BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of the Missouri Highways and Transportation Commission For a Change of Electrical Supplier.	)))	**Case No. EO-2012-0441**

STAFF'S RECOMMENDATION TO AUTHORIZE CHANGE OF SUPPLIER

COMES NOW the Staff of the Missouri Public Service Commission, and for its recommendation that the Commission authorize the electrical supplier to the signal light on the north side of the US 160 overpass at Interstate 44 be changed from Ozark Electric Cooperative, Inc. to City Utilities of Springfield, as requested by the Missouri Highway and Transportation Commission, states:

1. Staff in its Memorandum, attached hereto as Appendix A, recommends the Commission approve the Missouri Highway and Transportation Commission's application for a Commission order to change the electrical supplier to the westbound ramp signal light on the north side of the highway interchange at Interstate highway 44 and US highway 160 from Ozark Electric Cooperative, Inc. to City Utilities of Springfield.

2. Sections 91.025 and 394.315, RSMo.,[1] give the Commission jurisdiction over municipal utilities and rural electric cooperatives, respectively, to order a change to the supplier of electricity to a structure "on the basis that it is in the public interest for a reason other than a rate differential."

3. It is the opinion of the Office of the Staff Counsel that a prerequisite to the Commission ordering a change in the supplier of electricity to a structure is that the new supplier must be able to lawfully serve that structure. *See Union Electric Company v. Platte-Clay*

[1] Statutory references are to RSMo. 2000, unless noted otherwise.

Electric Cooperative, Inc., 814 S.W.2d 643, 646, (Mo. App. 1991) (*citing Union Elec. Co. v. Cuivre River Elec.*, 726 S.W.2d 415, 417 (Mo.App.1987)) where the court said,

> The court stated, "under [394.315 RSMo.1982] the [PSC] is vested with jurisdiction over electric cooperatives only in those limited circumstances where both the cooperative and an electric corporation have concomitant rights to serve the same area."

4. As explained in the following, it is the opinion of the Office of Staff Counsel that the most compelling interpretation of Subsection 386.800.1, RSMo., is that a city may not serve beyond its corporate boundaries unless it could have lawfully done so before July 11, 1991, or was already serving the structure before July 11, 1991.[2] The controlling law is Subsection 386.800.1, RSMo., which took effect with Section 386.800, RSMo., on July 11, 1991.

5. Subsection 386.800.1, RSMo., provides:

> 386.800. 1. No municipally owned electric utility may provide electric energy at retail to any structure located outside the municipality's corporate boundaries after July 11, 1991, unless:
>
> (1) The structure was lawfully receiving permanent service from the municipally owned electric utility prior to July 11, 1991; or
>
> (2) The service is provided pursuant to an approved territorial agreement under section 394.312;
>
> (3) The service is provided pursuant to lawful municipal annexation and subject to the provisions of this section; or
>
> (4) The structure is located in an area which was previously served by an electrical corporation regulated under chapter 386, and chapter 393, and the electrical corporation's authorized service territory was contiguous to or inclusive of the municipality's previous corporate boundaries, and the electrical corporation's ownership or operating rights within the area were acquired in total by the municipally owned electrical system prior to July 11, 1991.

[2] Staff addressed this issue recently in the context of a territorial agreement in the recommendation it filed on October 4, 2011, in the case styled *In the Matter of the Application of Black River Electric Cooperative and the City of Fredericktown, Missouri, for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier Within a Portion of Madison County, Missouri*, Case No. EO-2012-0047.

> In the event that a municipally owned electric utility in a city with a population of more than one hundred twenty-five thousand located in a county of the first class not having a charter form of government and not adjacent to any other county of the first class desires to serve customers beyond the authorized service territory in an area which was previously served by an electrical corporation regulated under the provisions of chapter 386, and chapter 393, as provided in this subdivision, the municipally owned utility shall apply to the public service commission for an order assigning nonexclusive service territories. The proposed service area shall be contiguous to the authorized service territory which was previously served by an electrical corporation regulated under the provisions of chapter 386, and chapter 393, as a condition precedent to the granting of the application. The commission shall have one hundred twenty days from the date of application to grant or deny the requested order. The commission may grant the order upon a finding that granting of the applicant's request is not detrimental to the public interest. In granting the applicant's request the commission shall give due regard to territories previously granted to other electric suppliers.

6. The Legislature passed Section 386.800, RSMo., following the Missouri Southern District Court of Appeal's June 21, 1990, opinion in *Associated Electric Cooperative, Inc. v. City of Springfield*, 793 S.W.2d 517, (Mo. App. 1990). In that case the Southern District held that the City of Springfield, governed by a city charter, could lawfully provide retail electric service beyond its corporate boundaries. Thus, Section 386.800, RSMo., limited the City of Springfield's authority to provide retail electric service beyond its corporate boundaries, as well as those of other municipalities.

7. Staff requested an extension of time to file its recommendation because the signal light in question is beyond the corporate limits of the City of Springfield, and Staff did not have support then to show the City of Springfield could concomitantly serve the light. As explained following, it does now.

8. The City of Springfield, operating as City Utilities of Springfield, has a map on its website titled, City Utilities Service Territory." A copy of that map is attached as Schedule 2,

Appendix A. In the legend for the map an outer boundary is labeled, "1942 Missouri PSC Electric Boundary." Staff inquired of City Utilities for the basis for its assertion it may lawfully serve the signal light in question. Counsel for City Utilities responded that its boundary is that of Springfield, Gas and Electric Company which the City of Springfield acquired, but that he did not have an approved map or other authority to provide.

