Company's bonds on or before January 1st, 1916, and further agrees to issue, sell and deliver proposed six per cent. notes at not less than 99, and to amortize the discount thereon out of net earnings within twelve months from the issue thereof; and agrees that it will with all possible dispatch seek to conclude the separation of its properties into separate and distinct corporations such as indicated, *supra*, at the earliest practicable date, and within five years from this date at latest, unless said term is expressly extended by order of this Board, approval to the issue of said six per cent. five-year notes in the amount of $150,000 will be granted to fund the short time loan for $135,000 now outstanding, and to capitalize the $15,000 expenditure cited in petition and properly chargeable to capital account.

Dated January 6th, 1914.

No. 157.

IN THE MATTER OF THE PETITION OF THE COMMISSIONERS OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, FOR A PEDESTRIAN SUBWAY UNDER THE TRACKS OF THE ERIE RAILROAD AT THE RAILROAD STATION AT RIDGEWOOD.

Application for an order requiring the Erie Railroad Company to construct an underground passage or subway between its depot and station at Ridgewood denied, the Board finding that because of the location of the streets at the station no intertrack fence could be extended sufficiently to prevent use of crossing at grade. With opportunity to cross at the street level, the subway would not be used to an extent sufficient to justify requiring its construction.

J. W. DeYoe, for the Commissioners of Ridgewood.

T. H. Burgess, for the Erie Railroad Company.

The petition in the above entitled cause is for an order compelling the Erie Railroad Company to construct an underground passage or subway for the use of the patrons of the road between the main depot, on one side of the tracks, and the train shed, located on the opposite side of the four tracks which run through the village of Ridgewood.

It appears from the evidence that the village of Ridgewood is a municipal corporation with a population of over six thousand inhabitants and that the four tracks running through the said village are used for both freight and passenger traffic. It further appears that about eight hundred persons are regular commuters between Ridgewood and New York, besides a large number of patrons of said railroad company going in other directions. It also appears that the greater portion of the patrons of the road live on the easterly side of the tracks, making it necessary for them in taking trains going east to cross over the tracks to the

shed and platform provided on the west side of said railroad. An estimate of the number of persons who cross and re-cross daily is given at 3,500.

The petition contains a further count to the effect that trains are operated on the two centre tracks while trains on the outer tracks are receiving and discharging passengers. This latter count was taken up by the Board's inspector upon another complaint, and recommendation was made, November 12, 1913, by the Chief Inspector of its Railroad Division to the effect that no trains pass over either of the crossings at this station while a passenger train is standing either receiving or discharging passengers.

In answer to the petition the Erie Railroad alleges

"That the construction of a pedestrian subway as prayed for in the petition would not minimize to any appreciable extent the so-called 'danger' referred to in the petition, for the reason that if any such pedestrian subway were constructed persons would still cross the tracks of this respondent at grade, except in those cases where a train obstructed its passage."

It further says

"That there are two streets crossing the tracks of this respondent at grade near the location of its depot, namely, at Franklin Avenue and Godwin Avenue; that as long as these streets remain open at grade across its tracks, the construction of a pedestrian subway would result in the useless expenditure of money."

Testimony as to the statements above set forth in the petition was produced at the hearing by the respondent. There is no doubt that the situation at the Ridgewood station is dangerous, particularly in view of the location of the streets which cross the tracks of the company at grade at or near the station. Godwin Avenue and Franklin Avenue converge so as to form Ridgewood Avenue, and as the point of convergence of these two streets is on the easterly side of the tracks, there is, therefore, a broad space near

the station where persons may cross the railroad tracks, making the situation much more dangerous than though a single street crossed at this point.

If there were no street crossing at this station, the Board would not hesitate to order a pedestrian subway and intertrack fence, so that the patrons of the road would be forced to use said subway, thereby avoiding the danger that now exists. Because of the location of these streets at the station, no intertrack fence can be extended sufficiently to prevent persons from crossing the tracks at grade near the station; and the Board believes that the subway would not be used to any great extent when an opportunity is open to cross the tracks upon the surface. The complaint in this matter, therefore, will be dismissed. The Board is of the opinion, however, that conditions, at the grade crossing referred to herein, are such that consideration may properly be given to the question of its elimination.

The Board is now conducting hearings in a number of cases involving the elimination of grade crossings and these must take precedence on its calendar. As soon as these hearings are concluded, or have progressed so as to admit of its being done, the Board will, if complaint under the statute is submitted, take up for consideration the question of the propriety of requiring the elimination of the crossing at the Ridgewood Station.

Dated January 13th, 1914.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings

of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ORDERED that the complaint in this proceeding be, and it is hereby DISMISSED.

Dated January 13th, 1914.

No. 158.

IN THE MATTER OF THE APPLICATION OF THE PUBLIC SERVICE RAILWAY COMPANY FOR APPROVAL OF CERTAIN ORDINANCES ADOPTED BY THE BOARD OF STREET AND WATER COMMISSIONERS OF THE CITY OF NEWARK, JULY AND AUGUST, 1913, GRANTING CONSENT AND PERMISSION, ETC., TO USE CERTAIN PUBLIC HIGHWAYS, ETC.

Where privileges granted by the governing body of a municipality are not to be employed as instruments of local transportation alone, but also in the transportation of passengers from and to communities lying without the borders of the municipality making the grant, the public convenience to be considered is not merely that of the people of the municipality making the grant, but that of all of the communities to be served.

The statute empowers the Board in granting its approval to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require.

Since the city did not contemplate that the grants made should be without conditions, the city should, before action by the Board, in appropriate form and with binding force, definitely express its intent as to the conditions to which the grants made by it are to be subject.

L. D. H. Gilmour, for the Public Service Railway Co.

The statute under which these ordinances are laid before this Board for approval (*P. L. 1911, Chapter 195, Section 24*) provides that no privilege or franchise granted to any public utility by any political subdivision of this State shall be valid until approved by this Board, and that

the Board's approval shall be given when, after hearing, the Board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests.

In reaching a determinination under this statute, the Board is required therefore to consider, *first*, whether the privilege or franchise granted is necessary and proper for the public convenience.

Where, as here, the privileges granted are not to be employed as instruments of local transportation alone, but also in the transportation of passengers from and to communities lying without the borders of the municipality making the grant, the public convenience to be considered is not merely that of the people of the municipality making the grant, but that of all of the communities to be served.

If the Board determines that the grants are, on this broad view, necessary and proper to the public convenience, it is *next* required to consider whether the grants properly conserve the public interests.

If the Board determines this question in the affirmative it is *then*, in performing its duty under the statute, required to consider what, if any, conditions the public convenience and interest may reasonably require should be imposed as to construction, equipment, maintenance, service or operation.

The power to grant or withhold consent to the use of the public highways and public places is vested by statute in the municipality.

In granting its consent the municipality may affix thereto "lawful and reasonable conditions beneficial to the public."

The conditions imposed by the municipality in granting its consent become, through acceptance of the ordinance making the grant, binding upon the utility to which the grant is made.

Compliance by the utility, with the conditions so imposed, is the consideration, to the municipality, for the grant made.

Even though a specified condition, so imposed, is without the power of the municipality, it is not open to the utility, which has accepted the ordinance making the grant, to raise the question that the imposition of the condition by the municipality was *ultra vires*.

The power of the municipality to impose conditions on the grant of its consent is, therefore, more comprehensive than its power to regulate the use of the public highways and public places.

For the former power, specific statutory authority need not be found.

For the latter, specific statutory authority is requisite, since the municipality, in general, possesses such powers only as the Legislature has by statute conferred upon it.

When the municipality has exercised its power of consent, future regulation, by it, of the exercise by the utility of the privileges derived through such consent must ordinarily be confined to such regulation as finds justification in the specific grant of power to the municipality by the Legislature.

The importance of careful consideration by the municipality of the conditions to be imposed in granting its consent is made manifest by these considerations.

A determination of the conditions, if any, to be annexed by the municipality to the grant of the consent to be made by it, would therefore seem to be an integral part of the act of making the grant.

To the benefit of such a determination, by the local governing body, this Board believes itself to be entitled before it is called upon to exercise the powers and fulfil the duties assigned to it.

The ordinances submitted to this Board, other than those

relating to the construction of subways, are unqualified grants of consent by the municipality and were formally accepted as such by the company.

That it was not the view of the governing body of the municipality to grant such consents without imposing conditions is apparent.

An ordinance submitted for the Board's information, but not for its approval, authorizes the execution of a so-called "blanket agreement" between the city and the utility, which purports to annex certain conditions to the grants made.

The ordinances submitted contain no reference to this agreement. As stated, the ordinances make unconditional grants.

The agreement itself has not been executed either on behalf of the city or the utility.

The statement made is that this "agreement is to be executed by the city and the company in the event of the ordinances becoming effective."

One of the provisions of the agreement, relating to transfers, is a mere undertaking between the city and the utility whereby they agree to attempt later to agree upon a revision of the existing system of granting of transfers.

The complaint of William Mungle against the Public Service Railway Company directed attention sharply to the existing conflict between the city and the utility as to the obligations of the company regarding the issuance of transfers.

The determination by the Court of Errors and Appeals, on the order made by this Board in that case, while sustaining the Board in requiring the grant of transfers to connecting and intersecting lines, served to indicate the view of the Court that a passenger was not, under the existing ordinances of the city, entitled to a coupon transfer or trans-

fer on a transfer even though such transfer might be essential to forward him to his destination by the most direct route.

Complaints made by passengers since this order, and the judgment of the Court of last resort thereon, indicate that the duty of the utility to issue and accept, and the right of the passenger to demand and use a transfer, is still the subject of doubt and misunderstanding and a source of embarrassment and annoyance.

The Board's study of the situation in connection with the case referred to indicates that under the existing ordinances transfers are, on the one hand, not required to be granted where their issuance might reasonably be demanded, and on the other hand are, in certain instances, required to be issued where they may be improperly employed by passengers in making round trips to their destination and in return therefrom.

This situation is perpetuated by the proposed agreement, except as it may be affected by future agreement under the provisions of the agreement to attempt to agree upon a comprehensive system of transfers.

The form in which the proposed agreement is cast also raises a question as to whether the city does not thereby surrender a power of regulation over the issuance of transfers which it now possesses.

It definitely limits the obligation of the company by the provisions that the company shall, upon request and without further charge, give to any person, who has paid a cash fare on any car, a transfer which shall entitle such person to a continuous ride in either direction on any street railway line intersecting or connecting with the lines upon which such transfer was given, and that no passenger shall be entitled to a transfer to a car, the route of which runs substan-

tially parallel to the route of the car on which the transfer was issued.

These provisions are substantially the same as those contained in existing ordinances relating to transfers, with this important exception, as indicated by the opinion of the Supreme Court, in the Mungle Case, that by force of the ordinance of December 29th, 1892, the existing ordinances are subject to "*any future regulations of the Board.*"

With respect to this provision of the ordinance of 1892 the justice rendering the opinion of the Court said:

"the point is made by the prosecutor that such reservation is not broad enough to cover any change in the transfer requirements, and this contention is said to be supported by the case of *Detroit* vs. *Detroit Citizens' Railway Company, 184 U. S. 368.* In this case the question at issue was the right of the city to reduce the fare to be charged, which was fixed by the contract, and the Court in its opinion limited the power to make further rules or regulations to matters incident to the construction and operation of the road, the repair of pavements, the removal or limitation of the number of tracks, the frequency with which cars should be run, the stopping of cars at street crossings, the sale of tickets 'and generally to details of the conduct or operations of the railway, which experience might show to be necessary,' and for, among other things, the accommodation of the public and the avoidance of injury to private property."

"I am of opinion that the requirements relating to transfers is a regulation which appertains to the sale of tickets and the operation of the railway concerning its method of carrying passengers to their destination for a single fare of five cents."

The presence in the proposed agreement of a provision with respect to transfers, substantially like that contained in the existing ordinances, with no clause reserving power of future regulation, may at some later day be contended to have evidenced the intent of the city to surrender the power of future regulation and to place the relations of the city, with respect to transfer privileges, upon an unqualified contract basis, which cannot be altered except by the joint action of the two.

Connected with this subject of transfer privileges is that of the re-routing of lines of cars.

The ordinances submitted will, under the privileges granted thereby, admit of the re-routing of lines of cars wholly independent of terminal operation.

By means of such re-routing, situations may arise in which, prior to the placing of the terminal plan in operation, certain now intersecting and connecting points of lines may be eliminated, at which transfers are now issued.

Neither the ordinances submitted nor the "blanket agreement" contain any provision covering this point. It is not intended to reflect upon the good faith of the officials of the utility.

Nor is it intended to have it inferred that they would, in the Board's opinion, take advantage of the possible opportunity presented by re-routing to lessen the present transfer privileges.

It is the purpose, however, to express its judgment that the rights of passengers to transfer privileges should not be permitted to rest upon ordinances whose construction has been and still is the subject of controversy, nor be dependent upon the mere good-will of those operating the utility.

In the Board's judgment the rights of passengers to transfer privileges should be clearly defined, established and delimited by joint action by the city and utility.

An appropriate opportunity for such action, which will leave no question of its legality, is presented in the imposition of conditions upon the grants of consent made by the ordinances presented to the Board.

In the Board's opinion, too, this situation presents an opportunity in imposing conditions to require reasonable notice to the city of the proposed re-routing of lines prior to the actual re-routing.

Such a provision will afford an opportunity to the officials of the city to consider any proposed re-routing; to confer with the officials of the utility with respect to the same; and in the event of disagreement to lay a complaint before this Board for action if, in the judgment of the city officials, the proposed re-routing is incompatible with proper and adequate service.

The Board is led, in part, to file this preliminary memorandum calling attention to the fact that the ordinances submitted make absolute and unqualified grants of consent, which have been formally accepted as such; that the proposed blanket agreement is unexecuted; that it is not complete in itself; that it is, in part, a mere agreement to attempt hereafter to agree; and that it may be construed to involve a surrender of rights which the city now has and the existence of which have been established through litigagation, because the statements made before the Board by officials of the city would indicate that in adopting the ordinances they relied upon the fact that the Board's approval was requisite and that there would be a further consideration of the entire matter by the Board.

The scope of the Board's power in the premises is questioned, however, in a memorandum filed on behalf of the company in the following words:

"Public Service Railway Company therefore respectfully submits: * * *

"That until the ordinances now before your Board for approval become effective it has no obligation to revise the present transfer system.

"That such revision has to do mainly with the media by which existing and recognized privileges are to be exercised, and

"That the determination of the proposition (last advanced) is a proper subject for consideration between the municipal authorities and the company, and the result is subject to revision by the Commission *only* in the event that the methods prescribed are not adequate or effective."

We wholly dissent from these propositions.

The statute specifically empowers the Board in granting its approval to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require.

In the judgment of the Board this power is sufficiently broad to comprehend conditions as to transfers and rerouting.

The Board's view, however, is that since it is apparent that the city did not contemplate that the grants made should be without conditions, the city should, before action by the Board, in appropriate form and with binding force, definitely express its intent as to the conditions to which the grants made by it are to be subject.

Upon acceptance by the company of the grants so conditioned, the question as to the adequacy of the conditions will be before the Board.

By pursuing this course, most effective co-operation between the city and this Board, in their respective spheres of power and action, will result and question as to the power of the Board may be avoided.

We shall, therefore, await the action of the city and the company on the suggestions herein made before reaching a final conclusion as to granting or withholding approval.

In the meantime, in view of the importance of the matter to both the city and the company, the Board will press its consideration of the plan of improving the street railway transportation facilities, in furtherance of which the ordinances submitted were adopted.

By this course it may reasonably expect to be able to reach and announce a final conclusion shortly after it is advised of the action taken by the city and the company with respect to the suggestions made herein.

Dated January 13th, 1914.

No. 159.

HIGHLANDS BOARD OF TRADE,

vs.

THE UNITED STATES EXPRESS COMPANY.

G. E. Jenkinson, for Highlands Board of Trade.

B. P. Kerfoot, for the United States Express Company.

The petition in this case was received May 14th, 1913. Answer filed May 23rd, 1913.

Hearings were held as follows:

September 12th, 1913, Jersey City,

October 3rd, 1913, Newark,

October 17th, 1913, Newark,

November 7th, 1913, Jersey City,

November 21st, 1913, Jersey City.

Brief received from United States Express Company December 5th, 1913.

The petitioners ask for winter delivery of express matter at Highlands. It appears that delivery is now made from May 1st to October 1st, and the petitioners desire delivery the year around. The answer of the company is that the business afforded at Highlands during the winter months is not such as to justify or warrant delivery service, as such business would be conducted at a loss.

During these proceedings various attempts were made by both parties in the case to arrange for delivery service by obtaining the services of some person who was otherwise employed, and who could by reason of such employment afford to accept the terms which the company offered. All of these attempts have failed, and the case is now before the Board upon its merits.

The petitioners rest their case partially upon a charge of discrimination. They urge that Sea Bright and Atlantic Highlands are in a class with Highlands and that the same services should be afforded in Highlands as in the two places just named. All three places are seaside resorts, with populations in summer largely in excess of those in winter. The winter, or permanent, populations of the three places are as follows:

> Highlands, 1,380, with Sandy Hook adjoining, and served from the same office, 1,000.
>
> Sea Bright, with a winter population of about 800.
>
> Atlantic Highlands, with a winter population of about 1,500.

It appears from the testimony that, although Sea Bright has a smaller population than Highlands or Atlantic Highlands, it has a larger express business. A comparison shows that the business done in Highlands for one year, covering total charges of all shipments amounted to $8,938.37
The same for Atlantic Highlands was $13,954.91
The same for Sea Bright was $20,374.81

It appears further that the business done at Sea Bright during the seven winter months averaged $1,052.30, which under the rules of the Express Company, warrants delivery service. The business done at Atlantic Highlands averages $761.70 per month, which does not warrant delivery service, but the company states that it has been able to make satisfactory arrangements with an outside expressman, who is reliable, and who performs the services at a cost to the company of 18%, he acting as agent and making the deliveries.

There is a standing offer made by the company to any one in Highlands, who is found satisfactory, and is willing to

undertake the work for that sum. At one time such an arrangement was agreed upon, but later failed. From the above facts and figures the charge of discrimination as against Highlands is not sustained, as the conditions in Sea Bright and Atlantic Highlands are not similar to those in Highlands.

The testimony shows that of the gross revenue received by the express company, about 48.26% is paid to the railroads for the services rendered by the railroad company to the express company; that the local expenses on each end of a shipment is 18%, or a total of 36%, and that the general or overhead expenses amount to 16.29%. The company avers that in 1912 its business showed a deficit of $61,000.

It also appeared that the express business at Highlands during the winter months carried charges of approximately $576.00, and that an estimate of the cost of maintaining wagons for delivery purposes during these months would be at least 15%, which added to the local agent's charge of 10%, would make a total charge at Highlands office of 25%, instead of 18%, which the company is willing to pay.

The business at Highlands would, therefore, carry charges of about 107%. The above figures include both interstate and intrastate business. The testimony shows that about one-third of the total is intra-state business.

It appears, therefore, that unless some arrangement may be made by which the express business at Highlands during the winter months can be handled at a cost of 18%, the Board cannot order the company to render delivery service during the period from October 1st to May 1st. It is, however, strongly recommended to the United States Express Company, to exercise further effort to obtain the service

of some person who will make deliveries during the winter months in the same manner as deliveries are made at Atlantic Highlands.

Dated January 27th, 1914.

No. 160.

IN THE MATTER OF THE PETITION OF THE JERSEY POWER COMPANY FOR AUTHORITY TO ISSUE STOCK IN THE AMOUNT OF SEVENTY-FIVE THOUSAND DOLLARS.

The proceeds of a proposed issue of stock were intended to defray the cost of rights of way in construction of certain lines for the transmission of electric current. The petitioner designs to obtain such current from the Jersey Corporation at Boonton and to transmit the same. The power transmitted is to be generated by the Jersey Corporation. Said Jersey Corporation is not a public utility as defined by the act regulating public utilities.

Question arises whether the stock, for the issue of which approval is asked, is to be used for objects in accordance with the law.

Without impugning the good faith of the petitioner it appears that the arrangement, in the furtherance of which it is desired to use the proceeds of the stock, is one that lends itself to the purpose of those who might be bent on escaping the control which the law of this State seems to throw around public utilities generally.

It appears to the Board that a security issue cannot be said, in the language of the statute "to be made in accordance with law," when said issue contemplates a purpose which, if consummated, renders the law regulating public utilities inoperative.

Culver & Whittlesey, for the petitioner.

Lindabury, Depue & Faulks, by *Kinsley Twining,* for the Morris & Somerset Electric Company, Intervenor.

S. N. Borden, for the Commonwealth Water & Light Company.

L. D. H. Gilmour, for the Public Service Electric Company.

This petition was filed with this Board on December 8th, 1913. Said petition asks this Board's authorization of the issue and sale of stock in the amount of seventy-five thousand dollars at par. The proceeds of the stock issue are intended to defray the cost of rights of way and construction of certain lines for the transmission of electric current. The route of said lines is roughly as follows: Westward from Boonton through Fox Hill and Denville to Millbrook to a point south of Dover; also from said line southward to a point on the eastern boundary of Morristown; also from Millbrook to and through Dover and Wharton.

An itemized estimate of the cost was submitted by George B. Cornell. Said estimate amounts to $65,438, and includes an allowance of 15 per cent. for engineering and contingencies.

The hearing on the petition was held January 9th, 1914, at Chancery Chambers, Jersey City. Briefs were submitted by the petitioner and by the Morris and Somerset Electric Company, Intervenor.

From the evidence it appears that the petitioner designs to obtain electric current from the Jersey Corporation at Boonton, and to transmit the same over the lines above described. The power transmitted is to be generated by the Jersey Corporation situated in Boonton. Said Jersey Corporation is not a "public utility," as defined by the act regulating public utilities. Further its certificate of incorporation expressly subjects its powers to the limitation that none of the properties be devoted to a public use. The interests in control of the Jersey Corporation, the Jersey Power Company, and the Eastern Pennsylvania Power Company of New Jersey, are to a large extent the same. The same individual is president of the three concerns. The officers of the Jersey Corporation and the Jersey Power Company are the same.

The three concerns have one and the same individual as their respective treasurers; the same is true of their respective secretaries. Their directorates are comprised for the most part of the same individuals. The same group with a slight interchange of offices appear in the list of officers of the Atlantic Gas and Electric Company. The latter, a Connecticut corporation, controls the Jersey Corporation, and is intended to construct the transmission lines for the petitioner herein. (Record, p. 58.)

The principal intervenor bases its objection chiefly on the ground that the petitioner designs the construction of transmission lines and the location of a sub-station within territory now adequately served by the intervenor.

The petitioner avers that the construction of said lines and the location of said sub-station are warranted by reason of its contract to afford power to the Morris County Traction Company.

The evidence does not disclose the precise location of the sub-station in question. The petitioner has secured rights of way towards Morristown only as far as Malapardis. (Record, p. 47.) This is approximately two and one-half miles from Morristown.

The engineer acting for the Morris County Traction Company testifies that sub-stations are to be located at Wharton, at Morristown and Millburn "as near as it could possibly be arranged." (Record, p. 42.)

A. B. Cheadle, a witness for petitioner, being asked if a sub-station is to be located in the vicinity of Elizabeth, replied it would depend entirely on what service Morris County Traction Company will desire. (Record, p. 22.)

From the above it is clear that the location of sub-stations to be built by the petitioner, while not as yet absolutely fixed, will involve in all probability building some of them in territory now supplied by other electric com-

panies. It is also in evidence that the proceeds of the $75,000 stock (approval of whose issue is now asked), will not suffice to cover the entire construction of transmission lines and sub-stations necessary to comply with the requirements of the Morris County Traction Company. (Record, p. 64.) It is in evidence that the rights of way secured by the petitioner for the transmission line to Morristown cross territory in which the principal intervenor has franchise rights and in which the principal intervenor has lines under construction. (Record, p. 101.) It is also in evidence that it is impossible to carry a transmission line from the eastern part of Morristown to Millburn on the line of the traction company without passing through territory now served by the Morris and Somerset Electric Company. (Record, p. 102.)

The petitioner's contention we understand to be that even though its transmission lines may in part invade a territory locally supplied by other electric companies, and though its sub-stations may have to be located in such territory, the furnishing of electric energy in large quantity to a traction company traversing a number of districts locally supplied with electricity is warranted generally where the price offered by the intruding company is lower than could otherwise be afforded, and where a local company has been remiss in offering to such traction company a comparable service or price. The petitioner also offers to agree that these extensions it designs shall be employed, in territory otherwise pre-empted, only for supplying energy to the traction company. A decision warranting such an arrangement is cited in Massachusetts where the Connecticut River Transmission Company was permitted to enter Worcester and Fitchburg, and sell power despite the opposition of the local companies. (Vol. 25, Annual Report of Mass. Board of Gas and Electric Light Commissioners.)

The Public Utility act, so-called (Chap. 195, P. L. 1911), provides that no public utility shall

"hereafter issue any stock, stock certificates, bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the board for such proposed issue."

and that

"It shall be the duty of the board, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said board."

The Public Utility act (P. L. 1911, Chap. 195, I, 15), also provides that

"The board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this act."

The first question arising is whether the stock for issue and sale of which approval is asked is to be used for objects in accordance with the law. The Jersey Power Company is not to generate but to transmit current to the Morris County Traction Company, and the Eastern Pennsylvania Power Company of New Jersey. The current so transmitted is to be generated by the Jersey Corporation, and by it to be sold and delivered to the Jersey Power Company. In case the current so generated fails in any wise to comply with the requirements of adequate service, or in case the price exacted by the generating company makes it commercially impossible for the transmission company to sell it at a just and reasonable price, how is the Board to exercise its lawful power of control and regulation? The generating company (a Jersey corporation), as above stated, is not a public utility. It is not by law subject to

the Board's regulation and control. It is, however, true that the contract between the Jersey Corporation and the Jersey Power Company, submitted by the petitioner along with its brief, recites that "the character of the service shall be such as they (the distributing company) may direct and desire so as to meet the requirements of all its customers and any regulations or demands made by the Public Utility Commission of the State of New Jersey or any other public body."

But it is doubtful whether such a contractural stipulation could confer jurisdiction on this Board over the character of service arising from the operation of the generating company.

If said contract were modified or rescinded by the parties thereto, it is evident that any control and regulation by this Board over the petitioner would be impaired or destroyed.

Without in anywise impugning the good faith of the petitioner, it appears clear that the arrangement in the furtherance of which they desire to use the proceeds of this stock is one that lends itself admirably to the purpose of those who might be bent on escaping the control which the law of this State seeks to throw around public utilities generally. Where the generating company is not a public utility, and therefore is exempt from the regulation designed for public utilities, and when the electric current transmitted by the transmission company is generated by a concern not under public regulation and control, how can this Board exercise the power conferred upon it by statute:

"After hearing, by order in writing, to ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product or service rendered by any public utility as herein defined * * *." (P. L. 1911, Chap. 195, II, 16, (f).)

It appears to this Board that a security issue cannot be said in the language of the statute "to be made in accordance with law," when said issue contemplates a purpose which, if consummated, renders the law regulating public utilities inoperative.

The objection chiefly urged by the Morris and Somerset Electric Company, that the petitioner seeks to invade with transmission lines and a sub-station a district already adequately and properly served, must next be considered.

The general position of this Board with reference to local competition of public utilities was originally set forth *In the Matter of the Application of the Atlantic Highlands Gas Company for the Approval of an Ordinance Passed by the Township Committee of the Township of Shrewsbury, Nov. 17th, 1910.* (Case No. 3, p. 7, in Vol. I, Reports.)

The principles there laid down have been followed *In the Matter of the Application of the Consumers Gas Company of Millville for the Approval of Ordinance No. 115 of the City of Millville* (Case No. 95, p. 650, in Vol. I, Reports); and *In the Matter of the Application of the Eastern Telephone and Telegraph Company for Approval of Two Ordinances Passed Respectively by the Freeholders of Cape May County and by the Borough of Avalon.* (Case No. 107, p. 733, in Vol. I, Reports.)

It is true that in all of these cases the action of this Board was taken upon franchises submitted for the Board's approval in accordance with the statute requiring such approval. The language of the section of the statute now applicable is that the Board's approval shall be given to an ordinance

"when, after hearing, said Board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests * * *."

The statutory provision making the Board's approval necessary for the issue and sale of securities is quoted above. While couched in somewhat different language from that used in reference to franchises the requirement that "the purpose of such issue be approved by the Board" seems analogous to the provision made by the law as the pre-condition of the Board's approval of franchises granted to public utilities by municipalities. The same grounds that would warrant the Board in withholding its approval of a franchise which should create competition locally between public utilities might be cited as grounds for the disapproval of the purpose of a security issue which would result in similar local competition between public utilities.

It is to be noted in all of the three decisions quoted above that the immunity from competition of the company in possession is rested upon its rendering adequate service at a reasonable price.

Do the circumstances in the petitioner's case render its position so exceptional as to justify a departure from the Board's rule as regards utility competition locally?

The Board is unable so to find. For first, the petitioner is physically able to transmit current to the Morris County Traction Company without entering with transmission lines and sub-stations into territory already locally supplied with electric current. This could be brought about, for example, by the traction company's running a line to some point where the petitioner could deliver current without invading territory already supplied. There is nothing in the record to indicate that the traction company could not continue to generate its own current, or obtain current from plants within the territory traversed. Despite the contract adduced between the petitioner and the traction company, the traction company does not seem to manifest any very

great solicitude over the situation; and it is perhaps not a far-fetched conclusion that the traction company feels confident of not going without current, whatever the outcome of this application.

Moreover there is force in the position that if the petitioner once enters the territory adjacent to Morristown, the petitioner may be solicited to take on local business without the legal right to refuse. Evidence was introduced to show that a written offer had been made within a month and a half by the Jersey Corporation to the Morristown and Erie Railroad Company, agreeing if the railroad company would grant rights of way for the transmission lines along the railroad, the Jersey Corporation (which here is but the petitioner's other half) would sell electric energy for power to the mills along the railroad and also to the railroad itself. (Record, p. 121.)

This is a form of competition to which the Morris and Somerset Electric Company may reasonably object. The intervenor, it appears, is giving adequate service throughout the district it serves. There is no complaint either of its service or its prices. It replaced the inadequate electric lighting service formerly given in Morristown. It experienced for a time local competition therein to its own and to the public's detriment. It has paid dividends on its stock only for the past two years. Its physical equipment and its financial ability are adequate to cope with a considerable extension of electric business; and, if required, to take on the supply of this traction company. In this respect it clearly differs from the Fitchburg and Worcester companies cited in Mass. Pub. Doc. No. 35, Jan. 1910. When, and if a case arises that shall disclose a public utility, a would-be invader of territory locally supplied, not legally disqualified from affording service in such territory, and capable of according service that cannot be matched in

character or price by public utilities already affording the local supply of such service, this Board will consider whether the circumstances warrant a departure from the precedents already established by it in reference to competing service locally by public utilities. The present petitioner's case does not seem to come within the exceptional character indicated.

The Board, on the evidence adduced before it, is not satisfied that the securities, approval of whose proposed issue and sale is sought by the petitioner herein, are, in the language of the statute, "to be made in accordance with law"; nor is the Board, upon the evidence adduced before it, satisfied that "the purpose of such issue be approved by said board," as required by the statute; nor in the judgment of the Board, on the matters adduced before it, can it approve either such proposed issue or the purpose thereof. The petition will be dismissed. An order will so enter.

Dated January 27th, 1914.

ORDER.

This application having been duly heard and the Board having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof, the Board's approval of this petition is withheld and the application is HEREBY DISMISSED.

Dated January 27th, 1914.

No. 161.

IN THE MATTER OF THE APPLICATION OF THE PLEASANTVILLE WATER COMPANY FOR APPROVAL OF NEW SCHEDULE OF RATES.

A schedule showing flat rates and rates for metered service was submitted to the Board by the Pleasantville Water Company. On this schedule hearing was held, notice of which was given to the municipalities served by said company. At this hearing E. A. Higbee appeared as counsel for Somers Point, Northfield, Linwood and Pleasantville, and objected to the rates as shown in the schedule. Comparisons were made by Mr. Higbee between these rates and those charged in other municipalities. It is not claimed that these comparisons show the flat rates in the Pleasantville Company's schedule to be unreasonable. It is claimed that the company's rates for metered service are unreasonable. These rates do not involve increases over those previously charged by the Pleasantville Water Company for metered service, but, on the contrary, show a decrease. The Board, therefore, cannot enter an order, under the statute, suspending the rates to which objection is made. The statute imposes the burden of proof on the issue whether rates are just and reasonable on the company only as to increased rates.

In the opinion of the Board the rates in the schedule submitted by the Pleasantville Water Company are not, prima facie, unjust or unreasonable, nor have the objectors shown the metered rates in said schedule to be unjust or unreasonable. The Board will permit the rate schedule of the Pleasantville Water Company referred to herein to be filed and to be applicable to the customers of said company.

Dated January 30th, 1914.

No. 162.

JOSEPH McBRIDE
vs.
PUBLIC SERVICE RAILWAY COMPANY.

Joseph McBride in person.