9. The City of Springfield apparently acquired Springfield, Gas and Electric Company in 1945. See *In the Matter of the Application of the City of Springfield,* 27 Mo.P.S.C. 137, decided March 19, 1945, *In the Matter of an Investigation of the Disposition by Springfield Gas and Electric Company of all of its works and system to the City of Springfield, Missouri,* 27 Mo.P.S.C. 167, decided April 4, 1945, and *In the Matter of the Application of the City of Springfield,* 27 Mo.P.S.C. 187, decided August 4, 1945. Copies attached.

10. In his dissent in *In the Matter of the Application of the City of Springfield,* 27 Mo.P.S.C. 137, Commissioner Wilson described Springfield, Gas and Electric Company's service area as "an area of eight miles beyond the city limits in all directions according to the map filed with this Commission by the Springfield, Gas and Electric Company." *Id*. at 146. Further, in 1939 the Commission granted Springfield, Gas and Electric Company a certificate of convenience and necessity in an area surrounding, but outside the city limits of Springfield in the case *In the Matter of the Application of Springfield Gas and Electric Company,* 24 Mo.P.S.C. 395, decided January 31, 1939. While the Report and Order in that case incorporates a map of that area by reference, it is not published in the Commission's reports. The Commission described the map as follows:

> A map is attached to the application, marked Applicant's Exhibit "B," which shows in detail the area in which the applicant now seeks blanket authority to construct, maintain and operate electric lines as the public convenience and necessity may require. This exhibit shows that the area for which the certificate is

> sought extends from the city limits of Springfield for varying distances of approximately from five to ten miles.

Although it was unable to locate the map from the 1945 acquisition case, Staff today located the map from the 1939 certificate of convenience and necessity case. The portion of that map showing Springfield, Gas and Electric Company's authorized service area is attached as Appendix "B." The signal light in question lies within Springfield, Gas and Electric Company's authorized service area shown on that map.

11. The Missouri Highway and Transportation Commission has stated to Staff it is seeking this change in supplier to the signal light because it desires to consolidate the electrical supplier to the signal lights and lighting for the new and existing apparatus at the intersection of the US 160 overpass at Interstate 44 as part of a project to upgrade the overpass, ramps and signals and lighting at this intersection.

12. Based on the foregoing Staff recommends that the Commission find that it is in the public interest for a reason other than a rate differential to authorize the electrical supplier to the signal light on the north side of the US 160 overpass at Interstate 44 be changed from Ozark Electric Cooperative, Inc. to City Utilities of Springfield, as requested by the Missouri Highway and Transportation Commission.

13. Neither Ozark Electric Cooperative, Inc. nor City Utilities of Springfield are required to provide annual reports or assessments to the Commission.

WHEREFORE, Staff recommends that the Commission grant the application of the Missouri Highways and Transportation Commission and authorize the electrical supplier to the signal light on the north side of the US 160 overpass at Interstate 44 be changed from Ozark Electric Cooperative, Inc. to City Utilities of Springfield.

Respectfully submitted,

/s/ Nathan Williams
Nathan Williams
Deputy Counsel
Missouri Bar No. 35512

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed; hand-delivered, transmitted by facsimile or emailed to all counsel of record this 13th day of August 2012.

/s/ Nathan Williams

MEMORANDUM

TO: Missouri Public Service Commission Official Case File
Case No. EO-2012-0441, Application of the Missouri Highways and Transportation Commission Requesting Authorization For a Change in Electric Service Providers

FROM: Alan J. Bax, Energy Unit – Engineering Analysis

_____ _____
Energy Unit / Date Staff Counsel's Office / Date

SUBJECT: Staff Recommendation to Approve Application

DATE: August 13, 2012

STAFF RECOMMENDATION TO APPROVE APPLICATION

The Staff of the Missouri Public Service Commission ("Staff") recommends the Missouri Public Service Commission ("Commission") approve the Application of the Missouri Highways and Transportation Commission ("MHTC") for a change in electric service providers as being in the public interest for reasons other than a rate differential.

OVERVIEW

On June 28, 2012, MHTC, through the Missouri Department of Transportation ("MoDOT"), filed an Application with the Commission seeking approval to change the provider of electric service to the westbound ramp signal light on the north side of the interchange at Interstate 44 and US Highway 160 near Springfield, Missouri. Ozark Electric Cooperative, Inc. ("Ozark") currently provides electric service to this signal light, which is located outside the city limits of Springfield, Missouri. City Utilities of Springfield ("CU"), the municipal electric service provider primarily for the city of Springfield, Missouri, is the current electric service provider to the eastbound ramp signal and lighting on the south side of this interchange, which is located within the city limits

of Springfield, Missouri. MHTC states that MoDOT is replacing the bridge and ramps as part of an upgrade project to this interchange. In the Application, MHTC says MoDOT will be installing a permanent metal post and mast arm signal in the place of the current span wire signal and desires to have a single electric service provider to the signal lamps on each side of the new interchange. MoDOT wishes to consolidate electric service with CU. The Application includes a letter from Ozark addressed to MoDOT in which it states that it does not oppose the request.