L. D. H. Gilmour, for Public Service Railway Company.

The complaint is that the Public Service Railway Company maintains two tracks that cross the sidewalk at grade in the form of a curve at its terminal in Hoboken; that the operation of cars over said tracks is a menace to public safety. The complaint also contains a prayer for the removal of said tracks at an early date.

The answer of the Railway Company is that cars are operated over the tracks above referred to carefully; that said tracks exist in their present location under lawful municipal authority; that their removal would be of great detriment to the traveling public and of great inconvenience to the Company in the operation of its street railway in lower Jersey City.

A hearing was held upon the complaint and answer on October 31st, 1913, at Newark, when both parties were represented.

Before the building of the present terminal of the Public Service Railway Company all of its tracks looped at or near the location of the two tracks complained of and crossed the highway as the two tracks now cross. One of the objects of the new terminal was to elevate the tracks from the street surface thereby permitting ferry passengers to take the cars without descending to the street level. To one familiar with conditions at this point before the new

terminal was constructed it must appear that the present arrangement is much more convenient and much less dangerous than before.

It was testified that the cars move slowly and under control over said sidewalks and that a signal is sounded before they proceed to cross.

Testimony was, however, adduced at the hearing that one or two persons had been hurt, not by being struck with the front, but by the rear side of the car as it rounded the curve, due it would seem to taking a position too near the tracks as the car passed.

The petitioner in presenting his testimony suggested that a man be placed at this crossing to warn persons not to stand too near the tracks and also to warn them of the approach of cars.

The Board finds and determines that a condition of danger exists by the operation of cars over said sidewalk and that an employee should be stationed at said crossing during commission hours, as at present observed by the company, and further that during non-commission hours the conductor station himself upon the back platform and warn persons of the danger. An order will so issue.

The Board recommends that the company obtain permission from the municipality to place a broad mark upon the sidewalk indicating the maximum overhang of the largest car passing the point and if such permission can be obtained that it so mark such sidewalk.

Dated January 30, 1914.

ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the

date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

The Board of Public Utility Commissioners HEREBY ORDERS the Public Service Railway Company to station a flagman at the place where the tracks of said Public Service Railway cross the public sidewalk, at grade in emerging from the terminal of said company in the City of Hoboken, and cause such employee to remain at such crossing during commission hours, as said hours at present are observed by the Public Service Railway Company.

The Board FURTHER ORDERS the Public Service Railway Company to require the conductor of each car passing the point herein referred to, during non-commission hours, to stand upon the back platform of the car in a position to be able to warn persons on the sidewalk of the approach of said car. This order shall become effective February 23d, 1914.

Dated January 30th, 1914.

No. 163.

MAYOR AND COMMON COUNCIL AND THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF NEW BRUNSWICK,

vs.

THE DELAWARE AND RARITAN CANAL COMPANY, PENNSYLVANIA RAILROAD COMPANY, LESSEE.

AMENDMENT OF ORDER.

Application having been made to the Board of Public Utility Commissioners, by the Delaware and Raritan Canal Company, Pennsylvania Railroad Company, lessee, for modification of the order of the Board of Public Utility Commissioners dated January 13th, 1914, forbidding the closing of the Delaware and Raritan Canal, except between January 15th and February 15th of each year, and such application having been duly heard, the Board

HEREBY ORDERS AND DIRECTS that its order dated January 13th, 1914, referred to above, be and the same is hereby amended to read as follows:

IT IS HEREBY ORDERED that the Delaware and Raritan Canal Company and the Pennsylvania Railroad Company, lessee, shall not, by their act, keep the tidal basin of the Delaware and Raritan Canal at New Brunswick, and the adjoining level from which said basin is fed, known as Five Mile Level, or either of them, closed to navigation after February 15th, 1914; nor close said tidal basin and the adjoining level, or either of them, before January 15th of any year hereafter; nor keep the same closed after February 15th of any year hereafter, unless on order of this Board on application made therefor.

It is intended by this amendment of the Board's order to make its order dated January 13th, 1914, applicable to the tidal basin at New Brunswick and the adjoining level from which said basin is fed, and to have remain applicable to all other parts of the Delaware and Raritan Canal the order of the Board entered February 6th, 1912 (Case, 44, p. 277, in Vol. I, Reports), in the matter of the complaint of the Board of Trade of New Brunswick against the Delaware and Raritan Canal Company, Pennsylvania Railroad Company, lessee.

Dated February 2nd, 1914.

No. 164.

IN THE MATTER OF THE PETITION FOR APPROVAL OF AN ORDINANCE PASSED MARCH 6TH, 1913, GRANTED TO PHILLIPSBURG'S LIGHT, HEAT AND POWER COMPANY BY THE COMMON COUNCIL OF THE TOWN OF PHILLIPSBURG.

A public utili y affording safe, adequate and proper service at reasonable rates will not be exposed to competition in the same locality through this Board's approval of the franchise of a competing company.

The Board denies the right of any public utility to count on this exemption from local competition except where the utility first in the field affords safe, adequate and proper service at reasonable rates.

Petitioners were required to establish affirmatively that the service in Phillipsburg fails to conform to the standard of being safe, adequate and proper.

The Board finds the petitioner has established this fact. Petition for approval of ordinance granted with conditions.

W. H. Walters, for the petitioner.

J. I. B. Reiley, for the town of Phillipsburg.

A. B. Cheadle, for the Eastern Pennsylvania Power Company of New Jersey, objector.

Ordinance—Phillipsburg's Light, Heat and Power Co.

This ordinance was passed by the common council of Phillipsburg on March 3d, 1913, and approved on March 6th, 1913. The petition asking this Board's approval was filed on May 26th, 1913. On December 3d, 1912, there was received by the Board an application by this company for the approval of an issue of $125,000 stock for constructing a generating plant and distribution system in Phillipsburg. Action on the petition for the stock issue was deferred until after an ordinance should be duly approved, granting permission to the company to do business in Phillipsburg.

Hearings upon the petition for this Board's approval of the ordinance of March 6th, 1913, were held as follows:

At Trenton, at the State House, on June 17th, 1913.

At Trenton, at the State House, on September 23d, 1913.

At Trenton, at the State House, on November 11th, 1913.

At Jersey City, at Chancery Chambers, on November 21st, 1913.

At Trenton, at the State House, on December 9th, 1913.

At Jersey City, at Chancery Chambers, on January 6th, 1914.

Electric current is now supplied in Phillipsburg by the Eastern Pennsylvania Power Company of New Jersey. For this Board to approve this franchise, and by separate action, the issue and sale of stock by the petitioner would involve competitive electric service in Phillipsburg.

The position of the Board in this matter of utility competition locally is of record (see Atlantic Highlands case, No. 3, p. 7, in Vol. I, Reports; Consumers Gas Company of Millville, No. 95, p. 650, in Vol. I, Reports; Eastern Telephone and Telegraph case, No. 107, p. 733, in Vol. I, Reports). Following the same line is the Board's decision of recent date *In the Matter of the Petition of the Jersey Power Company for Authority to Issue Stock, etc.*

Common to all these cases is the principle that a public

utility affording safe, adequate and proper service at reasonable rates will not be exposed to competition in the same locality through this Board's approval of the franchise of a competing company.

The Board has been careful to safeguard its stand in this matter by an explicit denial of the right of any public utility to count on this exemption from local competition except where the utility first in the field affords safe, adequate and proper service at reasonable rates. In case No. 3, p. 7, Vol. I, Reports, the Board said:

"These general propositions would seem to require strong countervailing considerations in the particular case under review if the Board is to approve the ordinance passed by the Shrewsbury township committee on November 17th, 1910. It is true that conditions may exist in particular cases which might warrant such action. If the Consolidated Gas Company had been shown to be totally devoid of enterprise, and were now reluctant to extend the supply of gas into the parts of Shrewsbury township which the Atlantic Highlands Gas Company stands ready to supply, or if the service of the Consolidated Gas Company had been shown in the past, or in the present, to be inadequate; or if there was such disparity in prices and quality of service offered by the two companies that the exclusion of the Atlantic Highlands Gas Company must result in subjecting possible consumers in Shrewsbury township to hardship, extortion or poor service; or if the Atlantic Highlands Gas Company could demonstrate that it alone of the two companies commanded processes or methods which promised pronouncedly better service or lower prices than the Consolidated Gas Company, there might be ground to question the applicability of the general principle of regulated monopoly to the case at issue."

It was made clear to the petitioners in the case at bar that they must establish affirmatively that the service in Phillipsburg fails to conform to the standard of being safe, adequate and proper.

On careful consideration of the record, the Board is of opinion that the petitioners have established this fact.

It appears to us proved that the Eastern Pennsylvania Power Company of New Jersey has not provided in Phillipsburg a service equal in quality to that furnished by

their predecessors, the Easton Gas and Electric Company; that the street-lighting service furnished by the objector has been uncertain, inadequate and improper; that the outages of lamps have been excessive; that despite complaint the street-lighting service has not been appreciably bettered; that the deductions in payment claimed by the town for large outages have not been disputed by the company; and that the inadequacy of street-lighting service has been allowed to continue, and as recently as October, November and December, 1913, has been as poor as in April, 1913, and poorer than the service in the intervening period.

The Board finds established by the record unquestionable inadequacy of service as regards house lighting, and power for factories and other industrial concerns. Very considerable losses to proprietors of business establishments in Phillipsburg and to their employees due to forced inactivity on account of inadequate electric power have been well attested by uncontradicted evidence. Especially is this true for trolley operation in Phillipsburg. Power therefor has frequently been inadequate or wholly lacking, resulting in stoppage of cars or their movement at a tardy pace.

The Board is not unmindful that in the early part of last year the generating plants in Easton were crippled for a time by a strike. Nor is the Board unmindful that some of the petitioner's witnesses have admitted subscribing to stock in the newly-projected company.

The newly-organized company was organized as the outcome of a movement which centered in the local board of trade, but whose organization was effected by a group all of whom belonged to said Board, but outside of the regular activities exercised by the said Board. Much of the irritation with the inadequate service is founded on a prevalent feeling that with the generating plants in Easton, and with

only a sub-office or agent in Phillipsburg, the Phillipsburg service is not accorded proper attention.

The evidence submitted by the Eastern Pennsylvania Power Company was rested largely on the testimony of two witnesses. One of these, the commercial manager, with his office at Easton, testified how complaints were handled. The other, a consulting engineer for a concern that is devising plans for a comprehensive service radiating from Easton, testified that more ample generating apparatus is partly installed at Easton, and more is to be installed shortly, and that a comprehensive plan of transmission and distribution lines is being devised which will include Phillipsburg, along with other places at which current is to be delivered. Counsel for the Eastern Pennsylvania Power Company, while averring that ample power will be available shortly, does not hold out the prospect that the changes in the transmission and delivery lines in Phillipsburg will be completed until October of this year.

The question arises whether a company holding a franchise and under legal obligation to furnish at all times safe, adequate and proper service may defer or postpone rendering such service, or postpone putting its apparatus in proper condition to render such service, until a more convenient season when the locality to be served shall have been embraced within a comprehensive scheme of reconstruction allowing such service to be afforded.

We do not believe that such postponement or delay is justified or justifiable.

We shall therefore approve the franchise under consideration as necessary and proper for the public convenience and as safeguarding the public interests.

We shall attach thereto, as the statute provides, conditions that will prevent the use of said franchise other than

as a *bona fide* instrument to afford the service required by the town of Phillipsburg.

With this end in view the franchise is approved upon the express condition that the franchisee files in writing with this Board its guarantee that it will construct and maintain its plant for the generation of electric current in Phillipsburg, and that it will begin the construction of said generating plant within six months from the date hereof, and of its lines of poles and wires within nine months from the date hereof, and that it will have completed, unavoidable accidents excepted, its generating plant and the main lines of its distribution system within eighteen months from the date hereof.

The Board calls attention of the town council to the doubtful propriety and dubious legality of imposing requirements of unpaid service to be rendered by the franchisee. The Board has hitherto objected to the imposition on franchises of a money payment as a condition of the grant. And the Board is not satisfied that it has not power to rescind such conditions as exact unpaid service. should such conditions be shown to be unjust or unreasonable. In case the town cares to impose such conditions, taking the risk of their possible annulment by the courts or by the Board, the Board will not, in this case, require their elimination from this franchise.

The Board in granting approval of this franchise hereby puts on record its serious question of the estimate of cost and earning power of the new company submitted together with the petition. In case the petition for the approval of stock to finance the new company had embraced the issue of bonds, it would have been a serious question whether this Board's approval of bonds could have been granted. The stockholder takes a risk with his eyes open, and we do not feel disposed to say that he may not take such a risk.

We suggest, however, to the petitioners in so far as they represent a civic and not a commercial movement, and to the town of Phillipsburg, that now they are legally competent to provide their own supply of electric current, it might be well to consider whether prompt amendment may not be exacted of the Eastern Pennsylvania Power Company as regards service; and whether—provided such amendment is secured—the service and the price thereof for the future may not be more advantageous, secured from the larger generating unit at Easton than locally provided.

A certificate of approval, incorporating the above condition, will be issued to the petitioner as of this date.

Dated February 3d, 1914.

CERTIFICATE.

Application being made to the Board of Public Utility Commissioners by Phillipsburg's Light, Heat and Power Company by petition in writing, for approval of an ordinance of the Town of Phillipsburg, passed by the Town Council, March 6th, 1913, entitled "An Ordinance granting Phillipsburg's Light, Heat and Power Company, its successors and assigns, the right to construct, operate and maintain an overhead electric lighting system upon the public roads, highways, streets, avenues, parks, parkways and other public places in the Town of Phillipsburg, prescribing the terms and conditions upon which said permission is granted and the regulation and restrictions under which the said system shall be constructed, operated and maintained";

The Board now, after investigation and hearing, determines that the privilege or franchise granted by said ordinance is necessary and proper for the public convenience and properly conserves the public interests, and, in

accordance with its report, bearing even date herewith, which by reference thereto herein is made part hereof,

APPROVES the same UPON CONDITION that Phillipsburg's Light, Heat and Power Company files in writing with this Board its guarantee that it will construct and maintain its plant for the generation of electric current in Phillipsburg, and that it will begin the construction of said generating plant within six months from the date hereof, and of its lines of poles and wires within nine months from the date hereof, and that it will have completed (unavoidable accidents excepted) its generating plant and the main lines of its distribution system within eighteen months from the date hereof.

Dated February 3rd, 1914.

No. 165.

IN THE MATTER OF THE PETITION OF THE BOROUGHS OF ROSELLE AND ROSELLE PARK, CONCERNING A CHANGE IN LOCATION OF THE RAILROAD STATION ON THE LINE OF THE CENTRAL RAILROAD OF NEW JERSEY KNOWN AS "ALDENE."

The Board does not regard moving the station at Aldene, a distance of approximately one quarter of a mile, as an abandonment, as defined in Chapter 195, Laws of 1911.

Weighing all the advantages of the new location, as against the disadvantages, and keeping in mind the necessity for a relocation, the Board is of the opinion that it would not be justified in interfering with the exercise by the Company of its discretion in the matter.

Louis B. Evert, for the petitioners.

C. W. Huntington, for the respondent.

Aldene Station—C. R. R. of N. J.

Petition filed October 14th, 1913.

Hearing at Trenton November 11th, 1913.

The petition herein recites that the Central Railroad Company of New Jersey is moving the railroad station known as Aldene from its present location to a point nearly a quarter of a mile west thereof, and beyond the borough limits of Roselle Park. The petitioners allege that said removal will prove a detriment to the community, a hardship to the patrons of the road, and will cause public inconvenience.

The petition was referred to Charles D. McKelvey, Inspector of the Board, and under date of October 29th he reported as follows:

"In connection with the petition from the Taxpayers and citizens of the Boroughs of Roselle and Roselle Park against the removal of Aldene Station, would say that the old station is to be abandoned and a new one built in its place 1,130 feet west of the old one. This removal became necessary on account of the track which is now being used by the Rahway Valley being required for a freight track, or an additional one for the Central. In the new arrangement the Rahway Valley train stays on its own rails instead of using the Central's track as heretofore.

In looking over the ground, I find there are about fifty houses lying east of the station. These people, when using the trains, would be obliged to walk eleven hundred feet farther to the new station. There are ten houses just west of station, whose inhabitants would walk about three hundred feet farther to the new station. There are twenty houses still farther west who would be nearer the new station. There are about twenty-five houses south of or opposite old station who could as well use the new station.

I learn there are seventy-seven commuters from this station. The new station and shelter shed opposite should be completed within the next thirty days. In the interest of safe operation, I RECOMMEND that the railroad company be permitted to change the location of Aldene Station, upon the conditions that an overhead passenger bridge and an intertrack fence be built."

The respondent company in its answer alleges that the station in its original location occupied land which belonged

to the Lehigh Valley Railroad Company, and which was held under short time lease; that said land was sold to the Marconi Wireless Telegraph Company, whose works immediately adjoin it to the east, and that by reason of such sale further occupation of the land for station purposes is not possible.

The company also alleges that through an arrangement with the Rahway Valley Railroad Company the old station was used jointly by means of track number 6, then a side track, which ran from the junction to the station; that such an arrangement will no longer be continued because of the necessity of using track number 6 as a west-bound running track, which will expedite moving all passenger and freight trains generally. It also alleges that it has selected the nearest and most available location for the new station, which will be situated in the fork of the Rahway Valley Railroad and the tracks of the Central Railroad, and that said location will permit transfers from one line to another; without the necessity of the Rahway Valley trains occupying the tracks of the Central Railroad. It is further stated in the answer of the company that a shelter shed will be constructed on the opposite side of the tracks from the new station, and an overhead bridge constructed in accordance with the recommendation of the Inspector of the Board, and further that an intertrack fence will be built. It is claimed by the company that because of the drainage conditions the construction of a subway would be impracticable.

The authority to deal with the present case is found in Section 17, sub. (b), Chapter 195, Laws of 1911, which reads:

"The Board shall have power after hearing upon notice, by order in writing, to require every public utility as herein defined.

(b) To furnish safe, adequate and proper service, and to keep and maintain its property and equipment in such condition as to enable it to do so."

Section 20 of the same act provides:

"No railroad company shall, without first obtaining the approval of the Board, abandon any railroad station, or stop the sale of passenger tickets, or cease to maintain an agent to receive and discharge freight at any station now or hereafter established in this State, at which passenger tickets are now or may hereafter be regularly sold, or at which such agent is now or may hereafter be maintained."

The Board of Railroad Commissioners, the predecessors of this Board, acting under authority of Chapter 197, laws of 1907, and Chapter 189, laws of 1909, supplementary thereto, said in its findings, "Concerning stational facilities at Mountain View on the line of the Erie Railroad Company," dated February 8th, 1910:

"Independent of statutory restriction the determination of the location of railroad stations rests in the discretion of the carrier. It lies within the power of the Legislature to compel a carrier to establish stations at places necessary for the convenience of the public, and it may delegate to a Commission the power to determine what stations are required.
* * *

"No general rule can be laid down as to what will constitute an abandonment of a railroad station under this statute. It is clear, however, that a change in the location of a station from one point to another in the same vicinity, does not, in general, constitute an abandonment. The case under consideration, therefore, involving as it does simply the setting back of the station a distance of some two hundred and fifty feet, does not fall within this section of the statute.

"The act creating this Board, Chapter 197, Laws of 1907, among other things confers upon the Board power to make all necessary orders requiring any railroad company operating in the State to furnish proper and adequate stations. The judgment of the Board is that under this section the exact location of a station should be left largely to the discretion of the company, subject to the condition that the station be so located as to reasonably serve the convenience of the public to be accommodated thereby.

"Unless the Board can, therefore, find that the station as proposed to be located by the carrier, would not reasonably serve the convenience of the public to be accommodated thereby, it cannot adjudge that the carrier does not furnish proper and adequate stations."

The Board does not regard the change in the location of the Aldene station as an abandonment, as defined in section

20, Chapter 195, laws of 1911, so that the sole question presented is whether the proposed location of the station at a distance of eleven hundred and thirty feet westerly from the site of the present station, including the shelter shed and overhead bridge to be constructed, furnishes safe, adequate and proper service as required by the act.

The testimony in this case discloses:

(1) That the Central Railroad Company could no longer occupy the land upon which the old station was located, necessitating, therefore, a removal to some other point.

(2) That in order to secure safe operation the trains of the Rahway Valley Railroad should not be permitted upon the tracks of the Central Railroad.

(3) That the site selected by the respondent for the location of its new station serves both patrons of the Rahway Valley Railroad Company and the respondent company.

(4) That the new location of the Aldene station is nearly midway between Roselle and Cranford stations, making three stations within a distance of eleven thousand, three hundred and forty feet.

(5) That both the station and the shelter shed on either side of the tracks of the Central Railroad will be located within easy reach of highways, both of which are provided with trolley lines.

From the testimony it appears that a great many of the patrons of the Central Railroad using the Aldene station, and going daily to New York, will be obliged to traverse the extra distance of eleven hundred and thirty feet in reaching the new station.

The Board is not unmindful of the fact that any change in the location of a railroad station which has existed for a number of years, and which has determined, in some instances, the location of the homes of the patrons of the railroad, will cause some annoyance and inconvenience. In

the present case the distance of removal is not such as to cause great hardship.

Weighing all the advantages of the new location against the disadvantages, and keeping in mind the necessity for a relocation of the Aldene station, the Board is of the opinion that it would not be justified in interfering with the exercise by the company of its discretion in the matter. The petition will be dismissed.

Dated February 3rd, 1914.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

IT IS ORDERED that the complaint in this proceeding be, and it is hereby, DISMISSED.

Dated February 3rd, 1914.

No. 166.

BOARD OF COMMISSIONERS OF OCEAN CITY

VS.

ATLANTIC CITY RAILROAD COMPANY.

Crossing of the tracks of the Atlantic City Railroad and Eighth Street in Ocean City approved with recommendations expressed to the Railroad Company for protection of travel thereover.

Ocean City *vs.* Atlantic City R. R.

The Board of Commissioners of the City of Ocean City in a complaint filed with the Board of Public Utility Commissioners stated that Eighth Street in said city is a public thoroughfare and has been opened and used by the public for a number of years; that the Atlantic City Railroad Company operates a railroad on Haven Avenue, which crosses Eighth Street at right angles, and that it is necessary and advisable that the railroad crossing at Eighth Street be planked and kept in repair for the full width of said crossing, so as not to impede traffic, the temporary crossing of gravel having been removed.

To this complaint the Atlantic City Railroad Company made answer, stating that while the statement of the complainant to the effect that Eighth Street is a public thoroughfare and has been opened and used by the public for a number of years, may be technically correct, this street has not been used as a crossing over the tracks of the Atlantic City Railroad at Ocean City, "the crossing only existing on the plans and no provision having been made for vehicular traffic at that point." The company expressed its willingness to leave the matter entirely to the judgment of the Board.

The Board caused its Inspector to examine the place of crossing and to report thereon. At the hearing in this matter the Inspector of the Board was called and examined as a witness. The opinion of the Inspector was to the effect that the crossing should be planked.

The Board after consideration of the testimony adduced at the hearing hereby gives its approval to the crossing of the tracks of the Atlantic City Railroad at Eighth Street in Ocean City, and

HEREBY RECOMMENDS to the Atlantic City Railroad that it plank said crossing and maintain the same in good condition; that it erect a standard crossing sign at the place of

crossing, and that the speed of all trains be reduced to ten miles per hour while passing over the crossing.

Dated February 9th, 1914.

No. 167.

IN THE MATTER OF THE INVESTIGATION AS TO THE REASONABLENESS OF RULES OF THE EASTON GAS WORKS AND THE EASTERN PENNSYLVANIA POWER COMPANY OF NEW JERSEY EXACTING A DEPOSIT IN ADVANCE OF SUPPLYING SERVICE.

A public utility is bound, within its legal competence and up to the limit of its physical equipment, to afford service to all who apply conformably to the reasonable requirements imposed by the utility.

Considerations requiring the utility to serve all applicants seem to establish the reasonableness of a rule which a utility may impose, requiring of its customers advance deposits to secure bills for service to be rendered.

Deposit of five dollars held to be not unreasonable for other than those having prepayment meters. For those having such meters a deposit of two dollars is held to be reasonable.

J. I. Blair Reiley and *W. H. Walters,* for the Town of Phillipsburg, objector against both companies.

Mayor John Mulligan, Robert Richards and *Carl Vogt,* for the city of Dover, objector against the Eastern Pennsylvania Power Company.

A. B. Cheadle, for the Companies.

Both respondent companies, as appears by the record, have recently put in force a rule requiring of new customers a deposit of five dollars ordinarily to secure payment of bills for service to be rendered. The original hearing in the case of both respondents was held at the State House in Trenton, on November 11th, 1913. To this hear-

ing the municipalities served in Morris, Somerset and Warren counties were summoned. A supplementary hearing in the case of the Easton Gas Works was held in Chancery Chambers, Jersey City, on January 6th, 1914. Testimony has been submitted by both the objectors and the respondent companies.

It was contended that the Easton Gas Works had no standing as a public utility entitled to do business in this State, and the status of such a utility before this Commission was questioned. We reserve to the latter part of this Report comment upon this contention, and here treat jointly complaints brought against both companies upon the rule the companies have introduced.

As before recited, it appears that each company within a few months has promulgated and generally enforced a new rule. This rule requires of every new customer a deposit of five dollars ordinarily as a prerequisite to obtaining service. The Easton Gas Works requires the deposit whether the customer has a regular meter or a prepayment meter. In the case of prepayment meters, where there is a monthly minimum of fifty cents, the five-dollar deposit is alleged to be required to maintain the minimum guarantee on monthly consumption. (Record, Nov. 11, 1913. p. 12.) The Easton Gas Works insists, through its president, that it does not now install prepayment meters. (Record, Nov. 11, 1913, pp. 11, 13.) In case, however, of a new consumer moving into a house in which a prepayment meter has been previously installed, the company attempts to enforce the rule requiring the deposit. No distinction is made as between owners of houses in occupancy of their houses, and tenants. In either case, if the consumer is a new customer, the Company attempts, in some cases unsuccessfully, to enforce the rule. Old customers, so long as their bills are not in arrears, are not subjected

to the rule in question. (Record, Nov. 11, 1913, p. 12.) No charge is made for the installation of a meter, and the service pipes are run at a cost of ten dollars per service. This, it is testified, fails frequently to cover the cost. (Record, Nov. 11, 1913, p. 24.) It appears that a receipt is given for the required deposit, which bears interest at six per cent. and is returnable upon termination of the consumer's contract with the company, and the surrender of the receipt, or is applied to the liquidation of the account. (Ex. R. 1, Easton Gas Works case.)

In the case of deposits exacted by the Eastern Pennsylvania Power Company old consumers, if not in arrears, are not subject to the rule, but all new residential consumers are required to deposit five dollars, and commercial consumers an amount determined by their estimated greater consumption. (Record, E. Pa. P. Co., p. 14.) In the case of new customers the deposit is exacted alike of owners or tenants.

The monthly bill of residential consumers of electric current ranges on the average from two dollars to two dollars and a half. (Record, E. Pa. P. Co., p. 16.) The average yearly bill for gas in Phillipsburg is from thirty-five to forty dollars a year. (Record, E. G. W., Nov. 11, 1913, p. 10.)

In determining the reasonableness of the impugned rules, it is necessary to distinguish the advance deposit required by such a rule from a minimum charge, a service charge, a meter rent, an insurance fund to insure the integrity of the meter, and the base rate for metered gas or electric current. The sole function of the advance deposit is to insure the payment for service whose amount cannot be known in advance.

Is such a deposit or advance payment a reasonable requirement?

That it is not universal is no proof that it may not be reasonable. Nor is its imposition, by explicit statutory warrant in some states, proof that the rule is reasonable in states where no such statutes exist.

What is the basic reason for such a rule? Why should the gas or electric company be permitted to require such a deposit, where the ordinary tradesman does not?

The fundamental reason seems to be this. A public utility is bound within its legal competence and up to the limit of its physical equipment to afford service to all who apply conformably to the reasonable requirements imposed by the utility. The public utility cannot at its option refuse to render service. It is thus debarred from exercising the choice which the ordinary merchant may exercise of declining to serve would-be customers. As an offset to this peculiar obligation, and to protect public utilities from bad debts which might otherwise be unavoidable, public utilities are allowed in some states by statute to require a deposit or advance payment. In some states water rents or other utility services are made a lien upon the property served. This is the statutory provision in this State as regards water rents where the municipality serves the consumer. These considerations requiring the utility to serve all applicants seem to establish the reasonableness of a rule which a utility may impose requiring of its customers advance deposits to secure bills for service to be rendered.

The limitations upon such a rule are equally evident. The deposit exacted may not be excessive or exorbitant. Otherwise the exaction of such a deposit might operate to destroy the universal obligation to serve any and all would-be consumers entitled to service. The deposits also must not be unduly or unjustly discriminatory, for the simple reason that such discrimination is unlawful for public utilities. The deposits also in the aggregate, and to the

extent not used to liquidate consumers' bills justly due, must be treated as a quasi-trust fund.

Viewed in the light of these considerations how is the five-dollar deposit exacted by the two respondent companies to be judged?

So far as the average monthly consumption of users of electric current and gas is concerned in this particular case, it would appear that the advance deposit is not unreasonable in amount, except as regards gas consumers on prepayment meters.

The testimony above recited shows the average monthly consumption of both gas and electricity is not far from two to three dollars. In case the monthly bill is not paid within the first ten days of the following month, the companies issue warnings of discontinuance within ten days thereafter. If this warning is not heeded, actual service is suspended, and the expense of the cut-off is imposed on the companies. In this case the service, assuming it has conformed to the monthly average consumption, would cost the company the loss of the price of approximately double one average month's consumption. For this reason the exaction of the advance deposit of five dollars cannot be adjudged unreasonable, so far as the amount is concerned.

In the case of gas consumers on prepayment meters, however, the case is different. The company imposes a minimum of fifty cents per month on such consumers. If, in the case of non-consumption, meter removal and discontinuance of service require, as testified, not more than two months, the utmost the company would lose would be double the monthly minimum, or one dollar plus the removal costs. To exact in such case a minimum of five dollars is clearly excessive. The fact is that the prepayment meter itself is a guarantee of payment for ordinary consumption. To superpose another guarantee in the form

of a deposit is not reasonable, unless the deposit is moderate and conforms to the risk of loss incurred.

Accordingly, the Board FINDS AND DETERMINES that in the case of gas consumers on prepayment meters an advance deposit of five dollars is unjust and unreasonable, and will require an abatement thereof in such cases to two dollars. Such a deposit in the case of consumers on prepayment meters the Board adjudges just and reasonable.

The Board is not unmindful of the testimony that the company is not now installing such meters. But where such meters continue to be employed, the advance deposit should not exceed the limit indicated; and unless the Easton Gas Works indicates its readiness to comply with this suggestion, an order to that effect will be duly entered.

Question may be raised whether confining the imposition of the advance deposit to consumers newly contracting for service, and exempting earlier consumers therefrom, so long as they do not fall in arrears, is not unduly or unjustly discriminatory.

The Board is not able to find that the imposition of the rule on those newly subscribing for service is unduly or unjustly discriminatory, at least until demonstration of their promptness and regularity in payment entitles them to ask the return of the advance deposit and to the same extension of credit as is now extended to old subscribers not in arrears.

In a recent Michigan case (1910) *Brown and Brown Coal Co.* vs. *Grand Trunk Railway Co.* (*124 N. W. Rep. 528*), it was held that

"The act of a carrier in hauling goods for some shippers without prepayment of freight, and not for others engaged in the same business, does not constitute a violation of the Laws of 1907, No. 312, Section 17, making it unlawful for a common carrier to give any preference to any shipper or subject him to any undue or unreasonable disadvantage or prejudice."

So long as the rule does not appear to work an undue or unjust discrimination it will not be set aside as unduly or unjustly discriminatory or preferential. The issue may fairly be raised, however, whether, after adequate demonstration on the part of the consumer of his financial reliability, a public utility avowedly according credit to reliable consumers may not be justly required to refund an advance deposit, or apply the same in liquidation of bills due. There seems little warrant in equity for the indefinite retention of such deposits, even though interest thereon be allowed. It savors altogether too much of a forced loan.

In general the complaint against the rule newly instituted and enforced by both respondent companies is disallowed, except as above noted in the case of the consumers of the Easton Gas Works served on prepayment meters, and without prejudice to the right of any consumer, who having demonstrated by his prompt payment for a reasonable period his financial responsibility, to petition for exemption from the operation of the rule.

The question raised as to the right of the Easton Gas Works to exercise a franchise in Phillipsburg we have reserved for discussion at this place.

Even though doubt were cast upon the legal right of the Easton Gas Works to exercise said franchise, the remedy would not seem to lie in this Board. Either *quo warranto* proceedings should be instituted to test the franchise, or the company might be forced, if it was prevented from exercising the franchise, to establish its legality affirmatively. There is evidently no connection between the reasonableness of a rule imposed by the company on its consumers, and the company's rightful enjoyment and exercise of a particular franchise.

As regards the franchise in question the following appears to be the case:

(1) The Easton Gas Company was originally chartered by Pennsylvania in 1850.

(2) By special act of the New Jersey Legislature (Chapter CXLV, Laws of 1854), the company was authorized to supply gas light in Phillipsburg, and to enter into contracts in relation thereto. The entire act is as follows:

"BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the Easton Gas Company, incorporated by an act of the Legislature of the State of Pennsylvania, approved the fourteenth day of March, one thousand eight hundred and fifty, be and they are hereby authorized to supply with gas light, such inhabitant or inhabitants of the village of Phillipsburg, in the county of Warren, or companies exercising their corporate powers in said village, as may desire a supply of the same; and to enter into and execute contracts, agreements, or covenants in relation to the authority hereby granted, and the said Easton Gas Company in all courts of law in this State shall be deemed and taken to be an existing corporation of this State, for the purposes aforesaid, and for the purpose of enforcing the performance of such contracts, agreements and covenants as shall be made in pursuance of the provision of this section, and for no other purposes whatever."

(3) On August 8th, 1903, the Easton Gas Company describing itself in the agreement of consolidation and merger as a corporation incorporated under the laws of Pennsylvania, and reciting that it had obtained certain rights in New Jersey, joined with four other corporations incorporated under the laws of Pennsylvania, and with them merged its capital stock, property and franchises, and formed *The Easton Gas Light Company*.

(4) In June, 1910, the Easton Gas Light Company, describing itself in the agreement for the merger and consolidation as "a corporation of the State of Pennsylvania," joined with the Easton Fuel Gas Company, and the Easton Power Company, both of them Pennsylvania corporations, and merged and consolidated into a company described as

to possess "all the rights, privileges and franchises hereby vested in each of the said corporations," and styled *"The Easton Gas and Electric Company."*

(5) The Easton Gas and Electric Company in January, 1912, changed its name to *"Easton Gas Works,"* one of the respondents herein.

Whether the original franchise to operate in Phillipsburg was properly and lawfully included in the first and second mergers, and, in consequence, vests now in *"Easton Gas Works"* is a matter upon which no conclusive evidence has been presented to this Board. The Board contents itself therefore in this proceeding with simply spreading on the record the foregoing abstract of the transfer of the franchise to operate in Phillipsburg.

The respondent, Easton Gas Works, is requested to notify this Board, within two weeks from the date hereof, whether it will modify the rule governing the advance deposit in the case of new subscribers served on prepayment meters so as to conform to the finding relating thereto set forth in this report..

Dated February 20th, 1914.

No. 168.

IN THE MATTER OF THE APPLICATION OF AMERICAN MALT CORPORATION AND AMERICAN MALTING COMPANY FOR APPROVAL OF AGREEMENT OF MERGER AND CONSOLIDATION.

Since this Board is required, in considering this application, to pass upon the question of the fairness of the plan to all parties interested, and should be able to find affirmatively that the proposed scheme is fair and equitable, and in all probability the best obtainable for all concerned, the burden rests on the petitioners to establish these things.

It may be that the plan proposed is the best that can be devised. It is not, however, supported by proof.

The Board is unable to conclude that the property, which the resulting corporation is to receive, is "reasonably worth in money at a fair bona fide valuation" the sum of $15,000,000 for which amount stock is to issue.

The application is denied.

Frederic J. Faulks (of Lindabury, Depue & Faulks), with whom was *Silas W. Howland*, of the New York Bar, for petitioners.

Samuel H. Ordway, of the New York Bar, for objectors.

Application was made by the American Malt Corporation and the American Malting Company, both organized under the general corporation act of the State of New Jersey, for the approval in writing of this Board, of a certain agreement of merger and consolidation, dated July 23d, 1913, duly entered into between the said corporations.

The petition was filed September 16th, 1913. Objection was filed by Samuel H. Ordway, for himself and another stockholder, on September 27th, 1913. Later objection was made by another stockholder.

Hearings were held on September 30th, October 10th, 1913, and January 6th, 1914.

The statute (Chapter 19, Laws of 1913), making the written approval of this Board a prerequisite to any merger of corporations is silent as to the rule or rules which should govern the Board in granting or withholding approval in such cases. No certain inference can be drawn from the silence of the statute in this particular, as compared with the express direction of the Public Utility Act (Ch. 195, P. L. 1911), regarding the Board's approval of proposed security issues by public utilities. From the fact, however, that Chapter 19 of the Laws of 1913 was

passed at or about the same time as certain other statutes, notably Chapters 13, 14, 15, 16, 17 and 18, which aim at certain common purposes of corporate regulations, it might perhaps be inferred that the Board's action upon mergers submitted for its approval should be in consonance with the public policy indicated in this group of statutes. In general, therefore, the Board is of opinion that, inasmuch as formal approval by a State tribunal is now, of necessity, a requirement in the case of every merger, the company resulting from such merger may properly be required to show at the time of merger, (1) assets behind its securities in amount sufficient to conform with the requirements imposed by the State upon companies newly incorporating under its laws; (2) that such a merger must not by any of its terms subject any security holder in any of the consolidating or merging companies to an unfair or inequitable condition or arrangement; (3) that in the carrying out of such merger it must be affirmatively shown that each and every statutory requirement applicable in the premises has been complied with.

Has the American Malt Corporation shown that, upon approval of this agreement for merger and consolidation, it will have assets commensurate with its capital stock of fifteen million dollars?

Admittedly, the American Malt Corporation at present has no property or assets (omitting a minor item of some $41,000) except the shares of stock in the American Malting Company. Of these shares the American Malt Corporation owns one hundred and forty-two thousand six hundred and forty-five shares of the preferred stock and one hundred and thirty thousand eight hundred and twenty-four shares of the common stock. Its holdings amount to over 98 per cent. of the total outstanding capital stock of the operating company. We may therefore closely ap-

proximate the value of the assets of the American Malt Corporation by finding the value of the net assets of the American Malting Company.

To ascertain the latter item we obtain no reliable index from the par value of the American Malting Company's securities. Counsel for the petitioners admit that originally it was "grossly over capitalized." (Record, Jan. 6, 1914, p. 37.) Two of the petitioner's witnesses, Messrs. Vuhlman and Sohngen, admitted that, when they sold their individual plants to the American Malting Company they each obtained approximately two and one-half times the amount at which they carried said plants on their books. (Record, Jan. 6, 1914, pp. 32-33.) Moreover the greater part of the purchase price was paid in cash, not in securities of the American Malting Company. Such stock of the latter corporation as was accepted in payment was taken voluntarily, and some sellers of individual plants "got everything in cash." (Record, Jan. 6, 1914, p. 33.) Mr. Vuhlman also testified that he never carried the good-will of his business as an asset on his books.

In the light of these facts alone the entry on the books of the American Malting Company of "Property, Plant and Good-will, $27,589,155.88," cannot be taken conclusively to indicate assets of corresponding value.

The company submitted evidence going to show that the aggregate present value of its various plants amounts to $6,396,000. While this was *ex parte,* the Board, as at present advised, is not disposed to challenge this valuation. If to this sum we add, from the balance sheet submitted as of April 30, 1913, the sum of the cash on hand, accounts and bills receivable, inventories, bonds purchased, mortgages held, securities held, special deposit for sinking fund, and unexpired insurance and taxes, the assets reach $12,674,000 approximately.

From this amount a deduction must be made of first mortgage bonds, accrued interest thereon, underlying mortgages assumed, accrued taxes due, accrued interest due on underlying mortgages, accounts and bills payable, and reserve account, all as of April 30, 1913, indicated by the balance sheet. These aggregate $3,436,000 approximately. Deducting this sum from the value of assets as above, we have a residue of approximately $9,234,000, indicating the net assets, except such intangibles, if any, as may be properly allowed.

Inasmuch as the capitalization of the American Malt Corporation is $15,000,000, it is evident that the sum of about $6,000,000—more exactly $5,762,000—must be shown to exist unless the Board is to approve of a merger resulting in a capitalization in excess of assets.

The petitioners have tried to establish that their intangible assets, particularly, but not exclusively, the good-will of the properties of the American Malting Company suffice to make up this amount.

At the hearing of January 6th, 1914, Mr. Vuhlman testified that the various concerns in the American Malting Company obtained a higher average price than most of their competitors. (Record, Jan. 6, 1914, p. 17.) He thinks it will run from 2 to 3 cents a bushel higher than that obtained by most of their competitors. There is no evidence, however, to show that the cost may not be greater per bushel than the cost of most of their competitors. He testified also to certain advantages obtained in the saving of cross freights, by reason of filling orders from malt houses conveniently located as regards consignees. He also testified as to the prestige enjoyed by the company's product. Allowing two or three cents per bushel on a yearly turnout of about 11,000,000 bushels, the witness thinks that a yearly profit of $275,000 or $300,000 would

represent the value of intangibles, consisting largely of good-will. Capitalizing this at 5 per cent., he testified that from $5,500,000 to $6,000,000 is a fair value for this asset.

Without denying that good will or other attested intangible assets may be, under certain circumstances, an asset properly to be capitalized, the Board is not convinced by the evidence presented, that the intangible assets are of anything like the magnitude claimed.

The reasons for doubting this claim are as follows:

First: The net profits which it is claimed have been earned of late years by the American Malting Company do not warrant the belief that the value of the total capital employed, tangible and intangible, is anywhere near the value of $15,000,000. Counsel for petitioners (Record, Jan. 6, 1914, p. 39) contends that under the present management from 1908 to 1913 the net earnings have averaged $621,544 per year. If from $275,000 to $300,000 is the annual net profit due to intangible assets, only the residue, $325,000 or $350,000 at the most, is traceable to tangible assets having, it is claimed, a value of over $9,000,000. This is less than four per cent. and not much over 3½ per cent. on capital which we are asked to believe is managed with such skill that its good-will is an asset of large magnitude. For the seven years of the previous management the net earnings averaged but $220,000 a year. This is the averment of counsel for the petitioners (Record, Jan. 6, 1914, p. 39), although the good-will is represented as having been practically continuous, and customers as having been satisfied and unwilling to leave this source of supply.

Moreover, while the result of a number of years is perhaps a fairer basis on which to estimate profits than showing of any one year, the net profits for the most recent year, ending August 31, 1913, were but $403,367.97.

If good-will and other intangibles are to account for

$300,000 of this sum, the tangible assets apparently yielded a profit of but little over one per cent. in this year.

The amounts expended in betterment and maintenance appear to be very moderate. They run as follows:

For year ending					Aug. 31, 1909,	$53,564.44
"	"	"	"	"	1910,	51,921.78
"	"	"	"	"	1911,	75,319.71
"	"	"	"	"	1912,	91,142.80
"	"	"	"	"	1913,	122,987.18

With the exception of this expenditure, it does not appear that it is customary to charge off an allowance for depreciation. (Record, Sept. 30, 1912, pp. 12, 13.)

The inference would seem to be warranted that the net profits as reported by the Auditor are presumably fully as great as any fair estimate thereof would warrant. And the meagre average rate of profit would imply that, with efficient management assumed, the reason is a lesser aggregate of capital assets than the $15,000,000 which the petitioners ask us impliedly to sanction in giving formal approval of this agreement of consolidation and merger.

Objection is made by several holders of preferred stock that the proposed division of stock between the holders of preferred and common stock is inequitable and unfair to the preferred stockholders. The objection is not specific, but alleges generally that the proposed plan is unfair to them.

Of the outstanding stock of the American Malting Company, the preferred stock represents about fifty-one per cent. or $14,440,000, as against $13,400,000 of common stock.

In the certificate of incorporation of the American Malting Company, it is provided:

"The preferred stock shall have a preference over the common stock in respect to dividends to the amount of seven (7) per centum per annum, which shall be cumulative, but no other preferences. That is to say, no dividends shall be paid in any year upon the common stock unless and until the preferred stock shall have received dividends at the rate of seven (7) per centum per annum from the time of the issue thereof. The preferred stock shall not be entitled to any dividend in excess of said seven (7) per centum per annum, but only the common stock shall be entitled to share in any further dividend which shall be declared or paid in any year."

Dividends upon the preferred stock have been very irregular. In no year has the full dividend been paid from earnings, so that there are now accumulated unpaid dividends on preferred stock amounting to approximately $12,000,000 or something over eighty per cent. of the par value thereof. No dividends have ever been paid on the common stock. The surplus applicable to the payment of accumulated dividends on the preferred stock, on dissolution, amounts to $2,141,884.49, or approximately fifteen per cent. of accumulated unpaid dividends.

The preferred stock enjoys no preference except as to dividends, and would, on dissolution, participate in the distribution of assets on equal terms with the common stock.

In the amended certificate of incorporation of the American Malt Corporation, it is provided:

"The holders of preferred stock shall be entitled to receive from the surplus of net profits arising from the business of the corporation, dividends at the rate of, but not exceeding four per cent. per annum from April 1, 1906, until October 1, 1906, and at the rate of, but not exceeding six per cent, per annum from and after October 1, 1906, payable annually, semi-annually or quarterly, as and when declared by the Board of Directors, the dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that if in any year a dividend at the rate aforesaid shall not have been paid, on the preferred stock, the deficiencies shall be payable before any dividends shall be paid or set apart for the common

stock. The holders of common stock shall be entitled to receive all moneys appropriated to dividends after the payments of dividends as aforesaid on the preferred stock. In the event of any liquidation or dissolution, or winding up, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full, the par amount of their shares and the unpaid dividends accrued thereon, before any amount can be paid on the common stock. After such payment to the holders of the preferred stock, the holders of the common stock shall be entitled to receive the remaining assets and funds in proportion to the shares held by them respectively."

It is evident that the primary purpose of those interested in the merging corporations is to secure control of the American Malting Company through the ownership of its stock by the Malt Corporation and then reorganize by consolidating the corporations and changing the amount of outstanding preferred stock and the amount of dividends to be paid upon it. The whole plan is to reduce the obligations imposed upon the present property by the terms on which the preferred stock is held. The amount of such stock is reduced from over $15,000,000 to $9,000,000, and the rate of dividends from seven to six per cent. In view of the value of the property owned and the earnings thereon, both objects are desirable. Both steps are in the direction of safer and sounder management.

But, in view of the objection offered by stockholders, it must appear that the proposed exchange of the stock of the resulting corporation on the basis of sixty-two per cent. of the holdings of preferred stock and forty-four per cent. of the holdings of common stock is fair and proper. Is such exchange equitable to the holders of the preferred stock, as well as to the holders of the common stock? The testimony shows that some stock of both classes was issued in exchange for property taken over at two and a half and three times actual value. (p. 32 *et seq.*, Rec. Jan. 6.) The objectors' stock was paid for in cash at par (p. 1, Rec.

Oct. 10.) What proportion of each class of stock represents cash or property taken at real value, and what proportion represents stock issued without consideration or without equivalent consideration, does not appear.

That the common stock has no present earning value is clear, and the prospect of future dividends is highly improbable. Unless the earnings increase considerably, it is doubtful if sufficient funds will be received to pay dividends on the preferred stock, and meet mortgage requirements and depreciation. The admitted purpose of reorganization is to endeavor to give the common stock some value and an opportunity, if possible, to enjoy dividends.

In view of the value of the property possessed and the financial history of the Malting Company, what is the present value of stock of each class? No attempt has been made to support the proposed plan of exchange on the theory that the issues of stock bear any relation to the cash or property exchanged therefor. No one seems to be aware how the percentages of present holdings to be given each class of stockholders were determined. (P. 56, *et seq.*, Rec. Jan. 6.) It seems to have been an arbitrary allowance based upon the judgment of the managers of the proposed consolidation as to the utmost the holders of preferred stock would be likely to yield.

Since this Board is required to pass upon the question of the fairness of the plan to all parties interested, and should be able to find affirmatively that the proposed scheme is fair and equitable, and in all probability the best obtainable for all concerned, the burden rests upon the petitioners to establish these things. It may be that the plan proposed is the best that can be devised. It is not, however supported by proof. Facts and reasons establishing it as the most practicable, feasible and fair means of reorganization should be submitted. This Board and dissenting stock-

holders should not be asked to accept conjecture in place thereof.

Section 18 of the corporation act requires, *inter alia*, that "at no time shall the total amount of the preferred stock issued and outstanding exceed two-thirds of the capital stock paid for in cash or property." In view of the findings as to the value of the property taken, and in the absence of proof to the contrary, we think serious doubt exists as to whether the proposed issue of $9,000,000 of preferred stock would not violate this statutory requirement. Lack of proof makes it impossible to pass finally upon this question, and it is merely pointed out as a possible barrier to approval.

Chapter 15, Laws of 1913, being a supplement to the corporation act, provides:

"(49) 1. Any corporation formed under this act may purchase property, real and personal, and the stock of any corporation, necessary for its business, and issue stock to the amount of the value thereof in payment therefor, subject to the provisions hereinafter set forth, and the stock so issued shall be full paid stock, and not liable to any further call; and said corporation may also issue stock for the amount it actually pays for labor performed.

"*Provided*, That when property is purchased the purchasing corporation must receive in property or stock what the same is reasonably worth in money at a fair, bona fide valuation; *and provided, further*, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; *and provided, further*, that when stock is issued on the basis of the stock of any other corporation it may purchase, no stock shall be issued thereon for an amount greater than the sum it actually pays for such stock in cash or its equivalent; *and provided, further*, that the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business; and in all cases when stock is to be issued for property purchased, or for the stock of other corporations purchased, a statement in writing, signed by the directors of the purchasing company, or by a majority of them, shall be filed in the

office of the Secretary of State, showing what property has been purchased, and what stock of any other corporation has been purchased, and the amount actually paid therefor.

"2. That if any certificate made in pursuance of this act shall be false in any material representation, all the officers who signed the same, knowing it to be false, shall be guilty of misdemeanor, and the directors, officers and agents of the corporation, who wilfully participate in making it, shall be guilty of misdemeanor; *and provided, further*, that any corporation which shall purchase the stock of any other corporation, or any property, for the purpose of restraining trade or commerce, or acquiring a monopoly, and the directors thereof participating therein shall be guilty of a misdemeanor."

This act is one of the group above referred to, and is designed to prevent the issuance of stock except for value received and to an amount equal to the actual assets of such corporation.

The effect of the consolidation and merger of corporations is to organize a new corporation, clothed with the powers and privileges of the merging corporations, and subject to such limitations as are imposed by law. In passing upon the capitalization, etc., of the resulting corporation the same rules as apply to an entirely new corporation should be regarded.

Does the proposed issue of stock fall under the inhibition of Chapter 15?

The corporation may issue stock for the value of the property or stock purchased by it. If the stock of the American Malting Company is to be exchanged, what is its value? It can have no greater value than is represented by the value of the physical property owned by it, plus the value of intangibles, if any. In this case the property is worth less than the proposed capitalization by some millions of dollars. The preferred stock has earned some dividends, but not sufficient to give it a market value equivalent to its par.

The common stock has no value as a dividend payer. The

fair value, therefore, of the property to be acquired for which stock is to be issued by the resulting corporation, is, as stated in the first section of this report, and is much less than the amount of stock proposed to be issued. We find ourselves unable to conclude that the property which the resulting corporation is to receive is "reasonably worth in money at a fair, bona fide valuation," the sum of $15,000,000, for which amount stock is to issue.

In connection with this application the suggestion occurs that the property of the Malting Company is not cognate in character and use to the property used or contemplated to be used by the Malt Corporation, in the conduct of its own proper business. No attempt was made to disguise the fact that, although the certificates of incorporation of both corporations confer power to manufacture, treat and sell malt, etc., the Malting Company is an operating company and the Malt Corporation is a holding company, not having ever engaged in manufacturing and selling any malt products (p. 54, *et seq.*, Rec. 6). It was organized primarily to hold the stock of the Malting Company, and has never exercised any of its powers, except to hold such stock. In the amended certificate of the Malt Corporation there is express provision limiting the holding of stock to that of the Malting Company. If the business done by each corporation is taken as indicative of the purposes for which it was formed, there is nothing in the business of the operating Malting Company and the holding Malt Corporation which can be said to be in the slightest degree similar or cognate in character, within the meaning of the act. In view of the conclusions on other phases of the case, a determination of this question is unnecessary. We think it unnecessary, also, to pass upon other questions that are suggested as reasons for withholding approval.

For the reasons above stated, the Board finds and deter-

mines that it cannot approve the merger and consolidation in the form proposed. The application will, therefore, be denied and the petition dismissed. An order will enter accordingly.

Dated, February 27th, 1914.

ORDER.

This petition having been duly heard and submitted, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered that the petition in this proceeding be and it is HEREBY DISMISSED.

Dated, February 27th, 1914.

An appeal was taken from this finding. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT.

AMERICAN MALT CORPORATION AND ANOTHER,

vs.

PUBLIC UTILITIES COMMISSIONERS.

Argued May 4th, 1914. Decided May , 1914.

Before SWAYZE, *J.*, by consent.

Elihu Root, Jr., and *Silas W. Howland*, (of the New York Bar), and *Frederic J. Faulks*, for prosecutors.

Frank H. Sommer, for the Commissioners.

Samuel H. Ordway, pro se.

PER CURIAM.

In order to expedite the proposed appeal, I will indicate succinctly the views I hold. The case was argued as if it involved the constitutionality

of chapter 19 of the laws of 1913, which requires that corporations intending to merge shall first secure the approval in writing of the Board of Public Utility Commissioners. It is said that this involves a delegation of legislative power. No statute is pointed to which becomes a law or ceases to be a law as the result of any act of the Commissioners. There is none. It seems to be thought that the Commissioners would legislate if they adopted any rules for their own guidance in granting or withholding their approval of a proposed merger of corporations; but such rules would have no binding force even upon the Commissioners themselves since they could rescind them at pleasure; they lack all semblance of legislation and surely could not render unconstitutional an act of the Legislature. The requirement of approval by the Commissioners is no more than the requirement that some judicial or clerical officer shall pass upon the regularity of incorporation papers, or the requirement of the act of the Secretary of State in *Iowa Life Ins. Co.* vs. *Eastern Mut. Life Ins. Co., 64 Law 340*, or the requirement of certificates from the Commissioner of Banks and Insurance under our present statutes. If it were necessary to sustain the constitutionality of the act, it would be quite natural to hold that the intent of the Legislature was no more than to require an ascertainment by the Commissioners of the fact that the proposed merger was of a character authorized by law. It is not, however, necessary to go so far as to limit in this way the powers of the Commissioners. The real question is whether the Legislature itself had the right to impose as a condition of merger, the approval of the Commissioners. To state the question is to answer it. The right to merge is purely statutory and there is no constitutional objection to the Legislature fixing such terms as it chooses, including, since that is its pleasure, the written consent of the Commissioners. The Legislature is under no compulsion to authorize a merger, and it may impose even fanciful conditions; it might, for instance, prescribe that the approval should be written in red ink. This power of the Legislature is not lessened by the fact that section 109, as originally enacted, antedates chapter 19 of the laws of 1913, nor by the fact that chapter 17 of the laws of 1913, amending section 109, is contemporaneous with chapter 19, requiring the approval of the Commissioners. It so happens that the provisions are in distinct acts, but one is an amendment of, and the other a supplement to, the Corporation Act; they must be read together as part of the same enactment with the section authorizing a merger. It is as if section 104 (C. S. 1659) read: "Upon obtaining the written approval of the Public Utility Commissioners, any two or more corporations may merge or consolidate."

No doubt the action of the Board must be reasonable and not arbitrary, but that is because we will not attribute to the Legislature an intent to exercise or permit the exercise of arbitrary power. The action

of the Commissioners must have a foundation in reason. It has such foundation when it is based upon the requirements of the Corporation Act, or upon settled legal principles, and not upon the mere whim of the Commissioners.

I doubt myself the view of the Board that the two corporations concerned were not such as could properly merge. The only difference between the kinds of business authorized to be carried on is that the Malt Corporation is authorized by its charter to buy the stock of the Malting Company. The merger act does not require that the corporations to be merged carry on the same kind of business; it is enough that the business is of similar nature. How the mere added power to acquire stock can make the two kinds of business dissimilar, I do not see. It is not the business in fact carried on but the business for which the two are organized that determines, under section 104, the right to merge. It was not the fact that one corporation was a holding company that condemned the merger in *Colgate* vs. *United States Leather Co., 75 Equity 229.* But even this difference between the Malting Company and the Malt Corporation is apparent rather than real; since section 49 (C. S. 1630) authorized any corporation organized under the act to purchase stock of other companies, and the Legislature not only reënacted this in 1913 (chapter 15) but by express provision recognized the right of one corporation to buy stock of another corporation owning property "cognate in character and use to the property used or contemplated to be used by the purchasing corporation." The expression seems to me broader than that contained in section 104; for corporations may be dissimilar in the kind of business they are organized to carry on, and may yet own property cognate in character and use to that used by the purchasing corporation, and *a fortiori* to that contemplated to be used. With this broad provision in the act of 1913, the Malting Company had by statute law the same powers as, perhaps more extensive than, the Malt Corporation had by its certificate of organization. It is no answer to say that the Malting Company could not vote on its own stock; neither could the Malt Corporation; but each could acquire and vote on the stock of the other. Nor is it an answer to say that in fact the Malt Corporation was only a holding company; the property contemplated to be used by it was the identical property actually owned and used by the Malting Company; in fact, one object of the merger was to do away with the holding company. If the action of the Commissioners rested alone on the ground that the business was not similar under the act of 1896, or cognate in character under the act of 1913, I should have difficulty in sustaining it.

I think it may safely be sustained on two grounds: (1) that the scheme of merger involves the issue of stock for less than its par value; (2) it is unfair to the preferred stockholders of the Malting Company.

In re Merger American Malt Corporation et al.

(1) Although the Malt Corporation owns most of the stock of the Malting Company, and as to that no material change is proposed, it will nevertheless be necessary to issue some stock of the Malt Corporation for some stock of the Malting Company, which is worth less than the par value of the stock proposed to be issued therefor. I am not impressed by the argument drawn from the broad language of section 109. If that argument is to be pressed to its logical result, the merging corporations may determine for themselves how much stock they will issue and how small a payment they will accept therefor; two corporations may accomplish, therefore, by merger what neither could do alone and issue stock for property worth less than its par value. It needs no argument to show that the necessary result would be to do away with the provisions of the act requiring money or money's worth. Such cannot have been the legislative intent. I think section 109 must be read in connection with the rest of the act and that money or money's worth is required for stock issued upon a merger as well as in other cases.

(2) I am persuaded also that the proposed merger is unfair to the preferred stockholders of the Malting Company for the reasons stated in Mr. Ordway's brief. It is said that the objection on this score is the proper subject for action by the Court of Chancery, and that equity powers cannot be conferred upon the Commissioners. I do not regard the case as one where judicial power is conferred upon an administrative body. The Legislature has seen fit to require the approval of the Commissioners as a condition precedent to a merger. I see no reason why their refusal to approve may not properly be based upon the fact that the scheme is such, that upon recourse to a proper tribunal, it would be enjoined. Surely it is not for this court to say that their refusal to approve in such a case should be set aside. Their approval would not prevent action by the Court of Chancery. In short, the action of the Commissioners is no adjudication of the right of the parties, but a mere step in administrative procedure which is subject to control by the courts.

The result is an affirmance of the order with costs.

An appeal was taken to the Court of Errors and Appeals from the above decision. The Court of Errors and Appeals affirmed the decision of the Supreme Court. In so doing, the Court of Errors and Appeals repeated the Supreme Court's decision and stated furthermore:

"Our examination of this case has led us to the conclusion that it was rightly decided in the court below.

We do not, however, wish to be understood that had we differed from

the Supreme Court and reached the conclusion that the Board of Public Utility Commissioners had not exercised a sound, but an arbitrary and unreasonable, discretion in disapproving of the merger of these corporations, that our decision would be different. The question, whether or not the Supreme Court has the power to review and reverse the determination of such board in the matter of approving or disapproving the merger of corporations under chapter 19 of the laws of 1913, not having been raised or argued, is not decided.

"The judgment of the court below will be affirmed for the reasons stated in its per curiam, except as to the observation to the effect that the action of the board in these matters must be reasonable and not arbitrary. Upon that question we express no opinion."

No. 169.

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE RAILWAY COMPANY FOR APPROVAL OF A MORTGAGE COVERING 35 CARS AND THE ISSUANCE OF BONDS IN THE SUM OF $200,000 THEREUNDER.

The petitioner proposes to borrow money to buy cars, to secure payment thereof by the purchase-money mortgage on said cars, and to issue bonds under the mortgage.

Approval of the mortgage and proposed issue of bonds is asked for.

A purchase-money mortgage possesses elements of advantage to those entitled to its security which do not attach to a mortgage not given for purchase money.

Before granting its approval of the proposed mortgage the Board holds that it should make certain that the proposed mortgage is a purchase-money mortgage.

The circumstances are not such that the mortgage can be said to be a purchase-money mortgage.

The application is denied.

L. D. H. Gilmour, for the company.

Application is made by Public Service Railway Company for approval by this Board of a mortgage proposed to be

made by the company to Fidelity Trust Company covering some thirty-five cars, and of the issuance thereunder of bonds for two hundred thousand dollars ($200,000) to be denominated Car Trust Equipment Bonds, Series "D"; the bonds to be in denomination of one thousand dollars ($1,000) each; to bear date December 1st, 1913, twenty thereof to be payable in each year commencing December 1st, 1914, and to bear interest at five per cent. per annum, payable semi-annually; both principal and interest to be payable in gold coin free and clear of all taxes whatsoever, national, State or municipal.

The resolution of the Board of Directors determining to issue the bonds provides that they shall be secured by "*a purchase-money* mortgage to be made by this company to the Fidelity Trust Company, as Trustee, upon thirty-five (35) street railway cars *about to be purchased and acquired by this company. Said bonds and said mortgage are to recite that the same are given to secure part of said purchase money.*"

In accordance with this resolution the proposed form of bond recites that "the said bonds are given to secure the payment of a part of the *purchase money* for thirty-five (35) certain cars *purchased* by the said Public Service Railway Company."

The proposed form of mortgage recites that the company in order to further its business and to extend its operation has found it necessary to acquire thirty-five additional street railway cars, and to that end has made and entered into certain contracts and agreements with divers persons to build, equip and furnish to it said additional thirty-five new cars, and that in order to raise and secure the purchase money for said cars it is necessary to raise and borrow the same and to secure the payment thereof by a *purchase-money mortgage* of and upon the said cars and equipment.

The mortgage purports to grant "thirty-five (35) street railway cars *purchased* by the said company *on the day of the date hereof;* the purchase money whereof is advanced and paid in large measure upon the above recited bonds, to secure which the same and these presents are given and intended."

The mortgage further provides that the "said bonds shall by the said Trustee be *delivered only in payment of said cars* so to be delivered to said company, and shall only be delivered upon the receipt by said company of said cars. A written statement or receipt signed by any officer of said company, acknowledging receipt by and delivery to said company of said cars at the date therein named, shall be good, conclusive evidence to said Trustee of the fact and date of the receipt of such cars by said company."

The affidavit attached to the mortgage recites that the true consideration of the mortgage "is to secure the sum of two hundred thousand dollars ($200,000) which is forthwith to be advanced for the purchase and acquisition of the said two hundred (200) bonds in said indenture of mortgage recited, the amount thereof being a portion of the *purchase money* for the thirty-five (35) cars therein named."

These several recitals indicate an intent to give to the mortgage the effect of a purchase-money mortgage. They constitute a representation by the company to the purchasers of the bonds that the payment thereof is secured by a purchase-money mortgage. Such a mortgage possesses distinct elements of advantage to those entitled to its security which do not attach to a mortgage not given for purchase money.

Such a mortgage is superior to all claims or liens impending over the mortgagor at the time of his acquirement of the legal title to the property mortgaged. It is, for in-

stance, superior to an encumbrance of the same property which the mortgagor may have attempted to create before he acquired legal title. So it is paramount to a mortgage theretofore given by the mortgagor which contains a general provision extending its operation to property which might later be acquired by the mortgagor. So, too, it is superior to the lien of a judgment that may previously have been recovered against the mortgagor and of a recognizance that may theretofore have been entered into by him.

To indicate this characteristic of the purchase-money mortgage, it suffices to cite four of the many cases in which it has been pointed out.

(1870) *United States* vs. *New Orleans R. R., 12 Wall. 362.*

(1880) *Clark* vs. *Butler, 32 N. J. E. 664.*

(1896) *Protection B. & L. Assn.* vs. *Knowles, 54 N. J. E. 519.*

(1897) *Daly* vs. *N. Y. & Greenwood Lake Rly. Co., 55 N. J. E. 595.*

57 *N. J. E. 347,* in *Clark* vs. *Butler,* the basis upon which this characteristic of the purchase-money mortgage rests was tersely stated as follows: "The justice of the doctrine * * * is obvious. No man should be permitted to acquire title to the property of another without first paying for it; nor should the creditors of a vendee be allowed to acquire against the vendor a more advantageous position than that held by the vendee."

Since the Board's approval of the proposed mortgage may well be taken as an approval of the recitals therein of existing facts, it would seem important that the Board, before granting its approval, should make certain that the proposed mortgage is a purchase-money mortgage, and that the representations made thereby and by the bonds to that effect accord with the fact.

This, then, requires a determination of the circumstances under which a mortgage constitutes a purchase-money mortgage.