On June 29, 2012, the Commission issued an Order making Ozark and CU parties to this case, and directing both Ozark and CU to file an Answer to the Application by July 27, 2012. Ozark filed an Answer July 19, 2012, in which it confirmed its non-opposition to MHTC's request. CU filed its Answer July 23, 2012, in which it recommends the Commission approve MHTC's request. The Commission also ordered the Staff to file a recommendation regarding MHTC's Application by August 3, 2012. On August 3, The Staff requested, and was granted, a one-week extension to file its Recommendation

Neither Ozark nor CU is required to file annual reports or pay assessment fees with the Commission. Staff is not aware of any pending or final unsatisfied decision against either Ozark or CU from any state or federal court involving customer service or rates within three years of the date of this filing.

DISCUSSION

Ozark has provided electric service to the westbound ramp signal at this intersection of Interstate 44 and US Highway 160 since September 2000. A map illustrating Ozark's distribution system in the immediate area, in addition to the location

of the current ramp signals on either side of Interstate 44 at the intersection of Hwy 160 and Interstate 44, is attached as Schedule 1. Ozark says it was approached by MoDOT in March 2012 with its intent to upgrade the signals and lighting at this intersection in connection with an upgrade project. At this time, MoDOT relayed to Ozark its desire to have CU provide electric service both to the new and the existing signals and lighting and have Ozark's existing service to the westbound ramp signal removed. Being able to provide such service, Ozark asked as to why MoDOT wished to retire its service. Reportedly, MoDOT has a contract with CU in which MoDOT receives free electric service to signals inside the city limits. It was MoDOT's intention to consolidate the electric service provided to both the existing and revamped signals on either side of Interstate 44 from CU's power source located in the southwest quadrant of this intersection and remove Ozark's existing service and associated equipment.

Attached as Schedule 2 to this recommendation is a map depicting CU's self described service territory, available on its website. This map indicates an available service territory that encompasses an area greater than the current Springfield city limits, an area that stretches into greater Greene County. This is an illustration of the service territory purchased by the City of Springfield in 1945 from Springfield Gas and Electric, a private company.

Both Ozark and CU have resources nearby capable of meeting MoDOT's stated desire to consolidate the electric service to the ramp signals on either side of Interstate 44 at this intersection to one electric service provider. MoDOT prefers to consolidate with CU rather than Ozark. With its power source currently located within the city limits on the southwest corner of this intersection, CU could provide service to both the new and

existing signals and lighting on either side of this intersection upon MoDOT completing its project upgrade. Although the Application includes the phrase "in an attempt to work out service problems", it is Staff's understanding that no service problems exist between MoDOT and Ozark. Consolidating electric service with one provider is usually a desirable outcome and typically is considered to be in the public interest, a commendable goal. In this case, despite the possibility that a rate differential exists, the request to change electric service providers overall appears to be in the public interest for other reasons than a rate differential.

CONCLUSION

The Staff recommends the Commission approve the Application of the MHTC for a change in electric service providers for the existing westbound lamp signal located on the north side of the intersection of Highway 160 and Interstate 44 from Ozark to CU as being in the public interest for reasons other than a rate differential as required by Sections 393.106.2, 394.315.2 and 91.025.2 RSMo 2000. The Application meets the filing requirements of 4 CSR 240-2.060 and 4 CSR 240-3.140.

In this case, the desire of MoDOT to consolidate the electric service provided to the signal lamps and lighting on both sides of this intersection with one electric service provider is reasonable. Both Ozark and CU have resources nearby that are sufficient to provide desired service to MoDOT following the completion of an anticipated project to upgrade this intersection. Commission approval is necessary to allow Ozark or CU to provide electric service to existing structures currently being served by the other on either side of this intersection. Thus, MHTC, on behalf of MoDOT, has requested CU be approved as the sole electric service provider to new and existing apparatus on either side

of this intersection following completion of the associated ramp upgrade project. Ozark has stated it does not oppose this request as long the request and change is not based upon any problem with its current service to the westbound ramp signal at this intersection. No problems were mentioned by MHTC in its Application.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Application of Missouri Highways and Transportation Commission for Change of Electric Supplier	))))	Case No. EO-2012-0441

AFFIDAVIT OF ALAN J. BAX

STATE OF MISSOURI)
) **ss**
COUNTY OF COLE)

Alan J. Bax, of lawful age, on oath states: that he participated in the preparation of the foregoing Staff Recommendation in memorandum form, to be presented in the above case; that the information in the Staff Recommendation was given by him; that he has knowledge of the matters set forth in such Staff Recommendation; and that such matters are true to the best of his knowledge and belief.