A study of the cases cited by counsel for the applicant, and an independent examination of the authorities, leads the Board to the conclusion that a mortgage cannot have the characteristics of a purchase-money mortgage except as it secures payment of purchase money for the property mortgaged and except as the vesting of the legal title to the property in the mortgagee and the delivery of the mortgage to secure the purchase money are contemporaneous, in the sense of constituting part of one continuous transaction.

The Board recognizes, of course, that with these conditions present the mortgage is a purchase-money mortgage irrespective of whether it is executed to the vendor or to a third person who advances the purchase money.

(1880) *Wallace* vs. *Silsby, 42 N. J. L. 1, 9.*

(1880) *Clark* vs. *Butler, 32 N. J. E. 664.*

(1887) *Bradley* vs. *Bryan, 43, N. J. E. 396.*

(1896) *Hopler* vs. *Cutler, 34 Atl. 746.*

(1896) *N. J. B. L. & I. Co.* vs. *Bachelor, 54 N. J. E. 600.*

(1899) *McShane Mfg. Co.* vs. *Kolb, 59 N. J. E. 146.*

The record before the Board makes it clear that the various recitals in the resolution of the Board of Directors of the company, the proposed mortgage and proposed bonds have no foundation of fact to rest upon.

It further makes it clear that the conditions which we have concluded must exist in order that a mortgage may be a purchase-money mortgage are not present. The facts are these. The thirty-five (35) cars proposed to be subjected to the mortgage are *now* the property of the company. They were not purchased by the company.

The motor equipment of the cars was purchased by the

company from the Cincinnati Car Company. The cars, however, were constructed by the company in its own shops by men engaged in general repair work and through use of the same plant and equipment which the company maintains for the repair of its cars.

The cost of material, work and labor involved in such construction has been met by the company out of available funds. It is now indebted to no one on account thereof. The purpose of the proposed mortgage and issue of bonds thereunder is to capitalize the expenditures so made and in such capitalization to create a debt which does not now exist. Clearly a mortgage cannot under such circumstances be said to be a purchase-money mortgage, nor have the effect of such a mortgage. Some other method of capitalizing the expenditures made in the construction of these cars must therefore be devised by the company. The application must therefore be denied.

To avoid misunderstanding, the Board adds the following comment: Investigation shows that the company has, through the construction of the cars in its own shops effected a material saving. Investigation further shows that the cars in question considerably exceed in value the sum of two hundred thousand dollars. This sum the company is entitled to capitalize.

The objections of the Board, therefore, go only to the plan proposed, including as it does a purchase-money mortgage when the prerequisites of such a mortgage do not exist, and the inclusion in the mortgage and the bonds issued thereunder of recitals which are at variance with the facts.

Dated, March 3d, 1914.

No. 170.

IN THE MATTER OF APPLICATIONS BY PUBLIC SERVICE RAILWAY COMPANY AND PUBLIC SERVICE NEWARK TERMINAL RAILWAY COMPANY FOR APPROVAL OF CERTAIN ORDINANCES ADOPTED BY THE BOARD OF STREET AND WATER COMMISSIONERS OF THE CITY OF NEWARK, JULY AND AUGUST, 1913, GRANTING CONSENT AND PERMISSION, ETC., AND RELATING TO THE USE OF CERTAIN PUBLIC HIGHWAYS, ETC.

The Board concludes that the several grants made by the ordinances of the City of Newark under consideration are necessary and proper for the public convenience; that the public interest is thereby properly conserved and that the ordinances should be approved.

The problem is that of a metropolitan district. The lines operating wholly within the city or partly within the city and partly beyond its limits carried an aggregate of 125,000,000 fare passengers in 1911. The Board holds that the ordinances, and possible operation under them, provide for relief in the congested area, and, taken in connection with ordinances already approved, for the extension of lines through relatively undeveloped sections.

Objections cited in a preliminary report are met by a revised agreement.

L. D. H. Gilmour, for the company.

These applications bring before the Board certain ordinances adopted by the Board of Street and Water Commissioners of the City of Newark. The purpose of the ordinances is to admit of putting into effect a comprehensive plan formulated by the companies for the improvement of the street railway transportation facilities of the city.

In so far as the ordinances relate to Public Service Railway Company they are laid before the Board in accordance with P. L. 1911, Chapter 195, Section 24.

In so far as they relate to Public Service Newark Ter-

minal Railway Company they are brought before the Board in pursuance to P. L. 1913, Chapter 82.

Favorable action by the Board upon these applications requires primarily that its consideration of the several ordinances shall result in a determination that the grants made thereby are necessary and proper for the public convenience and that in such grants the public interest is properly conserved.

The Board must, therefore, consider present conditions and the changes in these conditions which the ordinances require, and which they will admit.

In its consideration of these ordinances the Board has had the benefit not only of the results of studies made by its engineer, but also of those made by engineers on behalf of the Board of Street and Water Commissioners, of the City Plan Commission, and of the companies. It has also had the benefit of independent studies made by Delos F. Wilcox. It has also had the aid of the extended discussion of the problem by members of the municipal board and by residents of the city at the hearings which have been held. This material now forms part of the records of the Board. It has supplemented these studies by putting at least one of the suggestions made to the test of experiment.

Careful consideration of all of this material, and of the results of this experiment, lead the Board to the conclusion that the several grants made by the ordinances submitted are necessary and proper for the public convenience; that the public interest is thereby properly conserved and that the ordinances should be approved. The considerations which have led the Board to these conclusions may be briefly stated. Newark had in 1910 a population approximating 347,000. The problem to which the ordinances submitted relate does not involve that of providing safe, adequate and proper street railway transportation facilities for the residents of the city alone.

The city is the traffic centre of a metropolitan area which in 1910 had a population of 790,000. Lines of street railway radiate from a common centre in the city into and throughout this area. Of the twenty-one lines of cars operated within the limits of the city, eight are local and thirteen are suburban or interurban lines.

The problem, therefore, is the problem of this metropolitan district. The lines operating wholly within the city or partly within the city and partly beyond its limits carried an aggregate of 125,000,000 "fare passengers" in 1911. In great part this traffic was concentrated in a comparatively restricted area about the intersection of Broad and Market streets in the city, in which area the business activities of the city are in the main centralized.

Commenting on this feature of the concentration of the traffic in a restricted area, Delos F. Wilcox said:

"By reason of the plan upon which the street system of Newark has been laid out, traffic exhibits a natural tendency to converge toward the 'Four Corners.' * * * In 1911 the car lines operating entirely within the City of Newark, or partly within and partly without the city, carried a total of 125,000,000 fare passengers. The lines carrying 52 per cent. of this entire number passed through that portion of Market street between Broad street and the Pennsylvania station. Similarly, of a total of 585 cars operated in Newark during 1911, 52 per cent. were used on lines traversing this portion of Market street. Broad street, south of Market street, is not very much congested, but north of Market street, especially in the section from Central avenue to Bridge street, Broad street carries as many cars and passengers as the most congested portion of Market street; indeed, in 1911, 57 per cent. of the fare passengers on Newark lines rode on lines passing through Broad street, between Bridge street and Central avenue and of the entire number of cars operated in the city during that year, 51 per cent. were used on these lines. Putting the most congested section of Market street and the most congested section of Broad street together, we should have more than the entire number of passengers and cars in the city. This is accounted for by the fact that two important lines—Bloomfield and Paterson—are operated through the congested section of both streets. Eliminating the duplication, we find that 95 per cent. of the fare pas-

sengers and 91 per cent. of the cars in 1911 were on lines passing through one or the other of these two congested sections."

Philander Betts, this Board's Chief Inspector, commenting upon this phase of the problem, said:

"Newark is built on the radiating plan, and although, apparently, the great majority of street railway patrons start from the centre on their way home at night, this centre is not a point but an area with its southern limit (on Broad street) near the City Hall; its eastern limit (on Market street) near the Pennsylvania depot; its northern limit (on Broad street) near the Lackawanna depot, and its western limit (on Market street) not far from the Court House. In other words, large numbers of persons must be picked up within half a mile south of the centre, carried north and then sent west or still further north; many persons start from points within a half mile north of the centre, proceed south, thence further south or go to the westward; passengers from the east go in all directions after reaching the center.

"The congestion due to demand for service is therefore confined to a definite small area generally described as above."

The concentration of traffic in this area has resulted in a condition of congestion inconsistent with "safe, adequate and proper service."

The two tables included in the report made by the City Plan Commission are of interest in this connection, and are here reproduced.

Cars Scheduled to Cross Broad and Market Streets, in Afternoon Rush Period:

Time	East	West	North	South	Total
4.45 to 5.45	187	172	74	75	508
5.00 to 6.00	196	188	80	81	545
5.15 to 6.15	190	199	84	89	562
5.30 to 6.30	175	195	85	92	547
5.45 to 6.45	150	173	87	92	502
6.00 to 7.00	123	148	85	85	441

Cars Leaving Bank Street Loop and Entering Broad Street, one Block from Market Street.

4.45 to 5.45,	52
5.00 to 6.00,	57
5.15 to 6.15,	61
5.30 to 6.30,	53
5.45 to 6.45,	45
6.00 to 7.00,	39

The resulting condition of congestion is graphically described by F. Van Z. Lane in his report to Messrs. E. P. Goodrich and G. E. Ford, the experts of the City Plan Commission. While criticising operating conditions on Market street, he said:

"When it is considered that Market street is at the present time and will be, for some time to come, the only highway through which east and west bound railroad traffic can pass the heart of the city; that under present methods of operation this street is now operated up to its capacity, and that the capacity for railroad service of all of the several thoroughfares directly or indirectly feeding into it is dependent on the capacity of Market street, it may be realized that the situation is very serious and is one that demands immediate attention."

Again, he said:

"Many figures might be advanced showing the rapid growth of passenger and car traffic on Market street and that this growth is bound to continue, demonstrating without argument the necessity for immediate relief. 'Seeing is believing,' however, and one glance is worth a ream of paper description. A walk through Market street any rush-hour evening will show a street full of cars from one end to the other, going at no better rate of speed than a walk, with as many people standing as seated and large building operations going on which will soon add passengers for the already overtaxed cars. From 5:45 P. M. to 6:45 P. M. the average number of passengers standing in westbound cars operating out of Market street is 37, and more to be picked up before any get off. (In arriving at this figure, open cars have been reduced to closed car capacity. Open cars seat half as many again as closed cars and are operated only a small part of the year, so it is fair to figure on a closed car basis.) Thus it will be seen that the average

rush-hour load carried on Market street cars is 77 passengers, which is very close to the full carrying capacity of these cars, it being estimated at about 90 passengers. It must be realized, too, that June is the lightest time of the year for rush hour travel. * * * This fact, together with the one previously stated, that no more cars can be operated through Market street than is being done under present conditions, should convince even the most skeptical that it is not only absolutely necessary * * * that improved conditions should obtain at once with the present facilities, but that permanent relief should be immediately begun through other channels."

The serious nature of the conditions so pointed out becomes even more apparent when considered in the light of the fact that the capacity of the lines passing through this area of congestion measures the capacity of the entire system. Of the system, Harland Bartholemew, Assistant Engineer, in his report made for E. P. Goodrich to the City Plan Commission, said:

"The system is now used very nearly to its ultimate capacity, actually far beyond its seating capacity during the rush hour."

That this statement accords with the fact is demonstrated by a study of traffic tables. All who have considered the problem agree that the congestion is attributable to lack of adequate terminal or looping facilities at the centre of the city. At present there are but two loops, serving all non-crosstown cars; the one at Bank street and the other in Market street at the Pennsylvania station. All who have studied the problem also agree that permanent relief can only come through

"the creation of thoroughfares parallel to Broad street and to Market street, through the congested district."

The Board concludes, therefore, that there is a lack of safe, adequate and proper street railway service; and that the fundamental cause thereof is the concentration of the

traffic within a narrow area and consequent congestion; that such congestion is attributable in major part to the lack of adequate terminal or looping facilities and that permanent relief can only come through the creation and use in street railway service of thoroughfares parallel to Broad street and to Market street through the congested district.

The creating of parallel streets, and opening, by this means, the way to permanent relief, lies wholly within the power of the city. Over the exercise of this power the companies have no control, and this Board's power in this connection is confined to recommendation.

Dealing, then, with the situation as it now exists and as it will be affected by the ordinances submitted, the question which presents itself is: To what, if any, extent may operation under the pending ordinances be made to afford immediate, if but temporary, relief?

The construction under the ordinances of the Central avenue and Warren street connections from Warren street, north of Central avenue, east into Central avenue will provide added looping facilities in the congested area. The loop will be formed by tracks in Central avenue, Washington, Market, Bank and Warren streets. This loop might be employed in the tripper service of the Orange line.

The construction under the ordinances of the second track in High street from Springfield avenue north to Market street, with connections west into Springfield avenue, and the High and Warren street extension from the end of tracks on High street, south of Market street, north to Warren street, thence east into Warren street along same east to Washington street, with connection south into Washington street will afford further looping facilities.

The loop here will consist of tracks on High, Warren, Washington, Market streets and Springfield avenue. This loop might be used in the operation of tripper service for

the Springfield and South Orange lines. Other extensions and connections authorized by the ordinances would provide what may also be termed a loop consisting of tracks on Green, Mulberry, Front, Bridge and Broad streets.

This loop might be used by the Clinton Special, Elizabeth, Main, Trenton lines, and by the proposed Perth Amboy line; cars, coming north, could be operated through Green, Mulberry, Front, Bridge and Broad streets, returning south on Broad street.

Operation under the ordinances, over tracks constructed, and connections made, in Broad street, Park place, Centre, Mulberry and Market streets and the use of the loop in Market street at the Market street station will eliminate, "excepting only for unavoidable temporary necessity" the passing of cars from Broad street into Market street and from Market street into Broad street.

The contemporaneous "blanket agreement" entered into between the city and the companies as revised provides in terms for the permanent discontinuance of the use of the connecting curves at Market and Broad streets, "excepting only for unavoidable temporary necessity," when the connecting curves at Market and Mulberry streets authorized by the ordinances are installed.

It, therefore, appears that not only do the ordinances submitted provide needed additional terminal or looping facilities as above noted, but also definitely for the permanent discontinuance of the use, "except only for unavoidable temporary necessity," of the connecting curves at Market and Broad streets, which in the operation over them seriously impede traffic.

That by this means substantial, if but temporary, relief may be afforded does not admit of reasonable doubt. Other features of the ordinances give added assurance of immediate, if but temporary, relief.

The construction under the ordinances of the Park place and Centre street extensions from Central avenue across Broad street, east on Park place; and Centre street to Front street and Mulberry street will provide a direct crossing of Broad street at Central avenue. By this means part of the cars on the Central avenue line may be taken to the Pennsylvania station by way of Park place, Mulberry and Market streets. By this arrangement, too, part of the cars on the Bloomfield line may be taken to that station through Park place, Centre, Mulberry and Market streets. The cars on the Paterson line may also by this means be taken to that station following the operation of the Bloomfield cars just indicated from Broad street and Park place to the station. At the present time the Mulberry line extends from Ogden street and Fourth avenue to Miller street and Elizabeth avenue. The termini are "dead ends."

Ordinances submitted sanction the connecting of the northern end of this line with existing tracks on Bellville avenue by the construction of double tracks on Fourth avenue. They further grant permission to construct tracks on Hawthorne avenue from Elizabeth avenue westerly and to double track Miller street, Front street and two sections of Ogden street where at the present time single tracks are located. These ordinances hold out hope of the development of this line. Under them it will be possible to operate the line from the northerly part of the city through to the southwesterly sections. By this means a new trunk line may be created. There is at this time no connection between the Clifton and Mount Prospect avenue line across Bloomfield avenue. Because of this lack of connection between these two lines, a passenger on the Mount Prospect Avenue line destined for a point on the lines running east and west through the city south of Bloomfield avenue is required either to pay two fares or travel into the congested area in the city's centre.

The ordinances submitted will admit of the construction of connections at Mount Prospect avenue and Bloomfield avenue and at Clifton avenue and Bloomfield avenue, so providing a means for direct crosstown travel and obviating the necessity of choice between the payment of two fares and travel into the congested area. The use of these added terminal or looping facilities before referred to will, of course, require the re-routing of lines.

The matter of re-routing is of vital importance to the users of the lines. Their interests are, however, safeguarded by the blanket agreement as revised, which now provides "that no re-routing of any line of cars shall be made, nor shall any new lines be introduced and cars of such lines operated on tracks within the limits of the city, by the Railway Company until it has given the Board of Street and Water Commissioners notice, at least ten days in advance of the proposed re-routing or new installation."

This provision, in the event of disagreement between the city and the company, admits of negotiation, and in the event of failure of negotiation, of application by the city to this Board upon which the statute places the duty of requiring the provision of safe, adequate and proper service by the company.

In passing it should be noted that the municipal authorities in the adoption of these ordinances have not overlooked the fact that the relief to be afforded under them will not be permanent and that permanent relief can only come through the creation of parallel thoroughfares. The "blanket agreement" in terms conditions the grant for the two connecting curves at Market and Mulberry streets upon the undertaking by the Railway Company

"that if a new avenue * * * running approximately from Park place and Saybrook place to the Pennsylvania depot at Market street shall be opened and a grant to lay tracks in said avenue shall have been

given or tendered to the Railway Company, or its successors, upon the same franchise conditions as maintain on Park place and Center street, with proper connections to the then existing tracks in Market street at Pennsylvania Railroad station, the curve then connecting the southbound track on Mulberry street with the eastbound track on Market street shall be removed within nine months after such ordinance shall have become effective."

To this point the Board has considered the ordinances submitted only in so far as they might afford means of immediate relief in the congested area, unrelated to a proposed "terminal plan."

Certain of the ordinances submitted, however, provide for access to a proposed terminal building. Others provide means of re-routing lines in connection with the operation of the proposed terminal. The proposed terminal building is to be located on Park place some three blocks north of Market and Broad streets, opposite Military Park, and between Proctor's theatre and the building of the American Insurance Company. The site on which it is to be constructed is of irregular shape. It has a frontage of 180 feet on Park place; extends easterly to Mulberry street; is intersected by Pine street and has outlets to North Canal and East Park streets.

The structure proposed to be erected will be a three-level terminal. The concourse or main station will be on the street level from which passengers will ascend to an upper level, or will descend to a lower level, depending upon the lines which they desire to take. The sub-surface level will be devoted to the handling of cars which will enter the terminal through a subway from the west. Two tracks will be provided for unloading; three for loading; the cars turning a loop after discharging their passengers and before taking on a new load.

The subway leading to and from the structure will extend underneath Park place, the apex of Military Park, Broad

street, Cedar street and Halsey street, to a point on private property between Halsey and Washington streets. Here the cars will reach the surface and enter Washington street at grade, then proceed north and south.

The upper level will be reached from Mulberry street. At this street cars will leave the surface tracks and enter private property, ascending an incline to cross Pine street on an overhead bridge into the structure. At this point two unloading platforms will be located. After the cars discharge their passengers they will pass around a double loop at the Park place end of the structure and be diverted to four loading platforms. On both sub-surface and upper level the platforms will be separated, and each will have its separate stairway.

The plan for operation of the terminal contemplates its use for (1) interurban lines, all day; (2) part of the suburban service throughout the day, and (3) commission hour extra city or local service.

The Board has considered the several ordinances which are connected with the terminal plan, and has taken account of the criticisms contained in the various studies which have been placed before it. Its judgment coincides with that formed by the City Plan Commission that the proposed terminal plan, the execution of which is made possible by these ordinances, "will undoubtedly relieve traffic congestion to a marked degree." It is further satisfied that the grants of consent made by the ordinances for construction of approaches and means of access to the proposed terminal structure and of connections and extensions to admit of the re-routing of lines in carrying out of the plan of terminal operation are neeessary to the fiulfilment of the purpose of the plan.

The ordinance which provides for a subway from the west side of Halsey street under Cedar street, Broad street, Military Park, Park place, Boudinot street and Pine street

is vital to the plan. It authorizes the construction of the approach to the terminal from the west.

The ordinance which authorizes the Washington street connections from north and south into private right of way on the east side of Washington street provides connections which are essential for operation into the subway.

The ordinances which provide for Mulberry street connections from north and south into private right of way on the west side of Mulberry street and for an elevated structure crossing Pine street provide for the construction of the approach to the terminal from the east.

The tracks authorized by the ordinances to be laid, with their connections, on Park place and Centre street may be employed in diverting south-bound cars from Broad street, permitting them to enter the terminal from the Mulberry street approach.

The Clay street and Carlisle place connections and the Bridge and Front street connections, which are consented to, may be used in like manner. The tracks, with their connections authorized to be laid in Green and Lafayette streets, may be used in diverting cars from Broad street which come from the south.

The tracks with their connections authorized to be constructed in Warren and High streets will admit of the diversion of cars from Market street into Washington street and then into the terminal by means of the subway.

The degree to which the terminal plan will be effective in relieving congestion will depend in part upon the final determination as to the re-routing of lines.

As before noted, the interests of the city are in this particular conserved by the provision in the blanket agreement requiring the company to give notice of its intention to re-route.

Calculated as the ordinances heretofore considered are to provide to some extent immediate relief in the congested

area through the re-routing of cars made possible thereby, and to provide additional relief within that area in the not distant future through further re-routing in connection with the operation of the proposed terminal, the grants made by them are necessary and proper to the public convenience. Certain of the ordinances submitted are primarily unrelated to the problem of traffic congestion at the city's centre. These may now be considered.

Ordinances submitted providing for Bowery, Chapel and Ferry street connections will make it possible for cars running east on Ferry street to loop back at the intersection of Ferry with Bowery street, and will further make it possible to connect the Chapel street line with Ferry street for through operation. This will make possible the operation of the South Orange line around the Hamburg place, Avenue L and Magazine street loop by running part of the cars in one direction around the loop and part in another, instead of running them all around to Ferry street and back again.

The ordinance providing for the extension through Twelfth avenue from South Tenth street to South Twelfth street and from thence northerly to Central avenue with connections east and west into Central avenue, adds to existing facilities for handling traffic. The extension will, in the present, serve to save intending passengers a long walk to reach the lines as they now are, and in the future will provide a link in another north and south crosstown route.

The ordinance providing for the extension in Jackson street from Market street north to the center of the bridge over the Passaic river is a step towards providing a new entrance into the city from the neighboring towns in Hudson county. When completed, this extension will make possible the bringing of various lines south through Harri-

son, over the Jackson street bridge, and thence by way of East Market street into the centre of the city.

Certain other of the ordinances provide (1) for the extension of a wye in South Eighteenth street some fifty feet, allowing a temporary storage of two additional cars, so removing a cause of delay in the through movement of cars west-bound on the Clinton avenue line; (2) for a mere change in the location of a connection in the Roseville car barn; (3) for a connection into the East Market gas works which may be used in hauling out cinders to be used as railway ballast.

Further comment on these ordinances is unnecessary. The Board finds that the grants made by them are necessary and proper for the public convenience. Various objections to the ordinances have been urged before the Board. These remain to be briefly considered. It has been suggested that there is but little need for a passenger terminal, that such a terminal is of little use except for the accommodation of people who have to wait for trains which have an infrequent headway, for illustration trains on strictly interurban lines, and that the city has but one such line—the Elizabeth, New Brunswick and Trenton line.

A passenger terminal may, however, perform functions more important than the providing accommodations for waiting passengers. The proposed passenger terminal is designed not only to provide a waiting place for passengers intending to take the strictly interurban trains, but also to afford needed terminal and looping facilities upon private property in the congested area, to which cars may be diverted from existing local and suburban lines by re-routing as may hereafter be determined.

If the congestion in the city's centre is, as the Board has concluded, excessive, and the service by reason thereof unsafe, inadequate and improper, if the congestion is increasing with the growth of population resulting necessarily in

increasing inadequacy of the service; if the prime cause of the congestion is the lack of parallel streets and of adequate terminal or looping facilities; and if the creation of parallel streets is likely to be of slow development because of the expense involved and of other considerations, the provision of added terminal or looping facilities upon private property would seem to the Board to hold out the only hope of immediate relief in anything like a substantial degree.

It has also been suggested that the location of the terminal was improper, and that it should have been located immediately adjacent to the station of the Hudson and Manhattan Railroad. This objection is not without force.

Correlation of the local street railway system with that of the Hudson and Manhattan Railroad is, of course, desirable. Such correlation will, to some extent, be brought about when the contemplated extension of the street railway through Park place from Centre street to Broad street along the easterly side of Military Park is made.

It should be borne in mind in considering this phase of the matter that the present location of the station of the Hudson and Manhattan Railroad is not that originally contemplated; that the station structure is scarcely of the type that might be expected if it was contemplated that it should continue permanently; and that the location of the proposed passenger terminal possesses a manifest advantage in that it lends itself readily to the use of the bed of the Morris Canal (in the event of the abandonment of the canal as a waterway) for transportation purposes.

The canal and subsurface level of the proposed terminal may readily be connected and stational facilities provided for a high-speed line which would afford further rapid transit facilities for the city and the district to the northwest.

Objection has also been urged upon the ground of the inconvenience involved in landing passengers on the upper

level or the subsurface level with the necessity of ascending or descending to reach the streets or make transfers. That this feature involves some inconvenience is apparent. It is, however, unavoidable. In the preparation of the proposed plans, profiting by experience elsewhere, care has been taken to reduce this inconvenience to a minimum. The concourse or main station as planned will be at the street level. Neither the descent to the subsurface level nor the ascent to the upper level will exceed sixteen feet. The inconvenience of ascent or descent would seem to be less than the inconvenience of transfer during commission hours at present, when transfer requires in many instances the wedging of one's way through massed crowds; an inconvenience which, if present conditions continue unchanged, must continuously become more serious. The condition referred to will arise in comparatively few cases. Observation shows that passengers arriving in the city's centre have in the great majority of cases reached their destination. It will still be possible for any one desiring to transfer to do so at connecting and intersecting points before the terminal is reached. It is further probable that of those, comparatively few in number, who proceed to the terminal with a view to transfer there, a fair proportion will depart by cars leaving the terminal at the same level.

Objection was further made on the score that the use of the connecting curves authorized to be installed at Market and Mulberry streets would (1) involve an operation fraught with danger and (2) would create a new point of congestion.

Both of these objections have force. The advantages issuing out of the construction of these connecting curves, however, outweigh the objections. The element of danger introduced may be minimized by proper policing. The use of the connecting curves at Market and Broad streets adds seriously to the congestion at that point. This use is to be discontinued.

The installing of the curves at Market and Mulberry streets is not likely to result in a situation as acute as that now existing at Market and Broad streets since the number of cars turning these curves will be greatly less. Further than this, as before stated, these curves are to be removed when the proposed new avenue running from Park place and Saybrook place to the Market street station is opened and a grant to lay tracks therein, with proper connections, is made.

It has further been objected that under the ordinances the city's control over the operation of the street railways is lessened and that a diminution of transfer privileges is possible under them. Attention was called to these objections in a preliminary report made by the Board. These objections are now met by the "blanket agreement" as revised. This agreement as now framed provides that: "The operation of the street railways over the tracks, permission to construct which is granted in the ordinances herein recited, shall be subject to any power of future regulation which the city now has over existing lines." It likewise provides, as before indicated, for the giving of notice to the city of intention to re-route cars or install new lines.

It further provides that "in order that transfer privileges now enjoyed by the people of the City of Newark shall not be restricted by the operation of cars in said terminal, or by any re-routing of lines or the introduction of new lines, additional transfers shall be issued, when necessary, to preserve such privileges. It explicitly provides that transfers shall be given, if requested, on Washington street and Mulberry street from cars entering to cars leaving the terminal; that for the purpose of transfers the loops on the subway floor of the terminal and those on the second floor of the terminal, shall be deemed to be intersecting tracks and the tracks in the subway shall be deemed to intersect with surface tracks on Broad street and Park place, and

that the loops on the second floor of the terminal shall also be deemed to intersect with surface tracks on Broad street and Park place."

Objection was also interposed upon the ground that no provision is made in the ordinances for the settlement of the long pending controversy between the city and the company relating to the construction of the ordinance provisions requiring certain payments to be made annually by the company to the city, though provision is made for extending the operation of the ordinances in controversy over the extensions and connections authorized. This controversy relates neither to the service provided by the company, nor to the instrumentalities employed in service, nor to the rate of fare.

This Board conceives that it is its duty to approve ordinances adopted by the municipalities when it determines that the grants made thereby are necessary and proper for the public convenience, and that the provisions thereof properly conserve the public interest as to service and rates. In this conception of its duty this Board cannot withhold its approval of ordinances submitted to it on a ground unrelated to public convenience and necessity and to service and rates. If it finds that the grants made are necessary and proper for the public convenience and that the public interest as to service and rates are properly conserved, its duty of consideration ends and its approval must issue. It cannot make its action turn upon other considerations. The determination of other considerations rests wholly with the local authorities to whom application for the grants must in the first instance be made.

Objection was likewise made upon the ground that under the ordinances the cost of changes made necessary in the subway, through the construction of a subway by another company or by the city in the future, must be borne by such other company or by the city. The question here involved

is one the determination of which lies wholly with the municipality. The city has by the ordinances exercised its judgment and imposed the cost either upon itself or such other company. In this situation no question of service or of rates in connection with the grants made by the ordinances submitted is involved. For this reason, as hereinbefore pointed out, it does not lie within the province of the Board to consider this objection. If this Board were to consider the objection and were to reach a conclusion opposed to that reached by the municipal authorities in the enactment of these ordinances, it would not be warranted in withholding its approval.

Objection was also made for the reason that, while the grants of consent and permission made by the ordinances, other than that relating to the subway, are limited to a period of fifty years, the ordinance relating to the subway fixes a term of seventy-five years. To the exercise of the rights to which the ordinances, other than that concerning the subway, relate, the municipal consent and permission is requisite. In granting such consent and permission the municipality is bound by the provisions of the Limited Franchise Act. Under that act the grant by the municipality must be limited to a definite period of years not exceeding fifty.

In these ordinances the municipality fixed the period of its grants of consent at the maximum period of fifty years. Since these ordinances make grants of privileges it is requisite, under the Public Utility Act, that they be approved by this Board in order that they may be effective.

As before stated, the approval of this Board is dependent upon a finding by it that the grants are necessary and proper for the public convenience and that the public interests are by the ordinances properly conserved.

The Limited Franchise Act definitely imposes upon the municipal authorities the duty of fixing the term during

which the grant of consent made by them shall endure. In the performance of that duty discretion is vested in them, limited only by the fixing by the statute of the maximum period of fifty years.

This Board is of opinion that the duty and the power to fix the period of duration of the municipal consent is cast by the statute solely upon the municipal authorities; that in this respect they are the sole judges of the public interest, and that this Board is without authority to affect or disturb the action of the municipal body in the performance of such duty and the exercise of such power.

The right to construct the subway has a wholly different status. The grant of this right is made to the company directly by statute. (*P. L. 1913, Ch. 82.*) The municipal consent is not requisite to its exercise.

Hudson & M. T. & T. Co. vs. *Township Committee of Linden Township, 76 Atl. Rep. 445.*

The Limited Franchise Act and the limitations placed by that act upon municipal action are consequently not applicable. The municipalities have, it is true, power to prescribe "terms and conditions." The Hudson & Manhattan Tunnel and Terminal Company case before cited raises a grave question as to whether this power to impose "terms and conditions" is sufficiently comprehensive to entitle the municipality in anywise to limit the duration of this right granted to the company directly by the State. The city, nevertheless, in the ordinance relating to the subway has limited the period of the right to seventy-five years. To this the company has assented. The duty is imposed upon this Board to approve or disapprove the "terms and conditions" imposed by the municipality.

In this situation the Board would not be warranted in withholding its approval of this ordinance on the score that the limitation should have been fifty years rather than seventy-five years, and so identical with the limitation im-

posed by the other ordinances, particularly when, with respect to this ordinance, the right to impose any limitation of time is a matter of serious doubt. It was also urged that the ordinances should have been limited in their operation to an "indeterminte term" or during "good behavior." The Board has already pointed out its lack of control over the limitation of the duration of the grants. Aside from this, however, it would, for reasons already given, have been without the power of the municipal authorities so to limit the grants.

The city in the adoption of the ordinances, other than that relating to the subway, was, as already indicated, subject to the provisions of the Limited Franchise Act and obliged to prescribe a definite term of years not exceeding fifty, as the measure of its grants.

In its adoption of the ordinance relating to the subway the city, under the adjudication before referred to, was, as before noted, probably without power to limit to any extent the enjoyment by the terminal company of the right to construct the subway which the State had conferred upon it. Desirable as it may be to limit the enjoyment of special rights in public highways and places to an "indeterminate term" or "during good behavior," the municipality is, under the statutes as they now are, without power to impose such a limitation. Power to impose such a limitation must come through the enactment of new legislation making a change in the present general policy of the State to confine such rights to fixed terms of years, not exceeding a prescribed maximum.

Finally in connection with the suggestion that the investment in the proposed terminal may be over-capitalized, it may be noted that the statute authorizing the construction of the terminal provides that any proposed issue of stock and bonds in pursuance of the act shall be first approved by this Board.

The city has under consideration and in process of development by its City Plan Commission a logical and well-ordered city plan. If this plan is adopted and put into execution future transit lines should, of course, follow it as closely as possible. The location of particular routes should be determined by the city for the city's reasons and not necessarily to conform to plans proposed by the railway company.

In the Board's judgment these ordinances, and possible operation under them, provide for relief in the congested area, and taken in connection with ordinances already approved, for the extension of lines through relatively undeveloped sections. In no essential feature do they conflict with the plans proposed by the City Plan Commission in so far as these plans have been made known to the Board, or hinder the logical extension of transportation facilities in and through the city.

The Board is, therefore, satisfied that the ordinances properly conserve the public interest in the particulars that the statute has vested in the Board the duty of determination.

The approval of the Board of each of the ordinances submitted will issue, subject, however, to the conditions set forth in the several ordinances and "blanket agreement."

In granting its approval the Board directs attention to the report of Harold Bartholemew, above referred to, as to conditions at Bridge and Broad streets.

In the judgment of the Board, the suggestion of Mr. Bartholemew, which has also the approval of the Board's Chief Inspector, that consent be obtained for the laying of tracks upon Washington street from Broad street to Central avenue, so providing a direct crossing for all cars using Bridge street, should be adopted. Its understanding is that the company at the hearings upon the ordinances consented to make application to the municipal authorities for such

consent. It further directs attention to the necessity of carrying cars on Washington street across Market street. Experiments made in its behalf convince it that, though tracks admitting of the operation are now in position, such operation would, under existing conditions, unreasonably delay traffic and add to the existing congestion. A correction of street conditions at this point is essential if Washington street is to be employed as a parallel thoroughfare for street railway traffic and be utilized in the solving of the problem of the congested area.

Suggestions were made at the hearings of certain extensions designed to afford to the residents of the eastern section of the city means of crosstown travel, by use of Van Buren street. In the judgment of the Board, the provisions of such facilities are reasonably requisite. The understanding of the Board is that assurance was given by the company that it coincided in the view that facility for such travel might reasonably be demanded and that the suggestions made would be considered.

Dated March 17th, 1914.

No. 171.

IN THE MATTER OF THE APPLICATION OF RATES OF THE WILDWOOD WATER WORKS COMPANY TO THE BOROUGH OF NORTH WILDWOOD.

Since the passage of the acts creating this Board and defining its powers, the power of municipalities to impose conditions upon public utilities in the exercise of franchise grants, and to provide by contract respecting rates and service, is subject to the authority and control of the Board to fix just and reasonable rates.

The Board would not feel disposed to relieve a utility from a burden assumed by an ordinance or contract in any case where it appeared that

a municipality or its inhabitants would under such ordinance or contract receive rates or service more advantageous than this Board would be justified in ordering, unless it appeared that such ordinance or contract imposed terms involving such loss and hardship as to make it impossible for the company to render safe, adequate and proper service.

H. H. Voorhees, for the Borough of North Wildwood.
Joseph H. Gaskill and *Ernest Watts,* for the Wildwood Water Works Company.

Wildwood Water Works Company filed a new schedule of rates for service applying to Five Mile Beach. The Commissioners of the city of Wildwood and some inhabitants thereof protested the proposed rates and asked for a hearing thereon. Hearings were held, and on October 17th, 1913, an order was made in the matter.

In the memorandum filed in said cause the Board said (p. 17):

"There appears from the record to be a special contention by the borough of North Wildwood that by virtue of a contract concluded between said borough and the company all private consumers in said borough are entitled until 1917 to the benefit of a minimum of ten dollars per annum. (Testimony of June 24th, 1913, pp. 41, *sq.*)

"This contract, the respondent contends, has been superseded by a later contract with said borough for municipal supply, omitting all mention of rates to private consumers. A uniform schedule of rates applicable throughout Five Mile Beach is eminently desirable, inasmuch as the place is now essentially one community. The evidence before us, however, is not sufficient to determine the validity of the issue raised by North Wildwood.

"The orders to issue in conformity with this finding will not therefore be applicable to North Wildwood until and unless a special hearing to be called upon the contention put forth by said borough shall satisfy us that no legal obstacle prevents the uniform application of rates to said borough. The hearing thereon will be called by an order to issue forthwith."

Thereupon an order issued and a hearing was held on November 18th, 1913. Briefs were filed on behalf of North

Wildwood on January 20th, 1914, and by Wildwood Water Works Company on February 9th, 1914.

The borough maintains that inasmuch as there exists a contract between the borough and the water company regarding the minimum and base rates to be charged consumers in the borough of North Wildwood, this Board is without authority to order the filing of a schedule providing rates in excess of the maximum rates allowed in said contract.

The Board does not assent to this limitation of its powers either to fix rates or regulate service. Since the passage of the acts creating this Board and defining its powers, the power of municipalities to impose conditions upon public utilities in the exercise of franchise grants, and to provide by contract respecting rates and service, is subject to the authority and control of this Board to fix rates and regulate service. As was said by the Board in the case of *Borough of Butler* vs. *Butler Water Company* (p. 12):

"The contention is based upon the terms of ordinance No. 15, dated January 3d, 1905, under which the company is operating. We are not put to the necessity of determining the soundness of this contention. In our judgment the provisions of this ordinance cannot stand in the way of the exercise by the Board of its power to fix just and reasonable rates; to set standards of adequate and proper service, and to establish just and reasonable practices, rules and regulations.

"In so far as the action of this Board in the exercise of these powers contravenes the terms of the ordinance, the ordinance provisions must give way.

"The municipality in imposing the terms contained in the ordinance simply acted as an agency of the State. The Legislature might directly abrogate, modify or alter, so far as the municipality is concerned, the terms imposed by the municipality. While the Legislature has not done this directly, yet it has by the creation of this Board with the powers stated, constituted a body whose orders in fixing just and reasonable rates, setting standards of adequate and proper service and establishing just and reasonable practices, rules and regulations may indirectly have that result."

This view is supported by recent decisions of the New Jersey Supreme Court in several cases.

The State, Inhabitants of Phillipsburg et al. vs. *Board of Public Utility Commissioners et al.* (November Term, 1913.)

Public Service Railway Company vs. *Board of Public Utility Commissioners et al.* (November Term, 1913.)

See, also,

Manitowac vs. *Mannitowac & Northern Traction Company, 145 Wis. 13.*

LaCrosse vs. *LaCrosse Gas & Electric Co., 145 Wis. 408.*

Milwaukee Electric Railway & Light Co. vs. *Railroad Commission, 153 Wis. 592.*

State ex. rel. vs. *Superior Court, 67 Wash. 49-51.*

While this Board has the power to fix rates and establish rules and practices governing service without regard to ordinance provisions or contracts between municipalities and utilities, we would not feel disposed to exercise such power to relieve a utility from the burden assumed by such ordinance or contract in any case where it appeared that a municipality or its inhabitants would under such ordinance or contract receive rates or service more advantageous than this Board would be justified in ordering, unless it appeared that such ordinance or contract imposed terms involving such loss and hardship as to make it impossible for the company to render safe, adequate and proper service. A company may agree to give rates and service upon terms that will not accord to its stockholders a fair return upon the capital invested. We would not be disposed to permit an increase of rates in any case where an agreement between a municipality and a utility exists, if the only benefit from such increase of rates is an increase of dividends. In such case the company would be presumed to have acted

with a knowledge that its earnings would be reduced by such terms and to be willing to wait for adequate returns upon the investment. When, however, the effect of ordinance or agreement provisions is to impair service, such provisions will not be permitted to stand in the way of such order as this Board deems necessary.

Is there an existing agreement between the borough of North Wildwood and the Wildwood Water Works Company touching rates? From the evidence submitted to us, we are obliged to conclude that there is not.

The borough council might have imposed terms and conditions in the ordinances granting to the original company rights to use the public streets and highways. This it did not do as regards rates or service. The only effort at controlling rates appears in the seventh clause of the contract of December 24th, 1907, which provides:

"Seventh: That the said water company, its successors and assigns, shall have the right to make all reasonable rules and regulations for the government of the supply of water to private consumers, and all water supplied to private consumers shall not exceed the rate of twenty-five cents per one thousand gallons, the minimum rate to be charged each consumer shall be ten dollars ($10.00) per annum, for which forty thousand gallons shall be allowed."

This provision is omitted in the contract of April 5th, 1913.

The first inquiry is to ascertain whether the execution of the later contract operates as a repealer and vacates the earlier contract.

A careful reading of both contracts leaves no doubt that the borough authorities in executing the later contract intended that it should supersede the earlier one. The purpose of the earlier agreement was to secure a water supply for fire protection, street sprinkling, sewer flushing, etc., and fixing the terms of payment. In this contract

appears the provision above quoted. The purpose of the second agreement was to secure a water supply for fire protection, street sprinkling, sewer flushing, etc., and fixing the terms of payment.

If the provisions concerning rates to the inhabitants of the borough appeared in the second agreement, it is probable there would be no contention by the parties that the later superseded the former agreement. Inasmuch, however, as the contracts cover the same subject matter, and it is impossible to conclude that the later agreement is supplemental to or amendatory of the earlier and to be read as part thereof, it follows that the intention was to vacate the first and stand upon the second.

In *Burlington* vs. *Estlow, 14 Vroom 13,* Chief Justice Beasley said:

"It is one of the settled rules of construction that a statute is impliedly repealed by a subsequent one, revising the whole subject matter to which the first appertains. This is a principle of familiar application with respect to statutory provisions which are designed to regulate a subject existing at common law. The inquiry in such cases is, whether it was the legislative intention, in enacting the later law, to occupy the whole field embraced by the previous legislation."

See, also,

Bracken vs. *Smith, 12 Stew. 169.*

Haynes vs. *Cape May, 23 Vroom 180.*

DeGenther vs. *Home, 29 Vroom 180.*

Applying the test laid down in these and other cases, the conclusion is irresistible that the borough council intended to cover the entire subject of securing a water supply when it adopted the later contract. Under familiar rules, when a legislative body adopts a new enactment governing a subject, whatever is omitted is taken to be discarded.

Roche vs. *Jersey City, 11 Vroom 257.*
Camden vs. *Varney, 34 Vroom 325.*

If, therefore, the adoption by the borough council of the resolution authorizing the borough authorities to execute the contract of April 5th, 1913, was legal, there was no agreement between the municipality and the company touching rates to be charged inhabitants of the municipality. The objectors insist that the borough council cannot by resolution repeal an ordinance agreement or direct the execution of an agreement. They maintain that an ordinance is required to accomplish either end.

In the order calling a rehearing the Board asked to be advised under what legislative act the borough council acted. The borough did not deal with this question, and counsel did not furnish any facts from which it could be determined.

It is not necessary, however, to settle that question to determine the validity of the resolution passed by the council. There are several acts providing for municipal water supply by contract with a water company. In none that we have been able to find is there any provision that the contract must be adopted by ordinance.

In *Jersey City* vs. *Town of Harrison, 42 Vroom, p. 69,* it was held:

"Where the Legislature has authorized a municipality to act or contract, and does not require this to be done by ordinance, the legislative body of the municipality may contract by a vote upon a motion or by the passage of a resolution."

This case arose out of the action of the town of Harrison in passing a resolution directing its officers to execute a contract for a water supply.

We think it probable that the borough council of North Wildwood acted under the authority conferred by Sec. 76

of the Borough Act, as amended by Laws of 1899, p. 159. There is nothing in this act requiring authorization by ordinance. The borough council had power by motion or resolution to enter into a contract for a water supply. If such contract superseded an earlier one, it was none the less valid. No specific repealer of the ordinance authorizing the execution of the earlier contract was necessary to confer power on the council to authorize a new contract. The last contract is, therefore, a legal and valid contract between the borough and the water company.

It follows that the borough council having failed to put upon the water company any conditions as to rates or service, either in the franchise ordinance or by contract, this Board is obliged to conclude that its order heretofore made must apply to the inhabitants of North Wildwood. It so finds and determines, and will enter an order accordingly.

Dated, March 24th, 1914.

ORDER.

This case having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

The Board of Public Utility Commissioners HEREBY ORDERS that its order, bearing date October seventeenth, nineteen hundred and thirteen, "In the matter of protests of the city of Wildwood and individual consumers therein against approval of rates of the Wildwood Water Works Company," shall be applicable to the borough of North Wildwood.

This order shall take effect April 15th, 1914.

Dated, March 24th, 1914.

No. 172.

B. F. SAMSEL, JR.,
VS.
PENNSYLVANIA RAILROAD COMPANY.

ORDER.

Complaint having been filed by B. F. Samsel, Jr., against the Pennsylvania Railroad Company as to train service afforded by said company at South Amboy; the answer of the company to said complaint having been received and, on the issue joined, hearing having been held, the Board of Public Utility Commissioners finds and determines that the Pennsylvania Railroad Company does not provide safe, adequate and proper service at South Amboy, and that in order that such service may be provided it is necessary for the Pennsylvania Railroad Company to stop regularly the trains known as No. 202 and No. 227 at South Amboy, on each day that said trains are operated,

The Board HEREBY ORDERS the Pennsylvania Railroad Company to stop regularly at South Amboy at the station used by it for the accommodation of its passengers, trains listed on its schedules as No. 202 and No. 227 on each day said trains are operated.

The Board FURTHER ORDERS that the Pennsylvania Railroad Company shall not change its time schedule so as to materially affect the time of the arrival of trains known as No. 202 and No. 227 at the station at South Amboy, without obtaining permission therefor from this Board.

This order shall take effect Wednesday, April 15th, 1914.

Dated, March 24th, 1914.

No. 173.

IN THE MATTER OF CERTAIN ORDINANCES PRESENTED FOR APPROVAL BY PATRONS TELEPHONE COMPANY.

Of the ordinances granting franchises, and for which the Board's approval is sought, all would authorize the Patrons Telephone Company, at their option, to enter into certain localities now supplied by the West Jersey Toll Line Company with telephone service.

If by resolutions of the respective Township Committees, the ordinances shall be amended so as to exclude territory now supplied they might be again presented to the Board with prospect of favorable action.

George M. Shipman, for the Patrons Telephone Company.
E. M. Simpson, for the West Jersey Toll Line Company.

On February 10th, 1913, the Chief Inspector of Utilities called the Board's attention to the report that the Patrons Telephone Company was extending lines into Blairstown. On February 11th the Secretary, by direction of the Board, inquired of the Patrons Telephone Company whether it has franchises from any municipality permitting the company to use public streets or roads; and, if so, why said franchises had not been submitted to the Board for approval, as required by statute. Under date of February 12th, 1913, H. F. Aten, secretary of the Patrons Telephone Company, made reply that his company had obtained permits for the use of public roads from the township committees of Knowlton, Hope, Oxford and Blairstown townships. He also indicated that the company had not been apprised of the requirement of submitting said franchises to this Board for approval. Under date of February 18th, 1913, this Board informed H. F. Aten, secretary of the Patrons Telephone Company, that he should submit to the Board the company's franchises for approval.

Ordinances—Patrons Telephone Co.

Under date of May 12th, 1913, the West Jersey Toll Line Company, by W. S. Risley, president, protested to this Board against the action of the Patrons Telephone Company in installing and soliciting telephones in Blairstown, claiming that the West Jersey Toll Line Company was then furnishing local telephone service in Blairstown, and long-distance service to the subscribers of the Patrons, via Blairstown and Belvidere. This letter of protest was transmitted by the Board to H. F. Aten, secretary of the Patrons Telephone Company, on May 14th, 1913; and the Board fixed May 27th, 1913, as the time, and the State House, in Trenton, as the place, for hearing upon the aforesaid protest. The Patrons Company could not proceed on May 27th, but agreed that they would not further prosecute the extensions against which protest had been made until the matter had been presented to the Board. During the summer of 1913 the Patrons Telephone Company secured from the four townships the approval of ordinances granting the right to use roads within said townships. Upon the application for approval of these ordinances hearing was finally set for September 9th, 1913, at the State House, in Trenton, and the West Jersey Toll Line Company, objector, was notified of said hearing. Hearings were held at the State House, in Trenton, on September 9th and September 16th, the petitioner and objector both being represented by counsel. On the last date the matter went to conference, with the stipulation that the report of the Board's Inspector upon the matter, when made, should constitute a part of the record in the case.

Of the four ordinances granting franchises it may be said, generally, that the privileges granted by each and all of said ordinances would authorize the Patrons Telephone Company, at their option, to enter certain localities now

supplied by the West Jersey Toll Line Company with telephone service. If, therefore, by resolution of the respective township committees, the ordinances shall be amended as indicated below in this report, said ordinances might again be presented to this Board for approval with the prospect of favorable action thereon.

In particular, the franchise ordinance passed by Hope township, on February 25th, 1913, after designating certain roads on which the Patrons Telephone Company may place poles and wires, includes a blanket grant entitling the company to place poles and wires "on such other roads in said township as the Patrons Telephone Company may think it necessary to build its line upon." It appears that Townsbury, in said township, is now supplied by the West Jersey Toll Line with telephone service. It is, therefore, apparent that the ordinance would permit the Patrons Telephone Company at their option to enter Townsbury with poles and lines. This Board is on record against unnecessary duplication of apparatus. Should said ordinance be amended so as to exclude Townsbury and the districts now supplied in said township by the West Jersey Toll Line Company, the ordinance may be again submitted to this Board for approval. As it now stands, petition for the approval of said ordinance is denied.

The ordinance passed by the township of Oxford on August 4th, 1913, apparently accords to the Patrons Telephone Company the right to supply telephone service throughout said township. A large part of the township is already supplied by the West Jersey Toll Line Company and "under conditions which are adequate, considering the character of the territory supplied." Such is the testimony of the Board's Chief Inspector. Moreover, the contract which the Patrons Telephone Company made with the West Jersey Toll Line Company, which contract is in evi-

dence in this case, implies that each company is to supply a certain portion only of said township. In order to be approved by this Board, this ordinance must be so amended as to exclude territory now supplied by West Jersey Toll Line Company. In case Buttsville is not supplied by the West Jersey Toll Line Company there appears no particular reason why the franchise, as amended, may not accord to the Patrons Telephone Company the right to supply said locality.

The ordinance passed by the township of Knowlton August 9th, 1913, after designating certain roads on which the Patrons Telephone Company may place poles and wires, accords to that company the right to enter upon "such other roads in said township as the Patrons Telephone Company may extend its lines upon." To obtain this Board's approval the ordinance must be so amended as to exclude the vicinity of Manunka Chunk and Ramseysburg. These localities, it appears, are now supplied by the West Jersey Toll Line Company. They are, in general, nearer to Belvidere than to Hope. It seems proper, therefore, that the telephone service to these places should continue, as at present, to be supplied by the West Jersey Toll Line Company.

From the evidence it would seem that the Yetter Line lies partly in Knowlton township. Apparently this line was located long before 1903, and, therefore, it would seem that the Yetter Line might continue as originally located in Knowlton and Blairstown townships.

The ordinance granted by Blairstown township, like the preceding ordinances, is a blanket grant to the Patrons Telephone Company to occupy at will any and all public roads or streets throughout the entire township. After designating particular roads on which the Patrons Telephone Company is empowered to place poles and wires,

the ordinance gives similar permission "on such other roads as may be deemed necessary," and similarly accords permission to enter upon "such other roads in said township as the Patrons Telephone Company may extend their lines" (to).

The Blairstown ordinance is the essential bone of contention between the Patrons Telephone Company and West Jersey Toll Line Company. It seems necessary, therefore, to set out the situation in somewhat greater detail than in the case of the grants by the three other townships. The Blairstown Telephone Company, an unincorporated concern, originally constructed the telephone plant which for the most part occupied the village of Blairstown. The original franchise authority was a permit granted March 23d, 1901, in favor of Blair Hall Academy (unincorporated), whereby "The Blairstown Electric Light Company and Water Works"—the name assumed by the concern obtaining the permit—received the privilege of setting poles along the streets and the right to hang wires thereto "for transmitting power, light or messages over and upon the public roads." It appears that this concern erected only one set of poles, and strung thereon both electric light wires and telephone wires. It was operated by Charles H. Crissman. Said Charles H. Crissman used the same line of poles for electric light wires and telephone wires, and operated a central exchange in Blairstown village. In the spring of 1913 the West Jersey Toll Line Company applied to this Board for approval of its proposed acquisition of the Crissman Telephone System above described. The Board approved such acquisition, and the securities necessary to effect the same. By reason of the fact that the telephone wires were on the electric light poles, and that the telephone circuits were grounded circuits, not metallic circuits, the telephone service was poor whenever the

current was running through the electric light wires. Particularly at night was the telephone service inadequate. There were about fifty or sixty phones connected with the local exchange. From the evidence it appears that the West Jersey Toll Line Company, after acquiring this Crissman Telephone System, proceeded to improve the system and service. Within the region of electrical disturbance the grounded circuits were replaced by metallic circuits; and the evidence is indisputable that the telephone service, both local service and long-distance service, has been very essentially improved.

Just before the West Jersey Toll Line Company acquired the Crissman Telephone System, the Patrons Telephone Company purchased the Yetter Line. From the evidence it would seem that the Patrons Telephone Company took title to the Yetter Line between the first and fifteenth of February, and that the West Jersey Toll Line Company purchased the Crissman Telephone System the latter part of the same month. The Yetter Line runs from Columbia, opposite Portland, to Blairstown. The Patrons Telephone Company, it would appear, had built lines north from Hope towards Blairstown, and had brought some of these lines up within the confines of the village of Blairstown, and had planned to connect some four or five phones reached by lines built north from Hope, with various stations connected over the Yetter Line with Blairstown. This junction of phones, by means of a central exchange of the Patrons Company in Blairstown, was obstructed by the West Jersey Toll Line Company's acquisition of the Crissman Telephone System.

Should this Blairstown ordinance be approved, the Patrons Telephone Company, under its authority, will locate in Blairstown a central exchange. There will thus be in the same village, whose population is about six hun-

dred, two central telephone exchanges. This Board is already on record against the unnecessary duplication of telephone apparatus. It means generally, and it would mean in this particular case, imposing upon the public the evils of a divided service or a double price. We can see no sufficient reason for approving a franchise that would impose this undesirable condition upon telephone subscribers in this region.

The Patrons Telephone Company appear to rest their claim for the approval of the Blairstown ordinance largely upon the fact that the Yetter Line was located in Blairstown village, and was in working order long before the West Jersey Company had purchased any interest in the telephone business in Blairstown. Granting this fact unreservedly, it does not appear that the Yetter Line ever involved the location and operation in Blairstown village of an independent central exchange. It may be granted that the Yetter Line has a right to enter Blairstown. Such right does not seem to us to carry the right of the new purchasers of the Yetter Line to set up an independent competing central exchange in Blairstown village.

There might have been force in the plea for the approval of the ordinances and for setting up an independent exchange, if the West Jersey Toll Line Company on acquiring the local telephone system in Blairstown had been negligent or derelict in improving service. The testimony is altogether to the contrary.

The evident requirement of the situation is reasonable and adequate telephonic connection, between Blairstown and the surrounding country. The Board will endeavor to effect such telephonic connection by such means as are within its powers. But the pending Blairstown franchise must be re-shaped so as to preclude duplication of apparatus in Blairstown village before it can have this Board's

approval. In its present form, petition for approval is denied.

The Patrons Telephone Company, in a communication to this Board, dated March 17th, 1914, has asked the Board to afford information upon several matters. In reply thereto the Board would say, first, that it cannot see that its assent is necessary to the termination of the present contract between the Patrons Telephone Company and the West Jersey Toll Line Company. The Board would say, second, that in case such contract is terminated the Patrons Telephone Company would appear to have a right to exercise duly approved franchises covering any territory not already adequately supplied with telephone service.

The Board calls the attention of the Patrons Telephone Company to the fact that the statute requires every public utility to obtain from this Board approval of the issue of securities. The Patrons Telephone Company, by its own admission, has outstanding capital stock issued since the statute above mentioned became operative. Application should at once be made to validate such issue of capital stock.

Dated, March 31st, 1914.

No. 174.

IN THE MATTER OF THE APPLICATION OF THE JERSEY POWER COMPANY FOR APPROVAL OF ISSUE OF CAPITAL STOCK IN THE AMOUNT OF FIFTY THOUSAND DOLLARS.

Application for approval of issue of capital stock of fifty thousand dollars approved to the amount of forty thousand dollars, subject to acceptance by the petitioner of conditions outlined in this report.

Frank P. McDermott and *G. Whittlesey, of Culver* and *Whittlesey,* for the petitioner.

In re Issue of Stock—Jersey Power Co.

The Jersey Power Company, by petition received February 24th, 1914, asked this Board's approval of an issue of capital stock in the amount of fifty thousand dollars. Said issue of stock was to enable the petitioner to pay for the construction of a transmission line running from Boonton, via Fox Hill, to Millbrook, from Millbrook to Dover, from Dover to Wharton, including a branch to Rockaway. The total length of said transmission line was approximately 15.25 miles. Said issue of stock was also to cover cost of obtaining the rights of way. The first hearing on the petition was held on March 10th, 1914, at the State House, in Trenton; and the second hearing thereon was held at the Court House, in Newark, on March 13th, 1914.

The petitioner contemplates taking a lease of the power plant of the Jersey Corporation in Boonton. Current there developed, the petitioner proposes to carry over the above described transmission line for distribution mainly over the distribution system of the Eastern Pennsylvania Power Company of New Jersey. At the hearing petitioner indicated that it might by means of said transmission line take on some new large customers directly. The evidence disclosed that it is intended to discontinue the power plants at Dover and Bernardsville, now operated by the Eastern Pennsylvania Power Company of New Jersey. The interests in control of the petitioner and the Eastern Pennsylvavnia Power Company are substantially the same.

Question was raised by the Board at the hearing why the petitioner did not enlarge the existing power plant at Dover, instead of running a transmission line to another and distant source of generating current. The Board is, however, satisfied that petitioner demonstrated that the situation in Boonton affords sufficient water for condensing purposes, whereas at Dover an adequate supply is lacking.

The purpose, therefore, as qualified herein, for which this stock issue is asked is approved, subject to the limitations hereinafter set forth.

First, the approval of this application as hereinafter set forth is given with the explicit understanding that the petitioner has declared the intention of taking out all property of the Eastern Pennsylvania Power Company of New Jersey from under the mortgage executed by the Pennsylvania corporation of the same name.

Second, the approval herein granted is to be inoperative unless formally accepted by the petitioner in writing within thirty days from the date hereof, subject to the following conditions:

The petitioner by means of this distribution line undertakes not to furnish electric service locally in Boonton township and Hanover township, except as specifically permitted by the Board to afford service in this territory. The ground for this limitation is that this is territory already supplied locally with electric current. The power plant to be utilized by petitioner stands in the center of a region already supplied locally with electric current. The Board's general policy of excluding unnecessary duplication of apparatus in the same locality induces the Board to insist upon this particular restriction. If in this territory there are found large wholesale consumers of electric current who could not be as economically and adequately supplied with current from the local company, the petitioner is at liberty to ask the Board for a permit to connect with such customers, and in exceptional cases of this kind with a fair presumption that such permission would be granted. It is understood that this approval does not imply approval of the proposed lease by the Jersey corporation of its power plant to the petitioner. Separate application must be made for the approval of said lease.

Nor does this approval imply the Board's approval of the contract for the sale of power which petitioner proposes to enter into with the Eastern Pennsylvania Power Company of New Jersey.

In giving this approval the Board hereby puts on record its recognition that the Eastern Pennsylvania Power Company of New Jersey, which, as above recited, is controlled by the same interests as the petitioner, must immediately undertake the amortization of its power stations that are to be discarded, as well as the amortization of the displaced circuit between Millbrook and Dover.

Finally, the Board approves the pending petition to the extent that of the $50,000 asked for, only $40,000 may issue by the company at this time. The reasons for this reduction are as follows:

First of all, the petitioner, by counsel, admitted that the cost of the projected construction was approximately $4,000 less than the $50,000 asked for. (Record, pp. 6 and 146.)

It is apparent that the estimate made by George B. Cornell, and appended to the petition, is not based upon a reasonably specific knowledge of quantities required. For instance, said George B. Cornell computed that between Boonton and Millbrook five hundred and thirty poles would be required. It was later demonstrated by testimony of Frank Y. Lowe that the actual number of poles required for said stretch of the route was exactly four hundred and six. (Record, pp. 82-83.) Mr. Cornell's estimate was also based upon a line of four three-phase circuits between Boonton and Fox Hill. This was afterwards changed to a line carrying but two three-phase circuits, and the amount of copper and the cost of stringing it is greatly reduced. Mr. George B. Cornell testified that a forty-five-foot pole, delivered, will cost between eight and nine dollars, and that a forty-foot pole will cost about seven dollars. (Record,

p. 8.) The pole contract put in evidence by the company showed the price of forty-five-foot poles, f. o. b. at destination, to be five dollars and fifty cents. From these facts it is quite evident that the Board cannot safely adopt the estimate of George B. Cornell as the basis of cost for this transmission line.

We recast the estimate of cost as follows:

The contract with the Hopatcong Mountain Lake Land Development Company for five hundred and sixteen poles, with price, is as follows, showing the average price per pole to be about seven dollars and fifty cents:

Height.	*No.*	*Price Ea.*	*Total.*
70′	6	$18 50	$111 00
65′	10	15 00	150 00
60′	50	11 50	575 00
55′	80	8 75	700 00
50′	120	8 00	960 00
45′	250	5 50	1,375 00
	516 avg.	$7 50	$3,871 00

Average Height per contract:

70′ x	6 =	420
65′ x	10 =	650
60′ x	50 =	3000
55′ x	80 =	4400
50′ x	120 =	6000
45′ x	250 =	11250
Avg. 49′	516	25720

The cost of poles from Boonton to Millbrook (Record, p. 83) would be:

In re Issue of Stock—Jersey Power Co.

Height.	*No.*	*Total Feet.*	*Price Ea.*	*Total.*
40′	30	1,200	$4 90(est)	$147 00
45′	240	10,800	5 50	1,320 00
50′	70	3,500	8 00	560 00
55′	42	2,310	8 75	357 50
60′	24	1,440	11 50	276 00
Avg.47.3′	406	19,250	Avg.$6 55	$2,660 50

Our estimate is based on an average number of forty-five poles per mile. The record, page 84, shows forty poles per mile for very high poles, as between Dover and Wharton. The record, page 84, gives forty-five poles per mile for high poles. And the record, page 83, gives about forty-five poles per mile covering the stretch between Millbrook and Dover. A fair estimate per mile, therefore, is forty-five.

It was testified by the company's engineer, Mr. Lowe, that the cost of unloading and hauling poles averaged about one dollar and fifty cents each. (Record, pp. 81-85.) The same witness estimated cost of digging holes from two dollars to two dollars and fifty cents each. The same witness estimated the cost of setting poles at five dollars each. (Record, p. 85.) His testimony shows that this five-dollar estimate is based on setting poles which, on the average, were higher than those here to be used. (Record, p. 86.) The Commission's engineer, H. E. Carver, testified that in his judgment four dollars and ten cents was an adequate price for setting poles. (Record, p. 95.)

The petitioner showed its wire contract, making the price per copper 15.57 cents per pound. The company's engineer, Mr. Lowe, testified the cost of stringing wire would average about twenty-five dollars per mile of wire. (Record, p. 89.) From Millbrook to Dover, in our esti-

mate, we have allowed forty-five dollars per mile for stringing wire, owing to the conditions under which this wire must be strung.

But, in general, on the company's own figures we estimate average price of poles, delivered on the cars, at seven dollars and fifty cents each. We allow on the basis of the evidence, seven dollars and fifty cents as the average cost, for unloading, teaming, hauling, digging, locating, framing, setting, tree trimming, including necessary guys and anchors per pole.

We allow for wire five per cent. more than the company's estimate, inasmuch as their estimate allows nothing for sag. For braces, insulators and crossarms on poles we allow but seven dollars between Boonton and Millbrook. Clearly the preliminary estimate which made a common figure of ten dollars for such work, irrespective of whether the poles carried twelve wires or six, cannot be correct.

Our aggregate estimate will be as follows:

Boonton to Fox Hills and Fox Hills to Millbrook—2-3 phase circuit, 6 wires, 3.6+7.—10.6 mi.	
***406 chestnut poles, @ $15.00 erected,	$6,090 00
406 sets insulators, crossarms, etc., @ $7 erected,	2,842 00
6 wires, #4, 10.6 miles long, @ 700# per wire mile, including 5% sag and waste, 44,520, @ $0.19* erected,	8,458 80
10.6 miles of ground wire, @ $150,	1,590 00
	$18,980 80

*See foot note, page 470.

***See foot note, page 470.

In re Issue of Stock—Jersey Power Co.