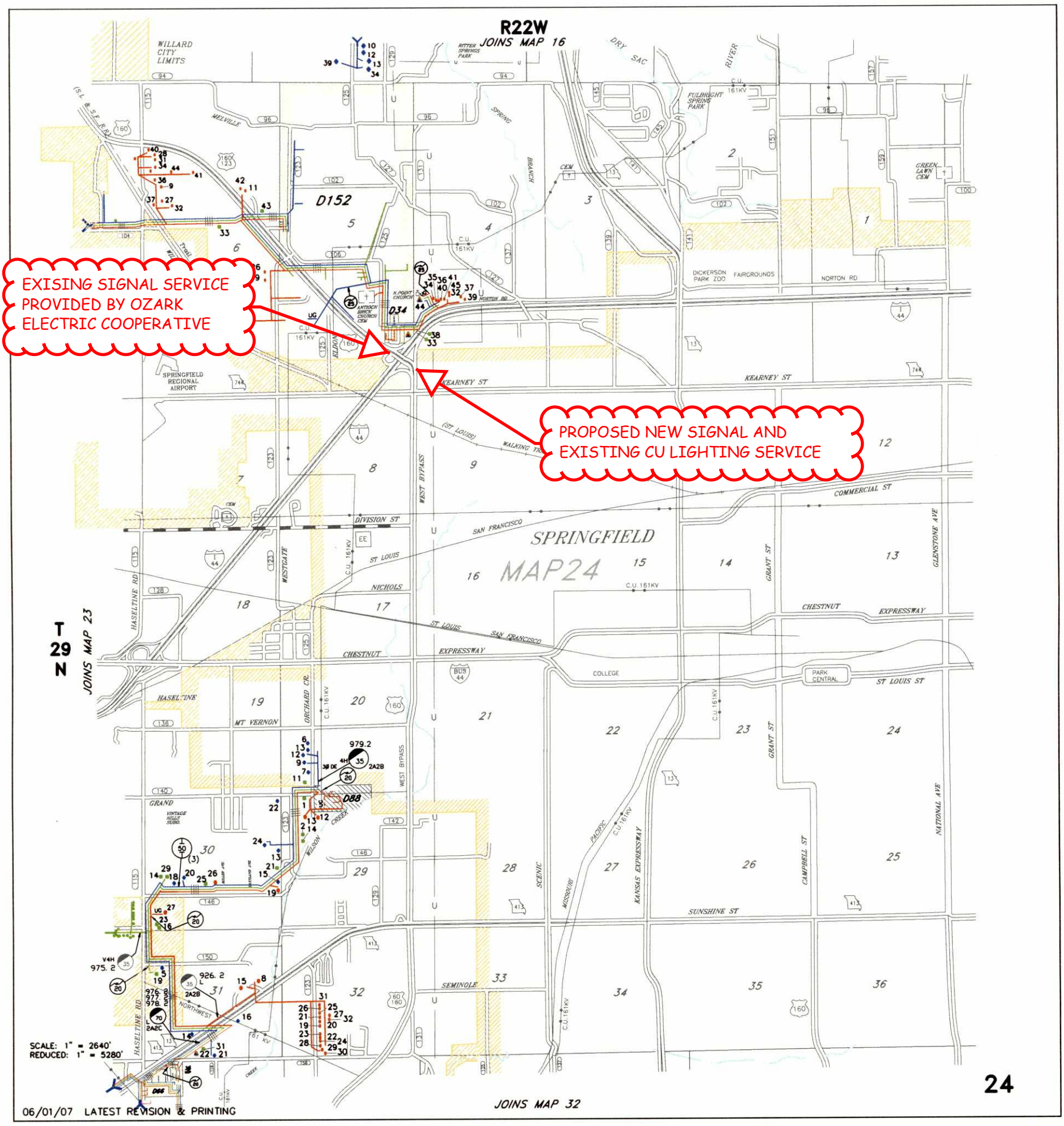
Alan J. Bax

Subscribed and sworn to before me this 10th day of August, 2012.

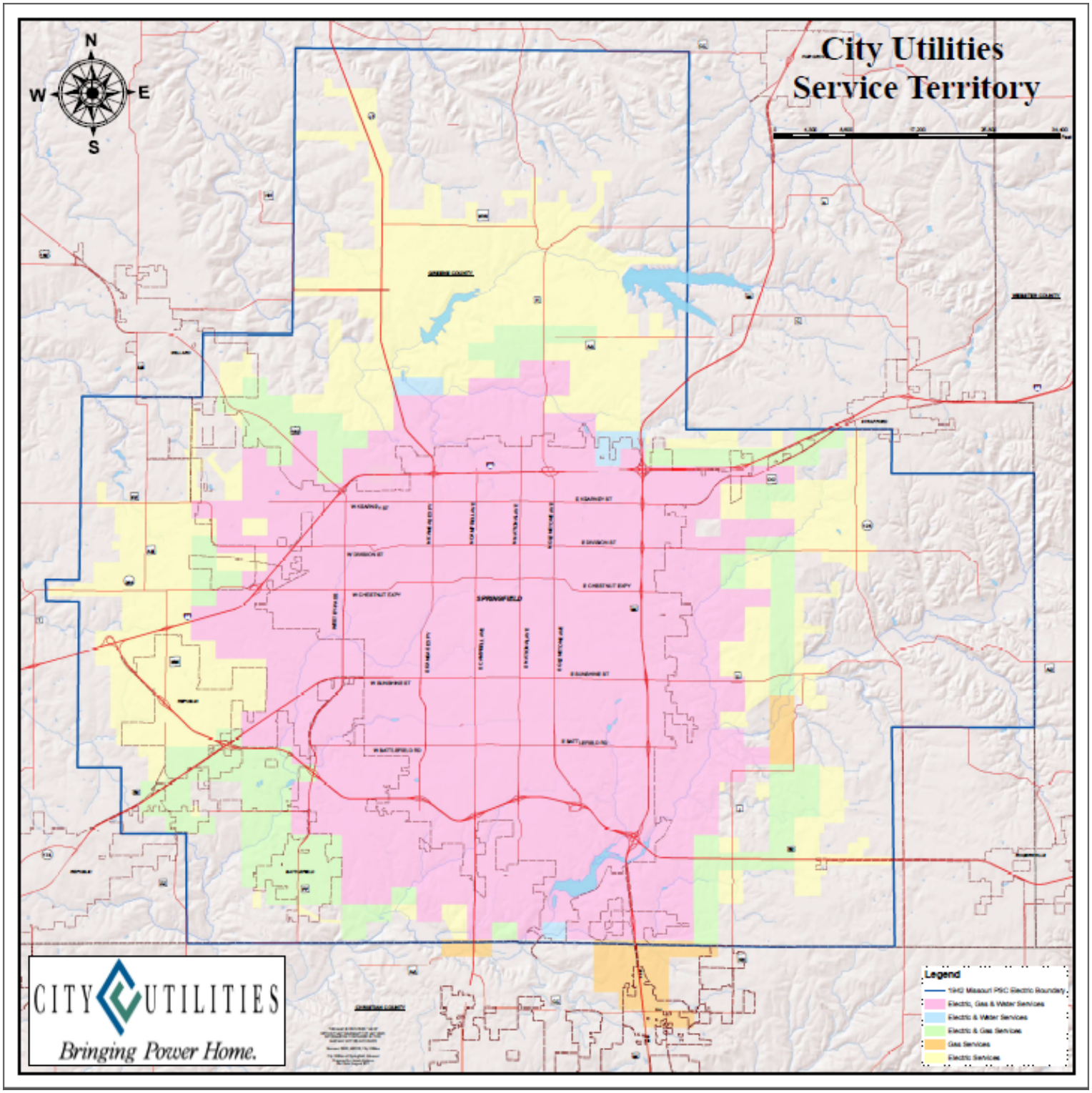
SUSAN L. SUNDERMEYER
Notary Public - Notary Seal
State of Missouri
Commissioned for Callaway County
My Commission Expires: October 03, 2014
Commission Number: 10942086

Notary Public

Ozark Electric Cooperative Base Map



Schedule 1


City Utilities
Service Territory
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CITY UTILITIES
Bringing Power Home.
Legend

Schedule 2

In the matter of the application of the CITY OF SPRINGFIELD, MISSOURI, a municipal corporation, for an order authorizing it immediately upon its acquisition of all of the common stock of Springfield Gas and Electric Company to cause said Springfield Gas and Electric Company to be dissolved and liquidated and its net assets and properties to be conveyed, transferred and distributed to the City of Springfield, Missouri, as the holder of all of the common stock of said Company, and permitting said Springfield Gas and Electric Company to cease operation as a public utility.

Case No. 10,614
Decided March 19, 1945
(Wilson, Commissioner, dissenting)

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1 **Certificate of Convenience and Necessity, §81.** In a proceeding to determine the sale of public utility properties to a municipality, the Commission stated that preferred stockholders, who under the instrument creating such stock were permitted to vote only in case of dividend default, were not entitled to vote on the question of the sale of the properties of such company where no such default was alleged or proved.

2 **Certificate of Convenience and Necessity, §81.** Preferred stockholders not entitled to vote on the sale of public utility properties are not entitled to object to the proposed sale on the ground that the proposed sale has not been voted on by the shareholders pursuant to *Section 72, General and Business Corporation Law, 1943.*

3 **Certificate of Convenience and Necessity, §81.2—Security Issues, §79.** The dissolution of a public utility corporation as a means to effect the transfer of its properties to a municipality is not a dissolution within the usual meaning of the words, and preferred stockholders of the utility are entitled to receive the call price for their stock rather than the liquidating price.

4 **Depreciation, §36.** Although it is contributed by customers, no part of the depreciation reserve of a public utility belongs to the customers.

5 **Certificate of Convenience and Necessity, §7, §81.** The Commission has jurisdiction to determine the public interest involved in the passing of title to properties from a public utility to a municpality.

6 **Certificate of Convenience and Necessity, §8, §18.** A city was found to be able lawfully to operate properties of a public utility nature located outside of its municipal limits, where the properties were being operated as a unit and where the properties located outside of the city were only a small portion of the entire operation and were operated incidentally to the properties within the city.

7 **Certificate of Convenience and Necessity, §81—Security Issues, §75.** A city was authorized, upon acquisition of all the common stock of a utility operating therein, to cause said utility company to be dissolved and its assets to be transferred to the city and to permit said company to cease operating as a public utility, all conditioned upon the preferred stock being called and paid off at the call rate, plus accrued dividends.

APPEARANCES:

Ted Beezley and *Robert B. Fizzell* for City of Springfield.

Arch A. Johnson and *Sam M. Wear* for Springfield Gas and Electric Co.

M. B. Lightfoot for Taxpayers League and in his own behalf.

Ted Hutchens for Springfield Chamber of Commerce and Springfield Industrial Committee.

John P. Randolph, Wm. C. Ross and R. E. Duffy for the Commission.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

The above caption is the caption of the application filed by the City of Springfield in this case. It expresses the purpose and prayer of said application so well that a detail of the application is wholly unnecessary, but references to its allegations will be hereinafter made as may be necessary to a full understanding of the application.

We will first identify the corporations concerned and designate abbreviated names for each and sketch the plan involved.