Branch Circuit to Rockaway, 1 circuit, 3 wires, 1.25 miles.	
56 chestnut poles (est. 40′, @ $11,	$616 00
56 sets of insulators, arms, fixtures, etc., @ $2,	112 00
3 #4 wires, each 1.25 miles long, 2,625# @ $0.19,	498 75
1.25 miles of ground wire, @ $150,	187 50
	$1,414 25
Millbrook to Dover, 1 circuit, 3 wires, 1.7 miles.	
77 chestnut poles, @ $15,	$1,155 00
Insulators, arms and fixtures, @ $3.50,	269 50
(Taken at same rate as item in company's estimate for "Changing Poles.")	
3 wires, #4, 1.7 miles long, 3570#, @ $0.22,**	785 40
1.7 miles of ground wire @ $150,	255 00
	$2,464 90
Dover to Wharton, 4 circuits, 12 wires, 17 miles.	
77 chestnut poles, @ $15,*	$1,155 00
77 sets of insulators, arms, fixtures, etc., @ $10,	770 00
12 wires, #4, 1.7 miles long, 14,280#, @ $0.19,	2,713 20
1.7 miles of ground wire, @ $150,	255 00
	$4,893 20
Total net cost,	$27,753 15
Engineering and contingencies, 15%,	4,162 97
Cost to reproduce,	$31,916 12

*Contract price is 15.57c. per lb. plus 3.43c., or $24.01 per mile for erection.

**Cost of erection is taken at 6.43c., or $45.00 per mile account of extra difficulty due to line already in place.

***Record, pp. 82-83.

This gives a total of $31,916.12; or, roughly, $32,000 even. Testimony as to the cost of right of way showed an outlay of, roughly, $8,000 therefor. (Record, pp. 3-4.)

Accordingly, as above recited, the petition will be approved to the amount of forty thousand dollars, subject to the petitioner's written acceptance of the conditions outlined herein.

Dated, March 31st, 1914.

No. 175.

PETER EGENOLF,
VS.
NEW YORK TELEPHONE COMPANY.

Telephone service differs from that supplied by other utilities in that the value of the service depends largely on the ease with which each subscriber can inform himself who other subscribers are.

If service on a monthly rather than an annual basis should be encouraged by materially lessening the charge for short term service, and distributing among long term subscribers the "over-head" and other expenses now attributed to short term subscribers, the task of keeping subscribers advised of those connecting with the company's lines would be much more difficult and expensive than at present, if not impracticable.

John L. Swayze, for the New York Telephone Company.
The complainant was not represented.

The complainant in this matter in a letter to the Board dated November thirteenth, nineteen hundred and thirteen, stated that he had been a subscriber to the New York Telephone Company for many years, and expecting to be absent for more than one year from Elizabeth (where he lives), he had his telephone disconnected. He returned to Elizabeth within the year and asked for one month's service

from the telephone company. For this service complainant stated the telephone company proposed to charge sixteen dollars. The petition is for a reduction of this charge. The charge to which the complainant objects seems to be sixteen dollars and seventy cents instead of sixteen dollars. Apart from this there is no difference between the petitioner and respondent as to the facts alleged by the petitioner.

In its answer the respondent stated that the short-term rate of sixteen dollars and seventy cents "cannot be successfully segregated and the make-up explained item by item." The charge was defended by the company as reasonable on the ground that certain fixed charges, such as installation, opening of account, completion of records, etc., must be met by the company in the case of each subscriber, whether service is rendered for one month or longer; that a great many subscribers' stations remain in service for a much longer period than one year; that in determining the annual rate this is taken into consideration and the cost of installation is absorbed in the charges from year to year.

It was claimed further that it would be unfair to subscribers as a whole to arrange for service for one month at one-twelfth of the annual rate, and the schedule for short-term service, the company stated, "is designed to protect the company against the cost of establishing the service under average conditions and produce a total charge not inconsistent with the value of the service rendered."

It is alleged also that temporary service is undesirable even when the full cost is paid, because of its effect on the company's operating methods as a whole, but in order to meet any sort of demand the company established a rate for such service. The company claims that schedule rates for short-term service gradually decrease from month to month so that during the last six months of the subscriber's

year on monthly service, they would be but very slightly in excess of the pro rata of the annual charge.

At the hearing in this matter the commercial engineer of the company attempted to explain the way in which the monthly charge is made up, reciting the numerous items considered and the sum allowed for each. Notwithstanding the testimony of the engineer, the Board is inclined to believe that the charge for short-term service cannot be explained satisfactorily item by item from the company's records as they now exist. Such practically was the admission of the company in its answer.

It seems probable that a charge so much in excess of the pro rata of the annual charge has been adopted largely for the purpose of discouraging demands for service of this kind. That such service is undesirable from the company's standpoint may be admitted. This, however, is not a sufficient reason why such service should not be afforded at a reasonable charge. The question of the reasonableness of the charge should, however, be considered with proper regard to effect of the provision of short-term service on other subscribers. The general practice of entering subscriptions for telephone service on an annual rather than a monthly basis seems to the Board to be reasonable. It also seems reasonable that each subscriber should bear his proportion of interest charges and other expenses commonly called "overhead." If a telephone is installed for service to be provided for one month, and if to the regular charge for service for one month there is added the cost of installing and disconnecting the telephone, and the subscriber's proportion of the "overhead," it is obvious that the charge to the subscriber for the single month must be much more than he would be required to pay each month if a subscriber on an annual basis.

The Board is inclined to believe further that a system of

distributing cost of supplying telephone service so as to encourage subscriptions for annual rather than short-term service is generally in the interest of subscribers.

Telephone service differs from that supplied by other utilities in that the value of the service depends largely on the ease with which each subscriber can inform himself who other subscribers are.

This does not pertain to subscribers to other utility service. An electric lighting company, for example, may supply one-half the residents of a community with service. It would not add to the value of the service to an individual subscriber for electric lighting for the company to publish for his information the names of other subscribers, and such list published and kept up to date would involve a needless expense. An essential of good telephone service, on the other hand, is that the individual subscriber shall be able to learn quickly the name of any other subscriber with whom he desires to communicate. Subscribers to telephone service are kept advised by the publication by the company of printed lists of subscribers. If service on a monthly rather than an annual basis should be encouraged by materially lessening the charge for short-term service and distributing among long-term subscribers the "overhead" and other expenses now attributed to short-term subscribers, it is apparent that the task of keeping subscribers informed as to those connecting with the companies' lines would be much more difficult and expensive than at present, if not impracticable.

It was claimed at the hearing that but two per cent. of the total service supplied by the company in New York and northern New Jersey is short-term service. It was claimed, further, that of the two per cent. that eventually become short-term subscribers ninety-five per cent. originally started as yearly service, "but owing to changes in a man's

business or his residence, sickness, or something of that kind, he desires to give up his yearly contract and make a flat settlement with the company. He makes it on our short-term rate. Of the two per cent. only five per cent. of the two per cent. is left where a direct application for short-term service is made."

While the Board is not inclined to encourage a departure from the practice of supplying telephone service on a basis of yearly subscriptions, and believes a departure from such basis by any considerable number of subscribers would be detrimental to good service and lead to higher costs, yet it seems to the Board that the rate for such service should bear a closer relation to the actual outlay required to supply it than seems to be the case at present.

The company's charge at present is based chiefly on a system of averages, in which the costs appear to be largely estimates. The Board will not rule at this time on the reasonableness of this charge, but RECOMMENDS to the company that it file with the Board a schedule of rates for short-term services, based on the actual costs of providing for and supplying the same.

Dated, April 1st, 1914.

No. 176.

INHABITANTS OF THE CITY OF PLAINFIELD,

VS.

PUBLIC SERVICE ELECTRIC COMPANY.

The Board is asked to order the respondent to continue to light the municipal buildings in the city of Plainfield without charge. The Board refuses to support the contention that the prohibition by the Public Utility Act of undue or unjust discrimination was an implied repealer

of rights previously existing by contract in favor of certain municipalities.

Held—That for the respondent to light without charge the public buildings of the city of Plainfield does not involve undue or unjust discrimination, but the respondent is bound to afford such lighting service without charge to the city.

Charles A. Reed, for the petitioner.

L. D. H. Gilmour, for the respondent.

By petition filed with this Board on January 12th, 1914, the petitioners ask this Board to enter an order requiring the respondent to comply with the terms of a certain ordinance and a certain agreement; and in conformity therewith to continue to light the municipal buildings of the city of Plainfield without charge.

The case was heard at the State House, in the city of Trenton, on January 27th, 1914, both parties being represented by counsel.

The essential facts in the case are practically undisputed.

It appears that the city of Plainfield, by ordinance approved July 12th, 1898, granted to respondent's predecessor in title the right to place distributing apparatus in public streets of the city. Said ordinance designated where and how such apparatus should be located and maintained.

There is no allegation that said ordinance was not duly accepted by the franchisee.

On November 28th, 1898, the city and the franchisee made an agreement, reciting, *inter alia,* that

"It was understood and agreed before the passage of said ordinance" (referring to the ordinance of July 12th, 1898), "and in consideration thereof, that the said Plainfield Gas and Electric Light Company" (respondent's predecessor in title), "should enter into this contract for the benefit of the said inhabitants of the City of Plainfield and all persons residing therein."

Among the covenants in said agreement contained is one whereby the franchisee undertakes

"while said Company, its successors or assigns, shall continue to use any of the streets of the said City, or any of the subways aforesaid (to) light by electricity, free of charge, the Common Council Chambers, offices of the Mayor, Collector, Street Commissioner, City Clerk, the City Jail, Station House, Almshouse, Fire Houses, as at present lighted or new in proportion, and all other offices, rooms or buildings, owned or occupied by the city officers or that may be hereafter owned or occupied for city purposes, including City Hall if the same shall be built or rented; etc."

This covenant in the agreement is quite apart from and independent of another in the same agreement whereby the city, at its option, may call upon the franchisee to light the city streets. The city expressly reserved its right to take city lighting from other parties, and to resume such service at the hands of the franchisee thereafter, if the city saw fit.

It is in evidence that Public Service Electric Company, by letter of December 8th, 1913, notified the mayor of Plainfield that it

"is convinced that it cannot longer continue to lawfully furnish free lighting to the municipal buildings in the City of Plainfield, and unless a contract for that purpose is made before the first of February next, the Company will be constrained to discontinue the lighting of such buildings at that time."

In this posture of affairs the city petitioned this Board, as above recited, to make an order requiring the respondent to comply with the terms of the ordinance and the covenants of the agreement as set forth above, and in conformity therewith to continue to light, without charge, the municipal buildings of Plainfield.

What are the grounds upon which the Board may order

a public utility to fulfil covenants embodied in a contract, related, as in this case, to a duly accepted ordinance?

The petitioners rest their request for such an order upon Chapter 195 of the Laws of 1911 (II, 17, (a)). This provides that the Board shall have power, after hearing, by order in writing, to require every public utility

"(a) To comply with the laws of this State and any municipal ordinance relating thereto, and to conform to the duties imposed upon it thereby, or by the provisions of its own charter, whether obtained under any general or special law of this State."

Petitioner's contention is that the laws of the State require an observance of contract obligations; that the lighting of the city buildings without charge is a contract obligation of the respondent; that respondent refuses to observe said contract obligation; and that, therefore, this Board has jurisdiction and should order compliance with the contract.

The Board is clearly of opinion that the section of the statute cited warrants the Board to order a public utility to comply with the laws of this State which relate to the utility by reason of the utility's specific character as a duly delegated agent of the State for affording service, safe, adequate and proper, at reasonable rates, and without undue or unjust discrimination.

But it is a hazardous pressing of the language of the statute which would make it imply that this Board may order a public utility to make a payment of money lawfully due to a contractor for work done, or to comply with a contract which differs in no way from a contract assumed by private parties.

The enforcement of obligations such as that just instanced, of a public utility, it was clearly never intended to impose upon an administrative board, or to withdraw

even in the first instance from the jurisdiction of the courts.

If the obligation of the respondent to light without charge the public buildings of Plainfield as a continuous payment for respondent's right of entry upon and occupancy of streets of Plainfield, said rights being obtained when its franchise from Plainfield was bargained for, were one flowing wholly from a contract that in its nature is entirely akin to a contract between two private individuals it would be an obligation not intended for this Board's cognizance or enforcement under the statute.

But this Board is not persuaded that the contractual obligation of the respondent to light the city buildings free of charge is one arising from a contract such as might be concluded by the respondent in a quasi-private capacity. The passage and acceptance of the ordinance approved July 12th, 1898, created certain contractual rights and obligations between the city and the franchisee. Some of these rights and obligations, such as the designation of streets on which the franchisee's distributing apparatus may be placed, are described in the ordinance. But the rights and obligations created by the passage and acceptance of the ordinance are not set forth in their entirety in the ordinance, but are defined in the subsequent agreement. This fact is attested by the preamble of the agreement of November 28th, 1898, wherein it is explicitly stated that:

"it was understood and agreed *before the passage of the said ordinance, and in consideration thereof,* that the said Plainfield Gas and Electric Light Company should enter into this contract for the benefit of the said inhabitants of the City of Plainfield and all persons residing therein."

Hence the omission of the ordinance to recite each and all of these contractural rights and obligations *in extenso* does not operate to deprive the rights and obligations subsequently set forth in the agreement, of the binding force

imparted to them by the passage and acceptance of the ordinance. By necessary implication the rights and obligations recited in the agreement become part and parcel of the contract created by the passage and acceptance of the ordinance, although their reduction to writing was subsequent to the approval of the ordinance. Being a necessary and pre-destined complement to the contractural rights and obligations named preliminarily in the ordinance, this Board has no alternative but to regard them to all intents and purposes as part of the contract effected by the passage and acceptance of the ordinance, and as entitled under the statute to the same enforcement as though the original ordinance had set them all forth at length.

The case before the Board was argued largely by the respondent on the ground that the Public Utility Act in forbidding undue or unjust discrimination precludes the lighting of municipal buildings in one case without payment and the exacting of payment in other cases for a service physically similar. It was argued that the prohibition of undue or unjust discrimination was an implied repealer by the State of rights theretofore existing by contract in favor of certain municipalities; that the State by this section of the act waived for itself and for its creatures, the various municipalities, rights previously enjoyed under contracts or franchise ordinances, unless such rights had in all cases been uniformly granted to all municipalities by the utility.

The Board is of opinion that this contention is groundless. Undue or unjust discrimination was forbidden at the common law prior to the enactment of Chapter 195, Laws of 1911. If such rights which municipalities have obtained by contract, whether incorporated in ordinances or not, when bargaining in respect of franchise grants, are void now; they have long been void hitherto. That such rights have been upheld in many adjudications precludes

the assumption that they were void or have become void. Such a position may readily prove a double-edged tool for public utilities. If the covenants under which they ob tained rights of entry always were void, the franchises in question are, many of them, in a parlous state. The utilities are not entitled to the rights they have obtained by such contracts, unless they honor the valid considerations required of them by virtue of such contracts.

The Board is of the opinion that when a public utility bargains with a municipality for rights of entry upon and occupancy of the public street, the public utility acts in a unique capacity; that in such unique capacity it may assume obligations to make a return for such franchise privileges as it seeks, and may express such obligations in terms of money, or of service. It may in such capacity lawfully undertake to pave the streets traversed by its cars. It may in such capacity undertake to pay to the municipality in money a certain portion of its receipts. It may in such capacity undertake to afford a stipulated amount of free service, such as free lighting or free telephone service for municipal buildings.

The essential thing is that the obligation so undertaken, even though expressed in terms of service to be rendered without money payment, is one assumed by the public utility *as a bargainer with a body politic,* not as a duly deputized and enfranchised agency required to afford service to the generality of consumers without undue or unjust discrimination.

It is one thing to promise service without charge when the utility bargains with a body politic for a franchise; it is a radically different thing for a utility duly enfranchised to sell service to the public generally. In the one case the utility buys particular privileges from a particular body politic; in the other case, the utility sells services to con-

sumers generally. In the one case it buys a franchise; in the other it sells a service.

The Board, therefore, is clearly of opinion that for the respondent to light without charge the public buildings of the city of Plainfield does not involve undue or unjust discrimination, but that the respondent is bound to afford such lighting service without charge to the city of Plainfield.

The alternative contention of the respondent that such lighting service without charge is a tax, and may be deducted by the respondent under the Voorhees' Act from the taxes paid to the municipality, is a matter not within the competence of this Board.

An order will enter conformably with the determination above made.

Dated, April 1st, 1914.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the Board of Public Utility Commissioners

HEREBY ORDERS the Public Service Electric Company to conform to the duties imposed on it by an agreement with the city of Plainfield, made November twenty-eighth, nineteen hundred and ninety-eight, by the Plainfield Gas and Electric Light Company (predecessor in title to the Public Service Electric Company), and to furnish free of charge to the city of Plainfield such service as the agreement re-

ferred to herein provides shall be furnished by the Plainfield Gas and Electric Company to said city.

This order shall take effect April 21st, 1914.

Dated, April 1st, 1914.

An appeal was taken from the above order. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT,
JUNE TERM, 1914.

PUBLIC SERVICE ELECTRIC CO.,
Prosecutor,

VS.

BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD,
Defendants.

ON CERTIORARI.

Before JUSTICES SWAYZE, PARKER and KALISCH.

For the Prosecutor, FRANK BERGEN.

For the City of Plainfield, CHARLES A. REED.

For the Board of Public Utility Commissioners, FRANK H. SOMMER.

The opinion of the court was delivered by KALISCH, J.

The facts before us show that by an ordinance approved July 12th, 1898, the City of Plainfield designated certain streets in said City on which the predecessor of the prosecutor, the "Plainfield Gas and Electric Light Company" might place and maintain poles and wires and also indicating in the manner in which the poles would be placed for the distribution of electricity. That subsequently on the 28th day of November, 1898, a contract in writing, under seal, was entered into between the company and the city which recites in substance that it was understood between them before the passage of the ordinance and in consideration thereof that the company should enter into the contract for the benefit of the inhabitants of the city of Plainfield and all persons residing therein, and which in substance provided that in consideration of the passage and approval of the ordinance and of the sum of one dollar paid by the city of Plainfield to the company, the company agrees

and covenants to and with the city that the company, its successors or assigns, will at all times hereafter, while said company, its successors or assigns, shall continue to use any of the streets of the city or any of the subways thereof, light by electricity, free of charge, certain municipal buildings, offices and rooms owned or occupied by the city officers, or that may hereafter be owned or occupied for city purposes. That from 1898 until 1913, the company and its successor carried out the terms of the contract.

On the 8th day of December, 1913, the prosecutor notified the city in writing that it could not lawfully continue free lighting of the public buildings and that it would discontinue the same on and after February 1st, 1914.

Thereupon, the city appealed to the Board of Public Utility Commissioners, which board after a hearing made an order directing the prosecutor to conform to the duties imposed on it by the contract and to furnish free of charge to the city of Plainfield such service as the agreement referred to provides and shall be furnished by it to the said city.

It is this order which the prosecutor seeks to set aside. The prosecutor rests its act on sub-division (d) of section 18 of the act of 1911, concerning public utilities (P. L. 1911, p. 381) which forbids the making or giving directly or indirectly, any undue or unreasonable preference or advantage to any corporation or to any locality; and upon an act entitled, "A Further Supplement to the act entitled 'An Act for the punishment of crimes (Revision of 1898),'" P. L. 1913, p. 27, which in express terms denounces, *inter alia*, as a misdemeanor for any corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public to discriminate between communities or cities of the state, by selling such commodity or rendering such service at a lower rate in one section, community or city than another, etc.

Whether or not this act is applicable to the case under consideration is wholly unimportant and, therefore, it is not considered and no opinion is expressed thereon.

We think, however, that the public utilities act in forbidding discrimination made the performance of this contract unlawful, and that, therefore, the prosecutor could not continue to perform the contract without being guilty of a violation of that statute. Thus we have the case of a contract lawful when made, the performance of which subsequently became unlawful. It is perfectly well settled that the effect of this is to excuse the promisor from performance. *Pollock on Contracts*, 4th ed. 406; *Pomeroy on Contracts*, 280, (Specific Performance); *Parsons on Contracts*, 6th ed. 675; *Louisville & N. R. Co.*, v. *Motley*, 219 U. S. 485.

For the city of Plainfield it is contended that sub-division (d) of section 18 of the act relating to public utilities is not applicable to the case at hand because it relates only to cases where it appears that there is undue or unreasonable preference or advantage given and that there is no evidence that the preference or advantage given is either undue or unreasonable. That in order to determine whether or not an undue or unreasonable preference or advantage has (was) made in any given case, it would be necessary to show by evidence all the attendant facts and circumstances.

This contention clearly ignores the spirit of this legislation. One of its objects was to abrogate the granting of gratuities to municipalities and thereby prevent reciprocal favors from being granted to the donors.

The evil sought to be eradicated was the insidious influence which might be exercised on municipal bodies and offices against the general public welfare, by the donors of such gratuities. Therefore, where it appears, as it does in this case, that the gratuity granted by the predecessor of the prosecutor to the city of Plainfield to light all its public buildings, offices and rooms free of charge forever, because it has received the privilege of placing and maintaining its poles and wires in the streets and subways of the city of Plainfield, no other evidence is required or necessary than is furnished by the contract, to demonstrate that the preference or advantage given by the contract is undue and unreasonable and within the inhibition of the public utilities act.

The fact that there was such undue and unreasonable preference or advantage given is sufficient basis to set aside the order made by the Public Utilities Commissioners.

There appears to be, however, another equally valid ground for setting it aside. The Board of Public Utility Commissioners, by the statute creating the commission has the power to enforce certain legal obligations of the prosecutor, but the language is not broad enough to confer on the board the power to enforce specific performance of contracts. This order made directs the specific performance of the contract between the parties.

What would be the legal effect of the statute if it were broad enough to confer such a power on the board need not now be considered. Nor is it necessary to consider whether the board would have had the power to enforce the contractural relation if it had existed in the ordinance.

The order will be set aside.

In re service Morris County Traction Company.

No. 177.

IN THE MATTER OF THE PETITION OF FRANK J. NELSON, DANIEL H. BEACH AND HOWARD B. KLINE, INDIVIDUALLY, ALSO AS MEMBERS OF THE TOWNSHIP COMMITTEE REPRESENTING UNION TOWNSHIP, AND THE CITY OF SUMMIT, REGARDING THE CHANGE OF SCHEDULE ON THE MORRIS COUNTY TRACTION COMPANY'S LINE FROM SPRINGFIELD TO ELIZABETH.

Complaint was made of change by the respondent of its schedule.

Held—That the respondent should run its cars every half hour from six A. M. to eleven P. M. each day between Maple Street, Summit, through the township of Union to the Central Station in Elizabeth, and that this is required in compliance with ordinances and to furnish safe, adequate and proper service.

John K. English, for Township of Union and Frank J. Nelson.

C. N. Williams, for City of Summit.

Elmer King, for Morris County Traction Company.

On October 13th, 1913, Frank J. Nelson, of Springfield, Union township, addressed a communication to this Board to the effect that on October 1st last the Morris County Traction Company had changed the schedule of the cars running between Springfield, in Union township, and the Central Railroad station, in Elizabeth; that prior to this date cars had been operated at half-hour periods during the whole day; that after October 1st the cars had been operated, and were now being operated, at hour periods between certain hours of the day, viz., from 9 A. M. to 3 P. M., and from 8 P. M. to 12 P. M. The letter also recited

that a petition containing one hundred and fifty names of citizens of Union township had been placed in the hands of the township committee, complaining of this change of schedule.

This informal complaint was made the subject of investigation by the Board, and on November 10th its Chief Inspector reported that the respondent company had changed the schedule in the manner complained of. Among other things, the Chief Inspector stated that a census had been taken on November 5th, 1913. This census showed that eighteen persons waited at Springfield thirty minutes each during the hours from 9 A. M. to 3 P. M., and during the hours of 8 P. M. to 12 P. M., two persons waited thirty minutes for a connection. Another census was taken on November 6th, showing six persons waiting thirty minutes from 9 A. M. to 3 P. M., and four persons from 8 P. M. to 12 P. M. The Chief Inspector concluded with a recommendation that the schedule in force previous to October 1st be replaced, and that cars be run at half-hour periods during the whole day.

On November 1st a petition was received from Daniel H. Beach and Howard B. Kline, as individuals, and as members of the township committee, reciting the change of schedule complained of in the letter of Frank J. Nelson, and praying that the respondent company be compelled to run its cars at half-hour periods in accordance with its former practice and in compliance with the terms of a certain ordinance granting a franchise to said company to operate in said township.

The Morris County Traction Company filed an answer and cross-petition, requesting that the city of Summit be made a party to the proceedings. Copies of the answer and cross-petition were duly served upon the city of Summit and answer filed by said city. At the hearing, which was

held in Jersey City, on December 5th, by consent of all parties, all petitions were consolidated.

No dispute exists as to the facts in the issue presented. The company, in its answer and in the testimony before the Board, admitted that the change in the schedule complained of was made on October 1st, 1913.

The ordinance of the township of Union required that "cars shall be run at least every half-hour from 6 A. M. to 11 P. M. over the tracks of the company; and the fare for the single continuous trip from any point within the limits of the township to the Central Railroad station in the city of Elizabeth shall not exceed five cents," etc. There can be no doubt that the company, under the ordinance above referred to, is obligated to run its cars in Union township every half-hour from 6 A. M. to 11 P. M.

The ordinance of the city of Summit requires that the company run its cars every half-hour between Maple street, Summit, and the Central Railroad station, in Elizabeth; and, further, that cars shall run the whole length of the line between said termini, etc.

The respondent company is at present operating its cars to the Central Railroad station in Elizabeth. We are, therefore, not concerned with the various questions raised by the company as to its legal obligations to run cars to that station under the ordinances of Union township or the city of Summit. The Board, therefore, finds and determines that the company should run its cars every half-hour from 6 A. M. to 11 P. M. each day between Maple street, Summit, through the township of Union to the Central Railroad station in Elizabeth; and that this is required both in compliance with the ordinances before referred to and to furnish safe, adequate and proper service.

An order will accordingly issue.

Dated, April 7th, 1914.

Charles Reincke *vs.* Public Service Gas Co.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the Board of Public Utility Commissioners

HEREBY ORDERS the Morris County Traction Company to run its cars every half-hour between 6 A. M. and 11 P. M. each day, between Maple street, Summit, through the township of Union to the Central Railroad station in Elizabeth.

This order shall take effect April twenty-seventh, nineteen hundred and fourteen.

Dated, April 7th, 1914.

No. 178.

CHARLES REINCKE

VS.

PUBLIC SERVICE GAS COMPANY.

This is a complaint of the practice of the respondent in discontinuing service to a customer for non-payment of bill when the customer has a deposit with the company amounting to more than the unpaid bill.

Held—That the company is not required to furnish gas at a risk of loss from non-payment, but while it has in hand more than enough of the customer's money to meet current accounts, summary discontinuance of service is unwarranted. Modification of respondent's rule recommended.

Charles Reincke *vs.* Public Service Gas Co.

The Company would be warranted in giving notice to the customer to restore the deposit to the original amount within a reasonable time, or in case of failure the account would be closed.

Charles Reincke, in person.

L. D. H. Gilmour and *Edmund W. Wakelee,* for the respondent.

This complaint challenges the reasonableness of the practice of the respondent company in discontinuing service to a customer who has failed to pay a bill for gas within the time limited by the company's rule, when said customer has a deposit with the company amounting to more than the unpaid bill.

On January 12th, 1914, complainant owed two bills for gas, as follows: December, $2.61; January, $1.26. On that date complainant paid the December account, leaving the January account unpaid. On January 13th the company gave notice that unless this bill was paid on or before noon of January 14th it would "discontinue the supply of gas." The bill not being paid, service was discontinued in accordance with the notice.

Complaint was thereupon made that the action of the company in thus cutting off service was unreasonable, because the complainant had, for five years past, a deposit of five dollars in the company's hands to guarantee payment of bills for gas supplied. A copy of the complaint was forwarded to the company, answer was filed, and the matter came on for hearing at Chancery Chambers, Jersey City, on March 6th, 1914.

No question is raised as to the reasonableness of the rule requiring the deposit, nor as to the amount of such deposit. The sole question raised is as to the reasonableness of the practice of the company in discontinuing

service when the deposit is more than sufficient to pay all outstanding charges.

To determine this question it is necessary to inquire into the nature of the deposit and the reasons which justify its exaction. These are discussed in the case decided by the Board in February, 1914, involving the reasonableness of the rule of the Easton Gas Works requiring deposits. In that case the Board said:

"In determining the reasonableness of the impunged rule it is necessary to distinguish the advance deposit required by such a rule from a minimum charge, a service charge, a meter rent, an insurance fund to insure the integrity of the meter, and the base rate for metered gas or electric current. The sole function of the advance deposit is to ensure the payment of service whose amount cannot be known in advance."

The fund is held to answer the default of the consumer, and whenever the consumer defaults in payment the fund may be resorted to. Its exaction cannot be justified on any other ground. Persons with credit and financial standing are not required to make a deposit. If the fund could be regarded otherwise than as answerable for the default of the consumer, it would be necessary for the company to reduce its claim to judgment and levy on the fund. Clearly the fund occupies no such position. It is a sum of money in the company's hands, which is answerable for the payment of the consumer's account, whenever there is default in the payment thereof in the ordinary course. In this view the company should have applied so much of that fund as was required to cancel complainant's charge for gas consumed.

In this situation, with complainant's debt extinguished, is one day's notice of a purpose to discontinue service reasonable?

We think not. The company is not required to furnish gas at a risk of loss from non-payment. Whenever it be-

comes necessary to have recourse to the guarantee deposit the company is justified in regarding the consumer as of doubtful responsibility and in protecting itself from the danger of future non-payment. But while it still has in hand more money of the customer than is required to meet current accounts, summary discontinuance of service is not warranted. In the judgment of the Board the company would be warranted in giving notice to the customer to restore the deposit to the original amount within a reasonable time, or, in case of failure to so renew the deposit, that the account would be closed and the deposit returned, after deducting all service charges to that date.

The company urged that transferring so much of the fund as would satisfy debts due would entail increased bookkeeping. This is undoubtedly true. It must not be overlooked, however, that the company is debtor to the consumer to the amount of the deposit and that its possession renders the company's account secure, and such bookkeeping as is entailed is required by the business of the company.

The Board RECOMMENDS a modification of respondent's rule to conform to the views set forth herein, and respondent is requested to notify this Board within two weeks from the date hereof whether it will so modify its rule

Dated April 20th, 1914

No. 179.

TOWN COMMITTEE OF NEWTON

vs.

THE NEWTON GAS AND ELECTRIC COMPANY.

H. G. Kays and *Theodore Simonson,* for the petitioners.

Albert C. Wall, for respondent.

Complaint was made by the town committee of Newton that the Newton Gas and Electric Company failed to give adequate and proper electric lighting service to the municipality and citizens of the town of Newton. The complaint was referred to the Board's chief inspector, who caused an inspection to be made of the electric property of the company. Under date of January 24th, 1914, a report of such inspection was submitted to the Board, a copy of this report was forwarded to the receiver of the company, and a hearing was called to determine the propriety of an order by the Board requiring compliance with the recommendations made therein. Hearing was held February 20th, 1914, at Chancery Chambers, Jersey City, at which the receiver and the municipality were represented.

The electric generating plant equipment of this company "consists of three American Crossley gas engines of 100, 200 and 250 horse power, respectively, supplied with gas from a 200 horse power suction type gas producer and a 250 horse power Loomis-Pettibone pressure gas producer. Each engine is belted to a General Electric sixty-cycle, 3-phase alternator of 75, 150 and 200 Kws.

capacity, respectively. The voltage regulation is obtained by a Tirrill regulator." (P. 26.)

It appears from the testimony that the electric service rendered by this company is unsatisfactory; that there are numerous interruptions of service for periods of time varying from a few minutes to an entire night; that there are frequent and marked fluctuations in voltage in excess of that allowable.

There was no dispute as to the existence of these conditions. The superintendent, also receiver of the company, Mr. Keplinger, admitted that the generating plant equipment did not work satisfactorily, and that it had not been working satisfactorily for several years. He stated that he had difficulty with the producers because of the quality of coal used. This trouble seems to have existed year after year, and now seems no nearer solution than it was when he took over the operation of the plant. He admitted there was trouble with the regulators, and that no correction had been effected. He admitted that the engines did not and had not for several years worked properly. He testified that he is in controversy with the manufacturer of the third and largest engine, because of its failure to do its work as guaranteed. This dispute has been pending for several years and appears to be no nearer a conclusion than when it began. Nothing is being done to settle the question involved. Since the installation of the engine, which the receiver says has never done its work, it appears that the receiver has continued to operate it, has done practically nothing to overcome its defects, and has failed to have it put in proper operating condition, or require the manufacturer to take it back. The obvious duty of the receiver is to put the equipment in condition to render safe, adequate and proper service. It is not an answer to a charge of inadequate service to plead a long stand-

ing dispute of the kind here involved, when the receiver admits and charges that the machinery installed is inefficient. The receiver should require prompt compliance by the manufacturer with the terms of the contract, testified to by the receiver, which required an engine capable of actually performing the work for which it was secured, or the substitution therefor of an efficient engine. The retention of an unsatisfactory piece of machinery cannot relieve the company of its duty to the public to give service. Inasmuch as the receiver has been offering this specious plea as his excuse for poor service for several years, and has, meantime, done practically nothing to bring the controversy to a close, it must be taken as not evidencing good faith on his part.

It was not disputed that the regulator used by the company is not doing its work. The receiver admitted it. (P. 105.) He said that repeated efforts were made to put it in condition, but it repeatedly broke down. This regulator should be put in shape without delay, if possible. If it cannot be made to operate satisfactorily, a new one should be installed.