The Springfield Gas and Electric Company, hereinafter called the Springfield Company, is a public utility corporation organized and existing under the laws of the State of Missouri, with is principal office at Springfield, Missouri. All of its common stock consisting of 50,000 shares, without par value, is held and owned by Federal Light and Traction Company, hereinafter called *Federal,* a corporation duly organized and existing under the laws of the State of New York and having its principal office in New York City in the last named state. The City of Springfield, Missouri, hereinafter called *City,* is a municipal corporation of Missouri, that is: it is a city of the second class and operates under the general laws of the State of Missouri applicable thereto. This City and its inhabitants are served by the Springfield Company with electricity, gas, bus transportation and steam heating, and the inhabitants of certain surrounding territory outside the corporate

limits of the City are served by said Springfield Company with electricity and gas. The City desires to acquire all the facilities of the Springfield Company so used in said service and to thereafter operate the same in the same service. The plan of accomplishing this end, as set forth in the application, is for the City to purchase all said common stock in the Springfield Company from the Federal, which owns it, and simultaneously with its acquisition, to cause the Springfield Company to be dissolved and liquidated, its bonds and other obligations to be paid, its preferred stock to be retired and all the net assets and properties (including of course the utility facilities) will be conveyed and transferred to the City, whereupon the Springfield Company will be permitted to cease operation as a public utility.

This application was heard before all members of this Commission on Wednesday, March 7, 1945, at 1:30 P. M., after due notice to all interested parties. At said hearing, the City was represented by its Mayor and by Counsel. The Springfield Company filed an acknowledgment of service of notice of the filing of the application and disclaimed all interest therein. Greene County, Missouri, by members of the County Court and its Prosecuting Attorney filed an acknowledgment of a notice of the hearing, entered its appearance, specifically consented that the application may be heard, tried and determined by this Commission, and waived any and all objections to any order that may be made by this Commission. Mr. M. D. Lightfoot appeared for himself as a consumer, and a Taxpayers League, and, while favoring the granting of the application as asked, pointed out that the consumers have contributed the depreciation reserve which should be under the authority of this Commission until it be found out whether or not that should revert to the ratepayers who paid it in or whether it should remain in the pocket of the Company. Mr. Ted Hutchens, Chairman of the Industrial Committee of the Chamber of Commerce of Springfield, adopted on behalf of his Committee the suggestions of Mr. Lightfoot.

A written protest was filed on behalf of Anna L. Graves and 13 other preferred stock holders, Series A, of the Springfield Gas and Electric Company, acting on behalf of themselves and for all other owners of preferred stock Series A. This protest called attention to Section 72 of the *General and Business Corporation Law* of Missouri enacted in 1943, and urged that under its terms, no corporation could sell all or substantially all of its property and assets, where such sale is not made in the usual and regular

course of business, except in the manner therein set forth; that, among other things, said statute provided that the Board of Directors of the Springfield Company should first have adopted a resolution recommending such sale and directing the submission thereof to the vote of the shareholders entitled to vote thereat; that no such resolution has been made nor has the proposition been submitted to a vote of the shareholders, including the protestants and others similarly situated, and that such sale has not been authorized by at least three-fourths of the outstanding shares entitled to vote thereon as required by the statute mentioned.

In this protest, the protestants further called attention to the fact that their preferred stock, Series A, par value of $100.00 per share is redeemable only at the *call* price of $115.00 per share instead of at the liquidating price of $100.00 per share. Their protest further charged that the City and the Federal, if permitted by this Commission, intends to and will attempt to retire the stock owned by the protestants and others at a liquidating price of $100.00 per share; that by reason of the favorable dividend rate of $7.00 per share, such preferred stock has commanded a high market value; and that many of these protestants have paid as high as $112.00 per share for their stock, and to permit retirement of such stock at less than $115.00 per share would work a great hardship and fraud upon protestants, which would constitute a confiscation of their property. The protestants in their written protest particularly called attention to the contract between the City and Federal in which it is provided that

> "there shall be deducted from such purchase price of $6,750,000.00 an amount equal to the preferred stock then outstanding and the first mortgage bonds then outstanding at the par and principal amounts thereof respectively, together with the then applicable additional call prices unless prior thereto an order shall have been made by competent authority permitting or requiring redemption of such securities without the payment of premium in which latter case the deduction shall be in an amount in accordance with such order."

The protestants prayed that the application not be approved unless and until the said laws of the State of Missouri applicable to the sale and purchase of the property and assets of the Springfield Gas and Electric Company be complied with and that the Commission make no order depriving the protestants and other owners of stock of their lawful rights as above set forth.

It was admitted at the hearing that much of this preferred stock, Series A, had been purchased by the protestants and other

holders at prices ranging from $108.00 to $112.00 per share. The City stated that in making the settlement with the Federal Company it intends to withhold the price of $115.00 per share of all the outstanding preferred stock, but it would leave the question of whether the price of $115.00 or $100.00 per share was the applicable price for future determination. Attorneys for protestants interpreted this to mean further litigation.

At the hearing, the plan for the purchase of this common stock by the City from Federal was shown in evidence, together with Exhibit B, which is a copy of the very recent opinion of the Supreme Court of Missouri, in Case No. 39356, entitled *City of Springfield, Appellant vs. Harry Monday et al., Respondents,* not yet officially reported*. The legal right of the City to use this method of acquiring said public utility property (that is, by purchasing the common stock of the Springfield Company and causing said Springfield Company to be dissolved and liquidated and the net assets and properties to be conveyed, transferred and distributed to the City) has been adjudicated, determined and approved by the Supreme Court of Missouri in this case. The legal right of the City to issue its public utility revenue bonds to finance such acquisition was also approved in this case.

There were also introduced in evidence Exhibit A, which is the contract between the City and Federal, and Exhibit D, which is the authoritative ordinance of the City supporting all such matters. Exhibit C was also filed in the case. It is the waiver etc. of Greene County, Missouri, previously mentioned. There was also introduced in evidence Exhibit E which is an extract from the Articles of Agreement of the Springfield Company dated April 17, 1927 and recorded in the Office of Recorder of Deeds of Greene County on the same day in Book 514 at Page 344. It provides that such preferred stock may be redeemed in whole or in part on any date fixed for the payment of dividends at a redemption price of $115.00 per share (with other provisions unnecessary to notice), and in the event of a dissolution, litigation, or winding up of the corporation, whether voluntary or involuntary, the redemption rate for the retirement of such stock is $100.00 per share.

[1, 2] It also provides that the common stock shall have exclusive voting powers, and that the preferred stock shall have no right to vote at any time at any meeting of the stockholders or election of the corporation or otherwise to participate in any action taken by the corporation or the stockholders, except as therein

*185 S. W. (2d) 788—Ed.

otherwise specifically provided or as required by law. The law does not appear to confer voting privileges upon preferred stockholders unless the instrument creating them does so, and the only exception provided later in the instrument is that if, and as often as, two quarterly dividends payable on the preferred stock shall be in default on the preferred stock, that immediately upon the happening of such event and until such default and subsequent defaults have been made good, the entire voting power for the election of directors shall become and remain vested exclusively in the preferred stock, and if defaulted dividends shall thereafter be paid, the entire voting power for the election of directors shall again be vested in the common stock. The protestants neither alleged or proved any existing defaults. Thus, it appears these preferred stockholders are not entitled to vote upon the question of the sale of the company's property, and are not under the protection vouchsafed to "shareholders" under said Section 72. This disposes of protestants' first point.

[3] As to protestants' second point. They charged that the City and Federal plan to pay off these preferred stockholders at the liquidating rate of $100.00 per share when they should be entitled to be paid on the basis of the *call* rate or $115.00 per share. The question of public interest is, however, involved in the retirement of the preferred stock. In the usual or normal sale of public utility properties, the parties involved are utilities and the liquidation of outstanding securities of the vendor is treated as a call in the manner provided in the securities outstanding. The Supreme Court in the Springfield case, *supra,* has pointed out that the dissolution and liquidation of the company is the method by which the title to the property may be transferred from the Springfield Company to the City. Since the dissolution and liquidation is to be used as a means of the transfer of the property, it is not a normal dissolution and liquidation as the term is ordinarily used. In this case due to the peculiar circumstances resulting from a sale of a utility corporation to a municipality, it is necessary that the corporation be dissolved, and to this extent we are of the opinion that a dissolution which may result is not a dissolution as this term is generally used, and for that reason, we are of the opinion that the preferred stockholders should receive for their stock $115.00 per share which is the call price, and our order will be so conditioned.

[4] The point made by the others who appeared is not sufficient to require a denial of the prayer of this application.

These others, definitely, did not wish any such result. Their idea that any part of the depreciation reserve, although contributed by the customers, belongs to such customers, is contrary to the law as expressed by our Supreme Court in *State ex rel. Empire District Electric Co. vs. Public Service Comm., 100 SW (2d) 509; 16 P. U. R. 437.*

On March 7, 1945, this Commission ordered the Springfield Company to reduce its gross operating revenues in the electric and gas departments for the year 1945 at the rate of $28,000 per month ($25,000 electric and $3,000 gas) for the period in 1945 during which the Company shall own and operate electric and gas properties by credits to customers to be made in the same manner as used by the Company in the 1944 reductions. During the hearing in this matter, the attention of the Mayor of the City of Springfield was called to the fact that this reduction had been ordered, and he was asked whether the City would make these reductions and refunds if the Springfield Company would not have time to compute the reductions and to make the refunds before the consummation of this sale, if it should be consummated. The Mayor replied that this deduction would be made from the purchase price in settling with the Federal and that the City would make the refund to the customers in the manner required by the Order.

[5] Our Supreme Court in the Springfield Case, *supra,* has covered about all the law which attends this case and has left very little, if anything, for us to determine except, of course, the jurisdiction to determine whether or not it is in the public interest, or whether or not it is deterimental to the public interest, for these utility properties to pass from the Springfield Company to the City and that the Springfield Company be permitted to cease operations upon the consummation of the plan. The best legal authority for the City to dissolve and to liquidate the corporation in order to obtain the property comes from the Supreme Court in this Springfield case. The Springfield Company intends to comply with the statutes and laws of Missouri in accomplishing the dissolution. It is within our jurisdiction to determine the public interest involved in the passing of title to the properties from the Springfield Company to the City. This will next have our attention.

It was shown in evidence that if the City obtains and operates the property as a municipal plant, it will escape large sums of taxation which the present operating utility is required to pay to the United States in the way of income and other taxes as well as state, county and school taxes. The Mayor, and one member of

the Council, testified further that in their opinion they could reduce rates to all consumers in the city below the present rates, even after the reductions required by the Commission, and could furnish lower rates to the consumers than could a utility, which is subject to all the taxation and regulations which obtain. It was further shown that it was the purpose of the City to employ all persons now employed by the Springfield Company which now operates the property and that all of such employees have been advised that they will be retained. It was further shown that the present employees have operated the Springfield Company in a highly satisfactory manner, and have rendered prompt, efficient and adequate service, and that the same operators and employees can do the same thing when working for the City if it obtains the property and operates it. The City officers also further testified that it was their purpose when changes, if any should occur in the present personnel as above mentioned, to employ other capable and competent persons for their places. There was further testimony to the effect that some industries have refused to locate in Springfield for the sole reason that they could not operate under the high rates which the said utility (the Springfield Company) has required.