It was established by the testimony that the distribution system of the company has not been maintained in proper and safe condition. The testimony discloses that poles and cross-arms are rotten and improperly set; wires are not run in accordance with the requirements of good practice, and in some instances create dangerous conditions; wires are permitted to sag and interfere with other systems using the same poles; transformers are not properly fused; tin cans are used in place of condulets on top of the conduits for underground service connections from poles; guy wires are run in close proximity to high-voltage lines; guy wires are permitted to hang loose, some are attached to fences and trees and many are loose from

their anchors; taps and splices are not taped and some are not soldered.

It was testified that the floor of the generating power station has never been finished, and that it presents a situation of hazard to employees. In plants of this character every effort should be made to maintain conditions that present the least possible danger to employees. This is required not only in the fulfilment of the employer's duty to its employees, but its duty to consumers requires that the plant shall be operated in the most efficient manner possible, free from interruptions of service due to accidents to employees. The efficiency due to consumers is not possible if employees are required to go about their work in constant fear of injury. The floor should be put in good condition without delay.

A copy of the report of the Board's inspector was served on the company. That report deals with some particularity with the defects of the plant, machinery and distribution system. Notwithstanding the fact that this report was in the hands of the company's representative for a considerable time before the hearing, no attempt was made to deny the existence of the conditions therein pointed out.

On the contrary, the receiver admitted generally the existence of the conditions pointed out in the report, and that the service given was faulty. The company's attention is directed to the matters specifically dealt with in the report.

The testimony establishes beyond doubt that the powerhouse, the generating plant equipment, the engines, producers and regulators, the outside distribution system and the system of lightning protection are not maintained in condition to render safe, adequate and proper service. It further appears that the company is not rendering safe,

adequate and proper service. The Board so finds and determines.

The Board finds and determines that it is necessary for the company, in order to render safe, adequate and proper service, and, therefore, will order the company—

First: To thoroughly overhaul its generating plant, and put the engines, producers and regulators in condition to render safe, adequate and proper service. If the present engines with their producers cannot be made to regulate satisfactorily, and to provide service continuously, they should be replaced by some other type of prime mover.

Second: To install adequate lightning protection.

Third: To overhaul its outside distribution system lines, and put the same in good order.

Fourth: To complete the floor of the powerhouse by putting it in good condition with a reasonably smooth, hard surface, and by installing rails and necessary devices for the safety of employees.

The Board recommends that a study be made of transformer loads, in order that greater efficiency and satisfactory voltage conditions may be obtained.

It is apparent that friction exists between the municipal authorities and the electric company, and between the electric company and the telephone company. It is recommended that efforts be made to effect co-operation between the municipality and the companies using the poles and wires.

The work required to be done should be commenced without delay, and pressed to a speedy conclusion. Not more than two months should be required to complete the work. June 20th, 1914, is fixed as the time of such completion. If new machinery is required which cannot be

procured and installed by June 20th, application may be made for additional time for such installation. An order will issue in accordance with the conclusions herein expressed.

Dated April 21st, 1914.

ORDER.

This complaint having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

The Board HEREBY ORDERS William L. Keplinger, receiver of the Newton Gas and Electric Company:

(1) To thoroughly overhaul the plant of the Newton Gas and Electric Company used in the generation of electricity, and to put the engines, producers and regulators used in the generation and distribution of electricity in condition to render safe, adequate and proper service, and to purchase such machinery as will enable said plant to provide continuously, safe, adequate and proper electric lighting and power service.

(2) To install adequate lightning protection.

(3) To overhaul the outside wiring and cables used in the distribution of electricity and to put the same in good order.

(4) To complete the floor of the powerhouse by putting the same in good condition with a reasonably smooth, hard surface, and by installing rails and necessary devices for the safety of employees.

The work called for above should be commenced not later than May 11th and completed not later than June 20th, 1914.

This order shall take effect May 11th, 1914.

Dated April 21st, 1914.

No. 180.

NICHOLAS LOURIE,

VS.

PUBLIC SERVICE GAS AND ELECTRIC COMPANIES.

Complainant is a user of gas supplied by the Public Service Gas Company and electricity supplied by the Public Service Electric Company. An account with the gas company was over paid and credited to complainant's account with the electric company. The question whether the complainant directed the gas company to transfer the over payment to the electric company is in dispute. The Board recommends that as the gas and electric companies are separate corporations written authorization should be obtained from customers for the transfer of funds from one company to the other.

H. H. Weinberger, for complainant.

L. D. H. Gilmour, for respondent.

Hearing April 1st, 1914.

Complainant resides at 169 Columbia avenue, Passaic, N. J., where he is a customer of Public Service Gas Company. At this house he uses gas for fuel and illumination. The firm of which he is a member has its business at 199

Monroe street, in the same city. At his place of business both gas and electricity are used.

It appears from the testimony that separate accounts are kept for gas consumed at each of the above houses. Gas is supplied by Public Service Gas Company and electricity by Public Service Electric Company.

On August 21st, 1913, complainant sent his check for $5.59 to Public Service Gas Company for gas consumed at 169 Columbia avenue, from May 22d, 1913, to June 21st, 1913, amounting to $2.16, and from June 21st, 1913, to July 22d, 1913, amounting to $2.43. The total of both of these bills is 4.59, and not $5.59, the amount for which the check was drawn. Upon discovering his error, complainant called the gas company by telephone and drew attention to the overpayment.

The complainant states that he was to be credited with the overpayment on his gas account. The agents of the company testified that the complainant agreed that the overpayment of $1 should be transferred to the electric account for 199 Monroe street with the electric company. This the complainant denies. It appears from the testimony that the dollar was credited to the electric account and that due allowance was made in bills for that service.

Bills for gas consumed at 169 Columbia avenue, from July 24th to October 22d, 1913, were: August 21st, $2.16; September 20th, $0.81; October 22d, $0.27, or $3.24 in all. On November 17th complainant sent his check for $2.24, or $1 less than the amount claimed to be due. Notice was thereupon given that unless the full amount of the bill was paid service would be discontinued. Complainant saw the company's manager and endeavored to convince him that the credit should be allowed on the gas bill. He was informed that he had been given credit by the electric company for the $1 in dispute, and that he must pay the balance claimed on the gas bill or service would be discontinued.

He insisted that he had not been credited on his electricity account, which he had paid in full. No adjustment of the difference being agreed upon, the company, on November 20th, cut off the gas supply. Complainant was without gas for several weeks, but, upon recommendation of this Board, is now receiving service.

The dispute is over the single question of whether the complainant directed that the overpayment be transferred by the gas company to the electric company. The complainant denies that he directed or acquiesced in such transfer. Mr. Doolittle, bookkeeper for the gas company, testified the complainant said it would be satisfactory to him if the dollar was placed to his credit on the electric account. Mr. Newman, manager of the company, testified that he had gone over both the gas and electric accounts with the complainant in the early part of November, and that complainant then affirmed what Mr. Doolittle had said as to the arrangement between them as to the disposition of the dollar. Mr. Newman, on the same occasion, went over all of complainant's accounts and showed him that the balance claimed to be due had not been paid by him.

It is not necessary to determine whether the complainant authorized the transfer, as alleged by the agents of the respondent. We think it not unlikely that the conversations as stated by Doolittle and Newman may have occurred and that the complainant forgot about it. An analysis of the complainant's accounts shows that there is one dollar due to one or the other of the companies. It appears as a charge in the gas account, because credit for the overpayment was made in the electric account. The analysis shows as follows:

Nicholas Lourie *vs.* Public Service Gas and Electric Co.

GAS ACCOUNT.

169 Columbia Avenue.

Bills Rendered.		*Amount Paid.*	
March 22, 1913,	$2 16		
April 22,	2 70		
May 22,	2 79		
June 21,	2 16		
July 22,	2 43	Check No. 331,	$4 86
Aug. 21,	2 16	" " 367,	2 79
Sept. 20,	81	" " 414,	5 59
Oct. 22,	27	" " 501,	2 24
Nov. 20,	63	Cash 12/3/13,	63
Dec. 20,	18	" 1/12/14,	18
Total,	$16 29	Total,	$16 29

Nicholas Lourie *vs.* Public Service Gas and Electric Co.

GAS AND ELECTRIC ACCOUNTS.

199 Monroe Street.

	Bills Rendered.		*Amount Paid.*		
Gas Bills—					
April 24,	$0	72			
May 24,		81			
June 23,	1	08			
July 24,		63			
Aug. 26,	1	08			
Sept. 23,		90			
Oct. 24,	1	17			
Total,	$6	39			
Electric Bills, Steiner & Lourie—					
April 23,	$2	60			
May 24,	2	50			
June 23,	2	40			
July 24,	2	80			
Aug. 26,	4	10			
Sept. 23,	4	30			
Oct. 24,	5	10			
Total,	$23	80			
Electric Bills—					
April 23,	$1	00	Check No. 330,	$4	32
May 24,	1	00	" " 368,	8	79
June 23,	1	00	" " 413,	4	43
July 24,	1	00	" " 473,	10	38
Aug. 26,	1	00	" " 503,	8	27
Sept. 23,	1	00			
Oct. 24,	1	00	Total,	$36	19
Total,	$7	00	$37	19	

Nicholas Lourie *vs.* Public Service Gas and Electric Co.

SUMMARY.

Bills Rendered.		*Amount Paid.*	
Gas—			
169 Columbia Ave.,	$16 29	169 Columbia Ave.,	$16 29
199 Monroe Street,	6 39	199 Monroe Street,	36 19
Electricity—			
199 Monroe Street,	23 80	Total,	$52 48
199 Monroe Street,	7 00	Amount due,	1 00
Total bills,	$53 48		$53 48

Inasmuch as Mr. Lourie based his complaint upon his claim that nothing was due upon either the gas or electric account, it is not necessary to determine which of the parties is correct respecting the alleged authorization to transfer the amount overpaid. The complainant should, within ten days, make payment of the dollar required to settle the old account. Meantime, no action should be taken by the company to discontinue service.

In view of the dispute between the company and the complainant, it appears that the company's agents acted rather summarily in discontinuing service.

It is RECOMMENDED in cases where there appears some reasonable ground for dispute, and particularly in cases where the consumer is responsible, that longer notice of discontinuance be given.

Inasmuch as the gas and electric companies are separate and distinct corporations, in order to avoid situations similar to this present one, it would appear wise, and the Board RECOMMENDS to the companies to secure the written authorization of customers to the transfer of funds paid by customers from the accounts of one company to the other.

Dated, April 24th, 1914.

No. 181.

IN THE MATTER OF THE APPLICATION OF HACKENSACK WATER COMPANY FOR APPROVAL OF AN ISSUE OF $250,000 BONDS AND $1,000,000 CAPITAL STOCK.

Application is made to the Board for its approval of issues of bonds in the aggregate sum of $250,000 and of capital stock in the aggregate sum of $1,000,000. Certain bonds were certified by the Trustee under the mortgage securing their payment and delivered to the Trustee. They were not sold until after the time when the law required approval by this Board.

The petitioner contends that certification and delivery by the Trustee to the company, prior to the enactment of the law, constituted an issue making the statute inapplicable to subsequent sale and delivery by the company. This contention is not sustained. Approval of the issue is granted by the Board.

Robert W. DeForest, for petitioner.

The petition herein asks approval of the issue by Hackensack Water Company of its bonds in the aggregate sum of $250,000 and of shares of its capital stock in the aggregate amount of $1,000,000.

FIRST: As to the issue of $250,000 in bonds.

Inquiries made by the Accountant of the Board early in 1913, and a report made by him as the result of his inquiries, indicated that apparently the Hackensack Water Company had issued its bonds to the face value of $250,000 since the organization of the Board, without obtaining the approval of the Board.

Further inquiry made by the Board developed that forty-seven of these bonds had been sold and delivered by

the Company on June 10th, 1912, at eighty-seven and accrued interest, and that two hundred and three had been sold and delivered by the Company on December 31st, 1912, at eighty-five and one-half and accrued interest.

It further appeared that these bonds had, at various times prior to January 31st, 1907, been certified by the Trustee under the mortgage securing their payment, and been delivered to the company. They were not, however, sold by the company, until the dates stated, because of the condition of the financial market which existed in 1907 and the low rate of interest (4%) which the bonds bear, which made it difficult to dispose of them at eighty, the minimum fixed by the statute. They were subsequently sold and delivered at the times stated without first obtaining the approval of the Board, on the theory that their certification and delivery by the Trustee to the company prior to the enactment of the statute creating the Board constituted an issue which rendered the statute inapplicable to their subsequent sale and delivery by the company. The Board signified to the company its dissent from this view.

Application is, therefore, now made for the Board's approval, *nunc pro tunc,* of the issue, sale and delivery of the bonds of the company.

Investigation satisfies the Board that the bonds were certified and delivered by the Trustee under the mortgage to the company on the basis of construction work actually done by the company in the amount thereof and the expenditures for which had not theretofore in anywise been capitalized. It further satisfies the Board that the prices at which the bonds were issued, sold and delivered by the company, which were in excess of the statutory minimum, were the best then obtainable. The approval now sought will, therefore, be granted.

SECOND: As to the proposed issue of $1,000,000 capital stock.

The Hackensack Water Company was organized by special act of the Legislature in 1869. It constructed a small plant at Cherry Hill, some two miles above Hackensack from which it supplied the village of Hackensack alone.

The company was reorganized shortly after it commenced business. Later, in 1881, it was again reorganized. Since the latter reorganization it has extended its system so that it now covers substantially the whole of the County of Bergen and parts of the County of Hudson, extending as far south as Hoboken. It furnishes water to the city of Hoboken, which city owns its own mains. In the rest of its territory it distributes water through its own mains to customers directly.

On December 31st, 1912, its customers numbered upwards of 34,000. Parts of the territory supplied by the company have grown so rapidly in recent years as to make extensions of plant and system necessary. Accordingly the company has entered upon the execution of a plan which involves increasing largely the capacity of its plant.

The plan includes:

(1) The construction of a large reservoir lying north and east of Oradell, the completion of which it is estimated will take some ten years. Three years of the estimated construction period have already passed.

(2) An addition to the pumping plant consisting of an extensive addition to the main building occupied by the pumping station, and the addition of a 20,000,000 gallon pump.

(3) An addition to the filter plant, doubling the capacity of the whole plant.

(4) Additional boilers, yard connections, accessories to the filter plant and other incidentals used in connection with the pumping and filtration plants located at New Milford.

(5) Extensions to the distribution system in many parts of Bergen and Hudson counties.

Inspections of the work in execution of this plan have from time to time been made by the Chief Inspector of the Board's Utility Division and an inspection has been specially made by him in connection with this application.

The purposes of the proposed issue of capital stock are as follows:

(1) Repayments of loans amounting on March 31st, 1914, to.....	$620,000
(2) Toward the completion of reservoir at Oradell	150,000
(3) Extension of distribution system next two years*	230,000
	$1,000,000

*Estimate based on average actual expenditures during past three years, which have exceeded $115,000 per year.

The company reports that between November 1st, 1910, and December 31st, 1913, the expenditures made by it and properly chargeable to capital account aggregated $1,527,-851.31; made up as follows:

Extensions to distribution system..	$384,136.89
Storage reservoir, Oradell	458,536.34
Real estate (chiefly for Oradell reservoir site)	207,224.74

Filtration plant, ...	111,304.89
Additions to pumping plants	252,637.99
Mains, ...	91,996.18
Office buildings, furniture, miscellaneous, &c., at Weehawken.....	22,014.28
	$1,527,851.31

These items have, to the extent of $1,360,874, been checked by the Accountant of the Board. In view of the fact that the application is for the approval of an issue of shares of stock limited to $1,000,000, a check by the accountant beyond the sum stated has not, at this time, been deemed necessary.

The items so checked by the Board's Accountant are reported by him as follows:

Capital Expenditures—November 1st, 1910, to December 31st, 1913, checked from books.	
Mains and hydrants	$384,137
Storage reservoir at Oradell.....	458,536
Real estate for reservoir site.....	204,242
Addition to filtering plant	111,305
New 20,000,000 gals. pump at New Milford, complete	108,411
Engine House No. 4 at New Milford...	94,243
	$1,360,874

The capital expenditures claimed have been further checked by the Board's engineering staff under the supervision of its Chief Inspector of the Utilities Division with the following result:

(1) Extensions are reported by the Board's Accountant as having cost $384,136.89.

The total additions during the period, November 1st, 1910, to December 31st, 1913, appear in the following table.

The unit prices used are those heretofore employed by the Board in its appraisement of the plant of the Butler Water Company.

These unit prices are thought to be fair for the purposes of comparison since the territory of the Hackensack Water Company in great part does not materially differ from that served by the Butler Water Company.

TABLE.

Length.	*Size.*	*Price per foot.*	*Total.*
955′	4″	.70	668.50
221,201′	6″	.90	198,980.90
18,961′	8″	1.14	21,615.54
24,818′ (Est)	12″	1.95	48,395.00
			$269,659.94

The company's records show that during the calendar year 1913, 76,102′ of mains of various sizes were laid at a cost of $95,127.50.

The average price per foot was $1.25.

The average price for the period covered by the table above was $1.02.

In the year 1913, however, some 2,000 feet of 24″ pipe was laid. This raised the average for the year.

In the appraisal of the property of the Butler Water Company it was found that the cost of hydrants and their connections was approximately 8% of the cost of mains, 12 inches and under.

For hydrants with their connections the Hackensack Water Company claims to have expended some $20,000.

This would amount to between 7 and 8% of the cost of

mains of 12 inches and under, and is consistent by comparison with other available figures.

Adding together the amounts so found the following result is reached:

Mains laid during period from Nov. 1st, 1910, to Dec. 31st, 1912.....	$269,659.94
Mains laid in 1913	95,127.50
Hydrants with their connections,....	20,000.00
	$384,787.44

As before stated, the amount reported by the Company as covering these items, checked as correct by the Accountant of the Board, is $384,136.89. It therefore appears that the item of extensions to mains properly checks.

(2) The item, Storage Reservoir at Oradell, is reported by the Company as totalling $458,536.34, and is checked as correct by the Board's accountant.

An analysis of the charges making this total shows the following results:

Since the inception of the work up to December 31st, 1913, the total number of cubic yards removed amounts to 1,532,706. Within the amount charged are included:

1 20 "	60,000	Approximate figures.
1 12" dredge,	$20,000	
Total	$80,000	

Estimated cost of grubbing and slashing 50 to 60 acres at $50 per acre,.	$2,500.00
Total charges	$458,536.34
Deducting the cost of dredges and clearing leaves a balance of.....	376,036.34

Dividing this amount by the number of cu. yds. removed gives us an average price of..... 24.6c per cu. yd.

This is reported by the Chief Inspector of the Board's Utility Division to be a fairly low price for work of this kind. To ascertain the actual cost there must be added the interest and depreciation on the cost of the dredges. It is expected that the work of excavation will require about ten years, of which three years have already elapsed. It would be proper therefore to charge off the cost of the dredges within the ten year period.

Taking the cost of the dredges at.....	$80,000
Salvage value	8,000
Balance to be depreciated.....	72,000
or on a basis of 10 years' use, per year,...	7,200
Interest on $80,000 at 6%.....	4,800
Total interest and depreciation per annum	$12,000

The excavation so far accomplished has required the operation of the dredges for about three years. If the total amount excavated is averaged over this period, the average excavation per annum has been approximately 500,000 cu. yds. On this basis the charge for interest and depreciation amounts to 2.4c. per cu. yd. Adding this to the charge shown above 24.6c. a round figure of 27c. per cu. yd, is obtained. This, too, is reported as a reasonable figure for work of this kind. In most contracts the cost is found to range between 30 and 45c.

(3) The next item, Real Estate, ($207,224.74) cannot readily be checked. The Accountant of the Board, however, reports that the amount stated corresponds to the amount shown by the ledger of the Company to have been paid.

(4) The same statement applies to the item, Filtration Plant. The cost of the work done up to December 31st, 1913, was $111,304.

(5) The additions to the pumping plant total $252,637.99 made up as follows:

20,000,000 gal. pump installed complete.	$108,411.17
Additions to building itself:	
Engine House, No. 4.....	94,243.26
Estimated cost of the boilers, steam piping, yard connections, new tank for coagulant and other similar items	50,000.00
	$252,654.43

(6) The total charges to meters from November 1st, 1910, to December 31st, 1913, were found from the ledgers to amount to $91,996.18. The charges for meters in the year 1913 have been checked and a comparison has been made between the charges found and an estimate of cost made up from available figures for the cost of meters. The meters in 1913 cost approximately $30,175.00.

It will thus be seen that total expenditures for meters in 1913 of which an exact record of the number and size purchased exists is approximately one-third of the total amount found charged for the period of three years and two months from November 1st, 1910, to December 31st, 1913.

(7) The remaining item amounts to $22,014.28, and represents extensive additions to the office building in Weehawken, together with fire-proof file cases and other furniture installed at that place.

The total expenditures during the period referred to as claimed appear to amount to $1,527,851.31. It is possible

that some portion of the item charged against the office building should have been charged for replacements, but this would involve a comparatively minor deduction.

The application of the company as before noted is for the approval of an issue of stock to the amount of $1,000,000. As considerably more than this sum is shown to have been expended for proper capital purposes by the Hackensack Water Company, approval will be given to the proposed issue of stock in accordance with the application.

Dated May 5th, 1914.

No. 182.

GEORGE COOK, *et al.*,

VS.

WELLS FARGO AND COMPANY.

Complainant asks for an order requiring the Wells Fargo and Company to maintain a "pick-up" and delivery service at Allendale. The Board cannot find that the rule of the company under which a "pick-up" and delivery service is not provided in connection with the Allendale office is unreasonable, nor can it find that the furnishing of such service is requisite, for adequate and proper service.

Held—That the installation and maintenance of a telephone by the company in its Allendale office is requisite to the furnishing of adequate and proper service.

Phillip B. Adams, for George Cook et al.

C. W. Stockton and *H. S. Marx,* for Wells Fargo and Company.

The petition herein seeks an order requiring the respondent, an express company, to provide a "pick-up" and delivery service to the residents of the borough of Allendale, in the county of Bergen, and further to install a telephone in its office in the borough.

The respondent by its answer admits that it does not furnish a "pick-up" and delivery service in the borough, and has not installed a telephone in its office.

The primary issue between the parties is, therefore, whether the rendering of adequate and proper service by the company to the residents of Allendale requires compliance with the prayer of the petition.

The statute (P. L. 1911, Chapter 195) requires that the company shall furnish "safe, adequate and proper service," and shall "keep and maintain its property and equipment in such condition as to enable it to do so." It further prohibits the company from providing or maintaining any service that is unsafe, improper or inadequate, and from withholding or refusing "any service which can reasonably be demanded and furnished when ordered" by this Board.

The statute in so far is merely declaratory of the rule of the common law.

The question therefore arises as to the duty of the company, in the respects complained of, under the common law rule. The common law does not (in the absence of a special contract, or of a custom to receive goods at other places) impose upon the common carrier of goods the duty to accept delivery at any place other than the place of business of the carrier, or the line of its travel.

This rule was recognized in (1895) *Bullard* vs. *American Express Co., 107 Mich. 95,* where the Court said:

"At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of the custom of receiving goods at other places."

Such carriers are, however, by the rule of the common law under a duty to make delivery to the consignee at his residence or place of business. This rule is so universally recognized that extended citation of authorities would not be justified.

In (1904) *Burr* vs. *Adams Express Co., 71 N. J. L. 263, 268*, the rule is concisely stated:

"In the absence of special contract or custom the duty of a common carrier of goods is not completed upon the mere arrival of the goods at destination, but includes the duty of delivery to the consignee."

It is further succinctly stated in *Baldwin* vs. *American Express Co., 23 Ill. 201,* as follows:

"It is the well-settled doctrine of England and of this country that there must be an actual delivery to the proper person, at his residence or place of business."

The rule is not extended to, and consequently the duty of personal delivery is not imposed upon, carriers by water. Nor is it applied to carriers by railway which operate over a fixed line. Such carriers are exempt from the duty of personal delivery. They are discharged from responsibility as common carriers by transporting the goods delivered to them to their business station nearest to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them.

That the rule, and the duty imposed by it, is not applicable to carriers by water and by railway is uniformly recognized.

In *Witbeck* vs. *Holland, 45 New York 13,* the Court said:

"Carriers by vessels, boats and railways are exempt from the duty of personal delivery. * * * Such carriers discharge themselves from responsibility as such by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them."

In *Atchison, T. & S. F. Ry. Co.* vs. *Interstate Commerce Commission et al., 188 Fed. Rep. 229* the Court said:

"The rule, however, never was applied to railroads. They are exempt from the duty of personal delivery, and bound only to carry the goods to the depot or station to which they are destined, and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them, after notifying the consignee or owner of their readiness to deliver."

The origin of the express business is interestingly noted in *Strauss* vs. *American Express Co. et al., 3 W. R. C. R. 556*, where the Railroad Commission of Wisconsin said:

"The express business originated in this country about the year 1839, when William F. Harndon, of Boston, Mass., entered into agreement with the Boston and New York Transportation Company, a common carrier by water, and the Stonington and Providence Railroad Company, respectively, whereby he obtained certain privileges for carrying on an express business. By the former company he was granted the right to transport * * * in the steamers of the company between New York and Providence, via Newport and Stonington, not to exceed once in each day from New York and from Providence, and as less frequently as the boats run between and from said places one wooden crate of the dimensions of five feet by five feet in width and height and six feet in length (contents unknown) until the thirty-first of December, A. D. 1839.

"The nature and extent of his undertaking is found in a notice published, during the last six months of that year, in two Boston newspapers, in which he states that he * * * 'will run a car through from Boston to New York and *vice versa* via Stonington, with mail train, daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes and bills, and will transact any other business that

may be entrusted to his charge.' *New Jersey Steam Navigation Co.* vs. *Merchants Bank, 47 U. S. 344, 346; Express Cases, 117 U. S. 18.*"

The inauguration of the business conducted by express companies is attributable to the need for a transportation service such as they provide, growing out of the modification before noted of the rule of the common law requiring common carriers of goods to make personal delivery to consignees, in its application to carriers by water and rail.

The origin of the express business, and the inducements which led to its introduction, have caused the general rule governing common carriers of goods and requiring personal delivery at the place of residence or place of business of the consignee to be applied to the express companies.

The exemption from the duty of personal delivery applying to carriers by water and by rail has not been extended to them, although availing themselves of carriage by water or rail.

In *Wilbeck* vs. *Holland, supra,* the Court said:

"* * * this exemption does not extend to express companies, although availing themselves of carriage by rail. They were established for the purpose of extending to the public the advantage of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail."

In *Am. Union Exp. Co.* vs. *Robinson, 72 Penn. St. 274,* the Court said:

"One of the distinctive characteristics of this mode of transportation is that the companies, whether their line is by land or by water, or partly by each, undertake to deliver to the consignees in the same manner all common carriers by land did before railways came into general use; it being now well established, that in the ordinary railway transportation of goods there is no obligation after the goods reach their appointed destination but to put them safely in warehouse. It was mainly to remedy this defect in railway transportation of parcels of

great value in small compass that express companies were first instituted in America.

"That these companies are to be held ordinarily to personal delivery has been so often decided as scarcely to require the citation of cases."

The primary rule applied to these companies is stated in *Downs* vs. *Pacific Express Co., 135 Mo. App. 330*:

"An express company is not only a common carrier, but is one required in most cases to deliver to the consignee the property it undertakes to transport."

From the nature of the undertaking of the express companies, then, there arises an implication that they will make personal delivery. Their duty to make such delivery is, however, merely the *prima facie* rule. That it is not absolute is indicated by the care taken in *Downs* vs. *Pacific Express Co., supra,* in the statement of the rule to limit it to "most cases," and by the recognition in *Burr* vs. *Adams Express Co., supra,* of the possibility of modification of the duty imposed by the rule by special contract or custom.

To the same effect are the following cases:

In *Baldwin* vs. *American Express Co., 23 Ill. 201,* the Court in commenting upon the testimony of the general agent of the company who had stated that the company delivered goods "actually to the person, or by notice," said that its understanding of the import of this testimony was:

"* * * that at important towns on their routes, and at the termination of their routes at important towns, they deliver personally; at way-stations by notice, and by depositing the goods or packages in a safe receptacle, if that be the known custom of the company. *Such a custom may be reasonable, and, therefore, legal,* and if well established, parties will be presumed as having contracted with reference to it; but at small stations, where the business will not justify them in keeping a special delivery agent, prompt notice should be given to the consignee, in order to discharge them from the strict liability of common carriers."

In *Express Co.* vs. *Holland, 109 Ala. 362,* the Court said:

"As to express companies, the rule seems to be well settled that, generally, they are required to deliver the goods or packages to the consignee at his residence or place of business. * * * But this rule has received modification, where the place of delivery is at small way-stations, where the business will not justify the keeping of special delivery messengers and wagons, in which case personal notice of the arrival of the goods or packages, and depositing them in a safe receptacle, if that be the known custom of the company, will be treated as a delivery when the consignee has had reasonable time, after such notice, to remove the goods or receive the packages. 'Such a custom may be reasonable, and therefore legal, and if well established, parties will be presumed as having contracted with reference to it.' * * *"

In *Bullard* vs. *American Express Co.,* in passing upon this matter, the Court said:

"Carriers on land receiving packages were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water or railroad companies, which must of necessity be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee. * * * The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not unreasonable to require the consignee to call at the office. * * * If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company in apparent good faith has assumed to fix limits, having regard to the public requirements that with regard to persons who have dealt with them having knowledge of this fact, they are not bound to deliver beyond these limits."

That the general rule is subject to modification by special

contract or custom is recognized in *State ex rel.* vs. *Adams Express Co., 171 Ind. 138,* where the Court said:

"It is true that the courts have treated common carriers by express as analogous to common carriers by wagon, and with the exceptions heretofore mentioned, have held that it is an implication of their undertaking that they will make personal delivery. The authorities, however, seem to rest on the theory that this responsibility springs from the nature of the undertaking where otherwise unrestricted.

"Judge Redfield refers to the duties of such carriers to make personal delivery as the *prima facie* rule (*Redfield, Carriers, Sec. 58*), and the doctrine is so stated by Cowan, J., in *Gibson* v. *Culver* (*1837*), *17 Wend. 305* * * *. Judge Story says: 'If there is any special contract between the parties, or any local custom or usage of trade on the subject, that will govern; the former as an express, and the latter as an implied term of the contract.' *Story, Bailments* (*9th ed.*), *Sec. 543. Angell, Carriers* (*4th ed.*), *Sec. 295,* lays down the rule that 'when the carriage is by land, and in the absence of any established usage, or any special contract to the contrary the goods must be carried to the residence of the consignee.' It is stated by a modern text-writer that 'in all cases where a special contract or usage is shown to exist which relieves the carrier from personal delivery, unless the provisions of the contract are unreasonable the carrier is not liable if delivery is made in accordance with such special contract or usage.' *Moore, Carriers, 194* * * *."

In *Hutchinson* vs. *United States Express Co., 63 W. Va. 128,* the rule and its modifications were considered; the Court said:

"By the general rule of law, express companies are required to deliver the goods to the consignee in person, or to his authorized agent, at his residence or place of business. The duty of carriage is not terminated on their arrival at the point of destination, that is at the station or agency to which they are directed. The duty of carriage and the liability as carriers continues beyond this point to the residence or place of business of the consignee. *12 Am. & Eng. Encys. Law 550, 6 Cyc. 454; Hutchinson on Carriers, Sec. 716.* In this respect express companies differ from other public carriers. But this rule is subject to some qualifications. * * * Of course, the commencement and termination of liability as carriers may be limited and controlled to some extent by special contract. How far this may be done it is unnecessary here to inquire. The general rule of law is also relaxed,

varied or set aside by usage or custom established by the company and recognized and acquiesced in by the public. The maintenance of delivery messengers and vehicles involves an expense wholly out of proportion to the business transacted at small way-stations, and at such places, a custom or usage generally obtains under which deliveries are not made elsewhere than at the express company office. The consignee is expected to call at the office for his package after having been notified of its arrival. Even in cities, delivery districts are sometimes established, beyond the limits of which deliveries are not made. *Hutchinson on Carriers, Sections 717, 718; 12 A. & Eng. Ency. Law.* The duty to give notice, usually by mail, is founded upon the usage or custom, dispensing with the general rule requiring delivery at the residence or place of business of the consignee."

The State and Federal Commissions, too, have recognized that the rule imposing the duty of personal delivery is the *prima facie* rule merely and is subject to modification by special contract and by custom.

See *Heineman Lumber Co.* vs. *Wells Fargo and Company,* decision by Wisconsin Railroad Commission, January 14th, 1914: *In re Express Rates, etc., 24 I. C. C. 394.*

These authorities justify the statement of the rule and its qualifications by *Wyman on Public Service Corporations, Sec. 1040*:

"Express companies generally undertake personal delivery to the consignee. They are, therefore, liable as common carriers until delivery, or rather until they have made reasonable efforts to deliver. In order to discharge the express company from its liability as a common carrier it must tender the goods at the consignee's address during business hours; and its liability as a carrier is terminated if it finds him absent or he refuses to take the goods. However, an express company may, at least in small communities where the business does not justify the provision of an equipment for delivering parcels, make the rule that it will not undertake personal delivery at all. In such a case, or when the consignee assents to the goods being held, instead of being delivered, the company remains liable as a carrier at most only for a reasonable time after notifying the addressee."

With this statement of the rule, and its qualifications, the question, whether the situation at Allendale is such as to

justify the rule of the company under which it does not provide a "pick-up" and delivery service at Allendale may be considered.

Allendale is a borough located on the main line of the Erie Railroad about twenty-five miles from Jersey City. The Erie Railroad is the only road serving the community, and Wells Fargo and Company is the only express company serving the community on the railroad. The borough is some two miles square and has a population of between nine hundred (900) and one thousand (1,000). It is essentially a residential community. It is without mail delivery except the rural free delivery. Express packages are received and delivered at the railroad station. Notification of the arrival of packages is given by the mailing of a postal card. There are in the borough individuals who make it a practice to carry packages for hire at a uniform charge of twenty-five cents per package. The respondent company has attempted to effect an arrangement for a local delivery service, but its offer of compensation, namely, ten per cent. on the business done at Allendale, was rejected.

The number of express shipments forwarded from and received at Allendale during the year December 1st, 1912, to November 30th, 1913, and the charges derived therefrom appears from the following tables submitted by the company:

George Cook et al. *vs.* Wells Fargo and Co.

(1) INTERSTATE.

	Forwarded.		*Received.*	
Mo. *1912*	*No.*	*Charges.*	*No. Ship.*	*Charges.*
Dec.,	190	$98 27	797	$293 82
Jan., *1913*	110	49 30	354	142 52
Feb.,	83	35 66	314	127 39
Mar.	96	43 91	369	151 19
Apr.,	91	40 75	460	186 32
May,	75	39 89	472	225 45
June,	103	99 59	457	229 98
July,	135	278 65	455	209 40
Aug.,	128	188 64	345	178 37
Sept.,	184	216 97	358	133 72
Oct.,	185	123 27	342	146 58
Nov.,	147	87 30	330	149 95
Total,	1,527	$1,302 20	5,053	*$2,154 59

(2) INTRASTATE.

1912	*No.*	*Charges.*	*No. Ship.*	*Charges.*
Dec.,	39	$14 40	63	$33 54
Jan., *1913*	19	5 45	47	16 66
Feb.,	13	4 00	31	12 27
Mar.,	18	7 03	26	8 97
Apr.,	13	5 00	54	23 51
May,	27	10 99	66	31 05
June,	25	9 20	56	21 46
July,	23	10 77	62	23 13
Aug.,	14	10 99	56	23 35
Sept.,	47	35 70	39	17 46
Oct.,	54	24 53	39	15 24
Nov.,	44	29 73	62	26 48
Total,	336	$167 79	601	$253 12

*There is an apparent error in the items in this column, which, however, will not seriously affect the result.

These tables show that during this period the aggregate of shipments forwarded and received, both interstate and intrastate, was 7,517, an average of 626 per month, and that the aggregate of charges was $3,877.70, an average of $323.14 per month. This sum represents the total of charges on every package received at and every package forwarded from Allendale.

The contract between Wells Fargo and Company and the Erie Railroad Company requires the payment by the express company to the railroad company of forty (40) per cent. of the entire gross earnings on express business over its lines. Contracts between the express company and other railroad companies call for the payment of higher percentages. The cost to the express company of the service rendered to it by the railroad companies averages 49.26 per cent.

The express company has an arrangement with the agent of the Erie Railroad Company at Allendale to handle its business. Under this arrangement it is called upon to pay him ten per cent. of the charges on all express matter handled at the station, both incoming and outgoing.

If we deduct from the monthly average of charges ($323.14) fifty per cent. ($161.57) as representing the approximate average of the payments by the express company to the railroad companies, there would remain $161.57. It is true that the contract between the express company and the Erie Railroad Company calls for the payments of but forty (40) per cent., which percentage is below the average, but the average must govern. Shipments from and to Allendale may in part involve the use of facilities provided by railroads other than the Erie Railroad.

If we deduct from this sum of $161.57 the sum of $32.31 as representing the average monthly payment to the agent of the railroad company for handling express matter (10%); there remains $129.26.

If we further deduct from this sum ($129.26) fifteen (15) per cent. ($48.46) as representing the average of "terminal costs" at the place of origin and destination of shipments to and from Allendale, we have remaining $80.80. Such a deduction must be made since every package received started from somewhere and every package forwarded ended somewhere.

TABLE.

Monthly average of total charges on shipments received and forwarded,		$323 14
Average of payments to railroad (50% approximate),	$161 57	
Average of payments to agent (10%),	32 31	
Average of "terminal costs" (15%),	48 46	
		242 34
Remaining,		$80 80

Out of this sum must, of course, come a sum representing the proportion of overhead or general charges properly chargeable to this station. Out of it, too, must come the added expense due to the installing of the "pick-up" and delivery service if it should be ordered.

The testimony adduced by the complainants bearing on the cost of the operation of a "pick-up" and delivery service was that of Gustave Nadler, the present mayor of Allendale. He testified that in his judgment the cost of such service would be $720 a year, made up of $40 per month for a driver and $20 per month for up-keep of horse, an average of $60.

The testimony adduced on behalf of the company, on the other hand, was that the cost of such service would amount to $87.50 per month, made up as follows: driver, $50; board

of horse, etc. (estimated), $25.00; shoeing, veterinarian, depreciation, etc., $12.50.

Realizing that the sum of $80.80 is reached without deduction of the proportion of overhead or general charges which Allendale should bear, it is apparent that, accepting either the estimate of the complainant or that of the company as to the cost of operation of the "pick-up" and delivery service, the remaining revenue available would not suffice to meet the added cost.

According to the testimony, the company has no fixed rule for determining whether or not a "pick-up" and delivery service shall be established in connection with an office.

In the judgment of one of the witnesses, "You ought to have at least one thousand dollars' worth of business every month." This coincides with testimony to which attention was directed by the Board in its report "In the matter of the complaint of the Highlands Board of Trade *vs.* United States Express Company."

The business at Allendale falls far short of this sum.

There is no assurance that the amount of express business transacted at Allendale will be maintained at the point it had attained November 30th, 1913. That the inauguration of the parcels-post has made, and may be expected to make, inroads upon the business is indicated to some extent by the fact that the business during the month of December, 1913, compared with the business for the same month in 1912, shows a falling off of some 30 per cent.

The effect of the new rates fixed by the Interstate Commerce Commission, and sanctioned by this Board as to intrastate business, which became effective February 1st, 1914, working a reduction of sixteen per cent., still remains to be determined.

Turning now to the consideration of the company's business as a whole, a summary of the company's report to

the Interstate Commerce Commission for the year ending June 30th, 1913, shows the operating expenses of the entire system as follows:

	Per cent.
Maintenance,	2.11
Traffic expense, advertising, stationery, printing, etc.,	1.06
Transportation expenses, wagons, stable and train employees, rents, claims, supplies, etc.,	39.33
General expenses, officers, clerks, law, insurance, taxes, etc.,	4.35
Payments to railroads,	49.26
	96.11
The profit, therefore, of the company's entire system is represented, for the year ending June 30th, 1913, by 3.89 per cent. of its gross revenue,	3.89
	100.00

The annual report and balance sheet of the company for the year ending June 30th, 1913, was put in evidence by the complainants. This report covers the entire business of Wells Fargo and Company, including its interstate and intrastate express business, and as well other lines of business in which it is engaged. The earnings on the capital stock of the company are shown as 12.71 per cent. Of the total income a little more than one-half was derived from the express business. Comparing the gross income for the year 1912 with that of 1913, this report shows a decrease of $396,247.91.

In this situation the Board cannot find that the rule of the company under which a pick up and delivery service is not provided in connection with the Allendale office is unreasonable, nor can it find that the furnishing of such service is requisite in adequate and proper service.

The complaints contend, however, that such a service is necessary to end an unjust and unreasonable discrimination by the company against Allendale and its inhabitants.

This contention is based on the fact that such service is provided to several communities located on the Erie Railroad within a short distance of Englewood, which either approximate or have a less population than Allendale.

The statute does not wholly prohibit discrimination. It prohibits discrimination only when unjust and unreasonable. A finding that discrimination is unjust or unreasonable requires more than a determination that a service is provided to one community and withheld from another. In order to justify such a finding the conditions must be substantially similar.

In *Phillips* v. *New York & Boston Despatch Express Company, 15 I. C. C. 631,* there was before the Interstate Commerce Commission a complaint of discrimination in that a pick up and delivery service was maintained at Fall River, Massachusetts, and not at Bristol Ferry, Rhode Island. The Commission said:

> "The right of an express company to maintain a free package pick up and delivery service at one point, while not maintaining such a service at another point, must, necessarily, be controlled by the conditions existing at each place. An express service at a large commercial and manufacturing town like Fall River that does not include a free pick up and delivery would not meet the present day requirements, and would be wholly unsatisfactory. But because such a service is maintained at Fall River, where the volume of traffic is large, and a wagon service can be conducted economically, it by no means follows that a like service must be maintained at Bristol Ferry, where the traffic is small and the cost of keeping up a wagon service might more than absorb all the revenue. Under such circumstances it cannot fairly be said that the defendant unduly discriminates against Bristol Ferry and its seventy-three inhabitants when it declines to maintain a free delivery there."

The communities which are made the basis of compari-

son in the attempt to substantiate the charge of discrimination are served from Englewood, an important center, and with the Englewood equipment. They lie in a typically suburban district surrounding Englewood, with territory laid out in streets and blocks, and may be readily and economically furnished a single daily delivery without separate equipment.

The suggestion is made that in like manner Allendale may be served from Ridgewood. This the Board is satisfied cannot be readily and economically done. The distance between Ridgewood and Allendale is some four and a half miles; the intervening territory is sparsely settled, and the communities are given over to "country homes"; the district is not typically suburban. The extension of the service to Allendale from Ridgewood as a central base would require the provision of added equipment.

On the record before it the Board cannot find that the company unjustly and unreasonably discriminates against Allendale in its failure to provide for that community a pick up and delivery service.

The conclusion reached on this phase of the complaint makes it unnecessary to consider the objection raised to the jurisdiction of the Board on the score that to require the pick up and delivery service desired would impose a burden upon interstate commerce, and involve a regulation of interstate commerce with respect to a matter upon which Congress has legislated and with reference to which it has clothed the Interstate Commerce Commission with jurisdiction.

The Board now turns to the prayer of the complainants that an order issue requiring the Express Company to install a telephone at its Allendale office.

That the installation of such a facility may, under some circumstances, be required of a public utility in adequate and proper service is recognized by the adjudications.

In *Atchison, T. & S. F. R. Co.* v. *State, 23 Okla. 210, 100 Pac. 11,* it was *held* that a corporation commission had power to require a railroad company to install and maintain a telephone at certain stations for the use of its agents in answering inquiries of the public for which telephones are usually used, as a telephone was a facility and convenience within the State constitution authorizing the commission to require railroad companies "to establish and maintain all such public service, facilities and conveniences as may be reasonable and just."

The particular fact held to warrant the order was that by the telephone the citizens of a town six miles from the station would be able to find out what freight had arrived and whether passenger trains were on time, etc.

See also:

Chicago, R. I. & P. Ry. Co. et al. v. *State, 24 Okla. 370; 103 Pac. Rep. 617.*

St. Louis & S. F. R. Co. v. *Newell, 25 Okla. 502; 106 Pac. 818.*

Kansas City, Southern Ry. Co. v. *State, 27 Okla. 806; 117 Pac. 207.*

In connection with the pending complaint, the following facts should be noticed:

No pick up and delivery service is furnished in connection with the Allendale office.

The borough is two miles square; its population exceeds 900.

Its express business, outgoing and incoming, annually exceeds 6,500 shipments, with charges exceeding $3,800.

It has no mail service except the rural free delivery service.

It has some eighty telephones in use.

The shipments in part are perishable goods, prompt delivery of which is requisite.

The installation of a telephone service would afford the company an added means of notifying its patrons promptly of the arrival of shipments, and would afford to its patrons a convenient means of ascertaining whether expected shipments had arrived. Such facilities are elsewhere afforded.

The installation of the service will entail a cost of $2.50 per month. This sum is greatly less than the sum offered by the company in its effort to arrange for a local delivery service, namely, 10% of the business. The addition of $2.50 per month to the terminal expense at Allendale will still leave this item at an amount less than the average allowed for this purpose.

In view of these circumstances, the Board concludes that the express company does not now furnish adequate and proper service at Allendale, and that its equipment is not such as to enable it to furnish such service, and that the installation and maintenance of a telephone at its Allendale office is requisite to the furnishing of such service.

An order to this effect will accordingly issue.

Dated May 8th, 1914.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof,

The Board HEREBY ORDERS Wells Fargo and Company to install and maintain a telephone at its Allendale office for the furnishing of adequate and proper service at such office.

This order shall become effective May 29th, 1914.

Dated May 8th, 1914.

No. 183.

WILLIAM FLEMER, INC.

VS.

WEST ORANGE WATER COMPANY.

The complainant asks if failure to pay a bill owing a water company by a former owner of a property imposed an obligation on a later owner, the later owner having paid the bill to obtain delivery of water. Attention is directed to cases seemingly applicable.

Under date of April 27th, 1914, William Flemer, Inc., through Albert P. Cain, its Secretary, addressed a letter to the Board which in substance stated that Juliet P. Haight had owned the premises No. 31 Overlook Avenue, West Orange; that she was indebted to West Orange Water Company in $19.76 for water supplied to said premises, the indebtedness covering the period October 1, 1913, to April 1, 1914; that the premises were sold under foreclosure of mortgage and purchased by William Flemer, Inc., who in turn leased the same from May 1st, 1914, to a tenant; that the water had been shut off and that the company has refused to turn on the supply until the unpaid account of the company against Juliet P. Haight had been discharged; that in order to secure service William Flemer, Inc., paid said bill, under protest. The letter asked that the complainant be advised "if (it) should be so obligated?"

This Board is a statutory body. It has no powers other than those conferred by the statute creating it. The power to require a public utility to refund or repay moneys im-

properly exacted by it has not been granted to it by the statute.

If, therefore, the Board were to treat this letter as a complaint; call for an answer by the company, and hold a hearing, and as the result of such hearing should find the facts to be as stated, and should conclude that the payment in question was exacted without right, still the Board would be without power to order repayment.

The statute, however (Chapter 195, Laws 1911, p. 374), by section 18 (c) provides that no public utility as therein defined shall

"adopt, maintain or enforce any regulation, (or) practice * * * which shall be unjust (or) unreasonable * * * or otherwise in violation of law."

It further provides, by section 16 (e) that the Board shall have power after hearing, by order in writing,

"to fix just and reasonable * * * regulations (and) practices * * * to be * * * imposed, observed and followed thereafter by any public utility"

as therein defined.

The Board will therefore request the West Orange Water Company

(1) to inform it whether it admits or denies the facts alleged in the letter above referred to; and if it admits the facts, then

(2) to state its justification for the course pursued; and further

(3) to state whether it has or follows any regulation or practice that requires payment by later owners of prem-

ises of the unpaid account against prior owners as a condition precedent to furnishing such later owners with water.

Upon the receipt of this information, the Board will determine what, if any, further action shall be taken by it under the sections of the statute above quoted.

In connection with these inquiries the attention of the company is called to the seemingly applicable rule laid down by the following authorities:

In (1879) *Coe* v. *New Jersey Midland Railway Co.*, 30 N. J. E., 440, the court *held*, that a board of public works of a city was not justified in refusing to supply water for the use of the engines, etc., of a railroad being operated by a receiver under the direction of the court, on the ground that certain water rents, which were due when the railroad was declared insolvent were unpaid.

In (1845) New Orleans *G. L. & B. Co.* v. *Paulding*, 12 Rob. (La.) 378, the plaintiff refused to supply the defend ant with gas unless he paid an unpaid bill contracted by a former owner of the building. He promised to do so in order to obtain the gas. The plaintiff turned on the gas, and afterwards sued him on his promise to pay the amount due from the former owner. The court *held* that the promise was unenforceable, and that the plaintiff had no right to require such a payment.

In (1898) *Turner* v. *Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, the court *held* that the regulation of a water company by which it refused to turn on water for a building until unpaid rates of previous owners or tenants were paid was unreasonable and consequently invalid, unless authorized by statute.

In (1905) *City of Chicago* v. *Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, the appellee, by fore-

closure, became the owner of various properties against which were delinquent water charges incurred by prior owners or occupants. It offered to pay the current charges for supplying it with water. The city refused to turn on the water until the appellee had paid all prior charges. In order to secure water service the appellee paid the prior charges under protest and instituted action against the city to recover the money so paid. Its contention was that the city had no right to collect the delinquent rentals from it. The court *held* that the appellee was entitled to recover in this action.

In (1906) *Linne* v. *Bredes,* 43 Wash. 540, 86 Pac. 858, the court *held* that, in the absence of express statutory authority, a city had no power to compel a subsequent owner or occupant of premises to pay delinquent water charges, which he did not contract or incur, as a condition to enjoyment of further water service, and thereby virtually create a lien on the property; and that an ordinance attempting to do so was unreasonable and unenforceable.

In (1906) *Burke* v. *City of Water Valley,* 87 Miss. 732, 40 So. 820, it was *held* that the rule established by a city, owning its water works, that if water charges against premises (which by another rule were charged to the owner and not to the tenant), were not paid, the water should be turned off, and not connected again until the delinquent charge was paid, thus preventing a tenant, on tendering water charges, from getting water without payment of charges due from a former tenant, was void for unreasonableness.

In (1908) *City of Covington* v. *Ratterman,* 128 Ky. 336, 108 S. W. 297, the court *held* that a municipal corporation

cannot, without statutory authority, compel the purchaser of property to pay rents for water consumed by his vendor, as a condition to furnishing his building a supply from its water system.

In (1908) *Poole* v. *Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, the court *held* that in the absence of a statute making water rents a lien, a regulation that, if the water rent remained unpaid for thirty days from the date of the bill, the supply might be cut off, without notice, was unreasonable, so far as it might be construed to authorize cutting off the water supply in case a tenant refused to pay delinquent water rents due by the landlord or former occupant, but was not unreasonable with respect to a consumer who is under an express or implied contract to pay the rents.

Dated May 12th, 1914.

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Moving station a distance of approximately one-quarter of a mile not an abandonment as defined in Chap. 195 of Laws of 1911. *In re change of location of station C. R. R. of N. J. at Aldene.* ..... p. 386

RATES. *See also* ORDINANCES.

Considerations requiring a utility to serve all applicants seem to establish the reasonableness of a rule which a utility may impose requiring of its customers advance deposits to secure bills for service to be rendered. Deposit of five dollars held to be not unreasonable for other than those having pre-payment meters. For those having such meters a deposit of two dollars

is held to be reasonable. *Investigation of reasonableness of rules of the Easton Gas Works and Eastern Pennsylvania Power Co. of N. J., exacting a deposit in advance of supplying service.* ....p. 393

Since the passage of the acts creating this Board and defining its powers, the power of municipalities to impose conditions upon public utilities in the exercise of franchise grants and to provide by contract respecting rates and service, is subject to the authority and control of the Board to fix just and reasonable rates. *In re application of rates of the Wildwood Water Works Co. to the Borough of North Wildwood.* ....p. 447

RATES—ELECTRIC UTILITIES.

The Board is asked to order the respondent to continue to light the municipal buildings in the City of Plainfield without charge. The Board refuses to support the contention that the prohibition by the Public Utility Act of undue or unjust discrimination was an implied repealer of rights previously existing by contract in favor of certain municipalities.
It is held by the Board that under a contract with the city the respondent is bound to afford lighting service to the public buildings in Plainfield without charge. *Inhabitants of the City of Plainfield* vs. *Public Service Electric Co.* ....p. 475

The Board's order in this matter was on appeal to the Supreme Court set aside. An appeal has been taken from the Supreme Court's decision to the Court of Errors and Appeals.

RATES—RAILROADS.

Increases proposed in rates for shipments of milk found to be generally not in excess of milk tariffs existing under comparable conditions and circumstances. *Petition of Trenton Terminal Railroad Co. for approval of proposed increases in rates for shipments of milk.* ....p. 42

In case it appears to be imperative for the protection of shippers for the Board to assume jurisdiction in the apportionment of joint rates the Board would incline to assume jurisdiction. But the primary task delegated to the Board concerns the relations of public utilities with their patrons, rather than the relations of public utilities per se. *Morristown and Erie Railroad Co. et als.*, vs. *Delaware, Lackawanna and Western Railroad et als.* ....p. 68

Unlawful discrimination is practiced by a carrier when it accords its patrons different treatment under circumstances and conditions essentially the same.
It does not argue illegal discrimination that one carrier exacts

rates of fare higher or lower than those exacted by another carrier.

The system of charges for urban traffic differs from the system in vogue in interurban traffic. It is because of the multitude of short rides that the occasional traveler can ride ten or fifteen miles upon an urban line at the fixed rate of fare. *Board of Street and Water Commissioners of Newark* vs. *Pennsylvania Railroad Co.* ..... p. 137

New schedules of railroad rates involving some increases, but reducing gross revenue and bringing about greater uniformity permitted to become effective. *In the matter of partial rescinding of the decision entered October 27th, 1911, as regards certain passenger tariffs submitted by Erie Railroad Co., New York, Susquehanna and Western Railroad Co. and New Jersey and New York Railroad.* ..... p. 176

RATES—STREET RAILWAY.

In the establishment of fare zones distance alone is not the controlling factor. Among the factors which must be considered in determining the reasonableness of a zone charge are the distance, number of stops, the density of population along the route, the passengers carried, the number of riders and the number of short trip riders and the investment required to furnish the service.

A municipal ordinance fixing a rate of fare continues effective as between the municipality and the company until such time as the State sees fit to exercise its paramount authority and until such time only. *City of Long Branch et als.*, vs. *Monmouth County Electric Co.* ..... p. 102

RATES—TELEPHONE.

Telephone service differs from that supplied by other utilities in that the value of the service depends largely on the ease with which each subscriber can inform himself who other subscribers are.

If service on a monthly rather than an annual basis should be encouraged by materially lessening the charge for short term service and distributing among long term subscribers the "overhead" and other expenses now attributed to short term subscribers, the task of keeping subscribers advised of those connecting with the company's lines would be much more difficult and expensive than at present, if not impracticable. *Peter Egenolf* vs. *New York Telephone Co.* ..... p. 471

Demand of Postal Telegraph-Cable Company for reduced tolls on calls designated to deliver telegrams over the telephone without assumption on the Postal's part of any of the contractural burdens in consideration of which the reduced toll

rates are accorded in the contract offered alike to all commercial telegraph companies would appear to involve an undue and unjust discrimination in favor of the Postal against the Western Union and as against the public generally. *Postal Telegraph-Cable Company* vs. *The New York Telephone Co.*.....p. 258

RATES—WATER UTILITIES.

A charge for all purposes for which water may be used, no allowance being made for wells or other sources of supply held to be unreasonable. *G. A. Curtis* vs. *Tintern Manor Water Co.* .....p. 19

Provisions of municipal ordinance cannot stand in the way of exercise by the Board of its power to fix just and reasonable rates. *Borough of Butler* vs. *Butler Water Co.* .....p. 111

Rate of forty cents per thousand gallons proposed by Wildwood Water Works Company held to be unreasonable. Rate of thirty cents per thousand gallons held to be just and reasonable. Determination of a minimum charged by number of rooms in a dwelling house not unreasonable. If number of rooms is the criterion of a customer's requirements, the aggregate number of rooms contained in all structures upon the premises should determine the minimum. Costs of meter boxes should be paid by the company upon installation, and only the residual apparatus charged to and collected from the consumer. *Protests of the City of Wildwood et als., against approval of rates of the Wildwood Water Works Co.* .....p. 218

SECONDARIES, GROUNDING OF.

See Standards and Regulations to be followed by utilities owning poles and wires. .....p. 275

SECURITIES.

Petition for approval of issue of bonds and collateral trust notes denied because of disparity in the amount of securities and property to be acquired. *Petition New York and New Jersey Water Co.* .....p. 35

The fact that a mortgage authorizing and securing the issues of bonds was executed and delivered before jurisdiction over issues of capital securities was conferred upon this Board did not make it unnecessary to secure the Board's authorization, when the bonds were issued after jurisdiction was vested in the Board. *Failure of Hackensack Water Co. to apply for and obtain authority for the issue of bonds in the aggregate amount of $250,000.* .....p. 168

Memorandum on practice of utilities pledging bonds as collateral security for loans. Attention of such utilities directed to statute. .....p. 171

Application for approval of proposed issue of stock and bonds denied because amount appeared to be excessive for purposes named in the petition. *Application Farmingdale Lighting Co.* ..... p. 240

Application for approval of issue of bonds denied on the ground that applicant did not propose to sell the same at the highest price obtainable therefor. *Petition of Public Service Railway Co. for approval of issue of North Hudson Railway Bonds in the amount of $620,000.* ..... p. 270

Approval of a proposed consolidated mortgage not to be taken as committing the Board to approval in advance of issuance of bonds thereunder. *Application of the New York Central and Hudson River Railroad Co. for approval of mortgage*..... p. 308

Purchase by the Atlantic City Electric Light Company of the shares of the capital stock of the Ocean City Electric Lighting Company held to be necessary for the business of the former company. The property owned by the Ocean City Electric Company is cognate in character and use to that used by the Atlantic City Electric Company in the direct conduct of its own proper business. *Application Ocean City Electric Light Co. for approval of transfer of capital stock to Atlantic City Electric Co.* ..... p. 332

The petitioner, a holding and operating company, seeks by the purchase of certain bonds of the Point Pleasant Traction Co. to obtain control of the Point Pleasant Light and Power Co. Unless the purchase of the bonds can be justified on the ground that it is a temporary investment, the Board's approval of the investment should be withheld.
The roadway and equipment of the Point Pleasant Traction Co. are not cognate in character and use with the water or electric property used by the petitioner. *Petition Commonwealth Water and Light Co. for approval of issue of $150,000 five-year six per cent. notes.* ..... p. 344

A security issue cannot be said in the language of the statute "to be made in accordance with law" when said issue contemplates a purpose which, if consummated, renders the law regulating public utilities inoperative. *Petition of the Jersey Power Co. for authority to issue stock.* ..... p. 364

Issue of securities by an electric utility approved under conditions set forth in report made by the Board. *Application of Jersey Power Co. for approval of issue of capital stock in the amount of fifty thousand dollars.* ..... p. 463

Application is made to the Board for approval of issues of stock and bonds. Certain bonds were certified by the Trustee

under the mortgage securing their payment and delivered to the Trustee. They were not sold until after the time when the law required approval by the Board. Contention not sustained that certification and delivery by the Trustee to the company prior to the enactment of the law constituted an issue making the statute inapplicable to subsequent sale and delivery by the company. *In re issue of stock and bonds Hackensack Water Co.* ..... p. 505

SERVICE—ELECTRIC UTILITIES.

Standards and Regulations fixed by the Board to be observed by utilities owning poles and wires. ..... p. 275

Newton Gas and Electric Company ordered to improve its facilities for supplying service. *Newton* vs. *Newton Gas and Electric Co.* ..... p. 493

As the Public Service Electric Company and the Public Service Gas Company are separate corporations, written authorizations should be obtained from customers for the transfer of funds from one company to the other. *Nicholas Lourie* vs. *Public Service Gas and Electric Companies.* ..... p. 499

SERVICE—EXPRESS COMPANIES.

Petition for deliveries by express company at Highlands during winter months not granted. *Highlands Board of Trade* vs. *United States Express Co.* ..... p. 361

Petition for an order requiring the Wells Fargo and Company to maintain a pick-up and delivery service at Allendale denied. Held that the installation and maintenance of a telephone by the company in its Allendale office is requisite to the furnishing of adequate and proper service. *George Cook et als.*, vs. *Wells Fargo and Co.* ..... p. 514

See this report also for general discussion of principles and court decisions governing deliveries by express companies.

SERVICE—GAS UTILITIES.

When the Board is petitioned to require extension of service by a gas company, before an order requiring such extension is warranted the Board must be reasonably certain that the net profit to accrue from the extension will be sufficient to warrant the outlay required.

Where, as a condition of its secondary franchises, a public utility is obligated to supply a certain territory, extensions not promising profit may be ordered by the Board under its power to make a utility comply with municipal ordinances relating thereto. *Board of Trade of Saddle River Township* vs. *Public Service Gas Co.* ..... p. 321

Gas company is not required to supply service at a risk of loss from non-payment but while it has in hand more than enough of customers' money to meet current accounts, summary discontinuance of service is unwarranted. *Charles Reincke* vs. *Public Service Gas Co.* ..... p. 489

As the Public Service Gas and Electric Companies are separate corporations, written authorizations should be obtained from customers for the transfer of funds from one company to the other. *Nicholas Lourie* vs. *Public Service Gas and Electric Cos.* ..... p. 499

SERVICE—RAILROADS. *See also* RAILROADS—STATIONS.

Railroad failing to keep its track and bridges in safe condition ordered to cease operating trains. *In the matter of determining whether the New Jersey and Pennsylvania Railroad Co. provides safe, adequate and proper service.* ..... p. 174

Petition for additional train service for transportation of school children met by offer from the railroad. *Boards of Education, Pequannock Township et als.*, vs. *Erie Railroad Co.* ..... p. 207

Pennsylvania Railroad Company ordered to stop trains at Matawan. *C. Taylor* vs. *Pennsylvania Railroad Co.* ..... p. 251

Pennsylvania Railroad Company ordered to stop trains at South Amboy. *B. F. Samsel, Jr.*, vs. *Pennsylvania Railroad Co.* ..... p. 455

SERVICE—STREET RAILWAYS.

Petition for order requiring the laying of an additional track by a street railway denied, the same being unnecessary to meet present demand for service. Recommended that the Commissioners of Trenton, the petitioner and the respondent confer with a view to having double track laid on East Hamilton Avenue within two years upon condition that only temporary paving repairs be undertaken by the city until the work of double tracking is begun. *Residents of Hamilton Avenue, Trenton, N. J.*, vs. *Trenton and Mercer County Traction Corporation.* ..... p. 13

Board's power to require a public utility to furnish safe, adequate and proper service might be taken to imply that where the rendition of such service necessarily involved some co-operation on the part of another public utility, whose property or equipment or operation might undergo some change, by reason of the requirement laid on one public utility, the Board is not wholly devoid of authority to require such co-operation, provided the legal rights of such other public utility are not

thereby infringed or violated. *Phillipsburg Horse Car Railroad Second Crossing over Penna. Railroad Co.* .....p. 27

Height of car steps determined. *W. S. Davidson* vs. *Public Service Railway Co.* .....p. 244

Public Service Railway Company ordered to station a flagman where its tracks cross the public sidewalk at grade in Hoboken during commission hours, and conductor required to be in a position to warn pedestrians of the approach of the car. *Joseph McBride* vs. *Public Service Railway Co.* .....p. 375

Morris County Traction Company should run its cars every half hour from six A. M. to eleven P. M. each day between Maple Street, Summit, through the township of Union to the Central station in Elizabeth, this being required in compliance with ordinances and to furnish safe, adequate and proper service. *In re service Morris County Traction Co.* .....p. 486

SERVICE—TELEPHONE UTILITIES.

Service of a telephone company is interrupted. Question of allowance considered. If company's fault, allowance should be made. If subscriber's fault, allowance deemed improper. *James Chittick* vs. *The New York Telephone Co.*.....p. 210

When classifications are made by a telephone company which are clearly to the disadvantage of certain classes of the public, whether the classification is by territorial boundaries or otherwise, it is the duty of the Commission to issue such instructions to the telephone company as will result in the customers of that class obtaining safe, adequate and proper service. *Fire Company of Ashland* vs. *Delaware and Atlantic Telegraph and Telephone Co.*.....p. 252

SERVICE—WATER UTILITIES.

The provisions of a municipal ordinance cannot stand in the way of the exercise by the Board of its power to set standards of adequate and proper service and to establish just and reasonable rates. *Borough of Butler* vs. *Butler Water Co.* .....p. 111

Water Company ordered to supply service. *Ralph S. Kelly* vs. *Middlesex Water Co.* .....p. 213

STOCK, APPROVAL OF ISSUES OF. *See* SECURITIES.

STREET RAILWAYS. *See* BRIDGES; RATES—STREET RAILWAYS; SERVICE—STREET RAILWAYS. *See also* ORDINANCES.

SUBWAYS. *See* RAILROADS—STATIONS.

TELEPHONE. *See* RATES—TELEPHONE. SERVICE—TELEPHONE UTILITIES.

VALUE, REASONABLE RETURN ON.

In determining the return fairly allowable on the value of the property of a water company consideration should be given to the fact that the plant as constructed has involved an unusual expense much of which is not attributable to nor for the benefit of the present water takers. *Protests of City of Wildwood et als., against approval of rates of the Wildwood Water Works Co.* ..... p. 218

WATER UTILITIES. *See* RATES, WATER UTILITIES—SERVICE, WATER UTILITIES. *See also* METERS, METER BOXES, ORDINANCES.

WIRES.

Standards and Regulations to be fixed by utilities owning poles and wires. ..... p. 275