Before the matter of municipal ownership proceeded very far, the Chamber of Commerce and 35 other civic organizations of the City were invited to send two delegates to a meeting to discuss the entire matter. As a result of that meeting, a smaller committee composed of nine persons was constituted and has been an advisory committee for the Mayor and City Council throughout all the time that municipal ownership has been under consideration by the City. It is the purpose and hope of the City that legislation may be obtained to give such an advisory committee a legal status. The character and prominence of these nine members who have been serving, and now constitute the advisory committee, was shown in evidence, although it was shown that only one of them has had any previous experience in operating a utility.

In this case, the consumer and the investor will have the same incentive to secure successful operation of the plant, the consumer because he will be interested in good service at the lowest possible price, and the investor because it is only from the proceeds of a successful operation that he will have any assurance of the security of his investment, since no interest or principal retirement can

come from any source except from the revenues derived from the operation of the utility properties.

[6] There was a question raised at the hearing as to whether or not the City of Springfield upon acquisition could lawfully own and operate the electric and gas properties located outside the corporate limits of the City. Certain small parts of the electric and gas properties proposed to be acquired by the City of Springfield are located outside the corporate limits of the City. However, the evidence shows that the electric and gas properties located outside the City limits are relatively small in amount. The operation of these properties outside the City limits is incidental to the operation of the principal parts of the systems located inside the City. Service is supplied exclusively from the plants located inside the City. The entire properties both inside and outside the City are operated as a unit. We are of the opinion that under the facts and circumstances in this case, the City of Springfield can lawfully own and operate that part of the properties located outside the City limits so long as it operates the entire gas and electric properties primarily for the purpose of supplying electricity and gas for its own needs and the needs of its inhabitants and is incidentally selling surplus electricity and gas to nonresidents without impairing the usefulness of its gas and electric properties for said primary purpose. We are supported in this conclusion by the Supreme Court's holding in *Speas vs. K. C., 329 Mo. 184,* 44 S. W. (2d) 108, and the *Springfield case,* supra. Also subparagraphs 37 of Sec. 6609 and Sec. 7787, R.S. Mo. 1939.

[7] From the evidence adduced, this Commission is of the opinion and finds that it is not detrimental to the public interest for the City immediately upon its acquisition of all of the common stock of the Springfield Company to cause said Springfield Company to be dissolved and liquidated and its net assets and properties to be conveyed, transferred and distributed to the City and permitting said Springfield Company to cease operation as a public utility, all conditioned upon the preferred stock being called and paid off at the rate of $115.00 per share, plus all accrued and unpaid dividends, if any, or such sums be made available to such preferred stockholders by deposit thereof, as set forth in said Exhibit E.

Entertaining these views,

It is, therefore,

Ordered: 1. That if the City of Springfield shall hereafter acquire all the common stock of the Springfield Gas and Electric Company (a corporation), then and in that event permission is hereby granted to dissolve and to liqui-

date the Springfield Gas and Electric Company and its net assets and properties to be conveyed, transferred and distributed to the City of Springfield, Missouri, as the holder of all of the common stock of said Company, from and after which the said Springfield Gas and Electric Company shall cease to operate as a public utility and its certificate of convenience and necessity, granted by this Commission, shall thereby cease and come to an end, all upon the condition that the preferred stock shall be called and paid off at the rate of $115.00 per share, plus all accrued and unpaid dividends, if any, or that such sums be made available to such preferred stockholders by deposit thereof as set forth in Exhibit E proffered in this case.

Ordered: 2. That this report and order shall be in effect on March 24, 1945, and that the Secretary of the Commission shall forthwith serve certified copies of same upon all interested parties.*

WILLIAMS, Chr., HENSON, and ARENS, CC, Concur. WILSON, C., dissents in separate opinion.

DISSENTING OPINION

The application in this case seeks an order of this Commission approving the transfer of all of the physical properties of Springfield Gas and Electric Company to the city of Springfield, Missouri and the discontinuance of operation by the company as a public utility and the dissolution of the corporation.

This case, in my opinion, is one of considerable importance, involving the utility properties in the fourth largest city in the State and the electric, gas and transportation services to the city of Springfield's more than sixty-thousand inhabitants and electric service to others within an area of eight miles beyond the city limits in all directions according to the map filed with this Commission by the Springfield Gas and Electric Company. In determining whether the proposed transfer should be approved, the issue before this Commission is whether or not such a transfer would be in the public interest. That question must be decided upon the record that is before the Commission and upon the law contained in the applicable statutes and the adjudicated cases.

Although the Supreme Court of Missouri has recently held that the city of Springfield may issue public utility revenue bonds for the purchase of the common stock of the Springfield Gas and Electric Company from the Federal Light & Traction Company, *City of Springfield, Missouri, Petitioner, Appellant vs. Harry Monday, et al., Respondents,* No. 39,356 (unpublished), **the Court did

*See report and order of August 4, 1945 reported herein.
**185 S.W. (2d) 788—Ed.

not hold that the City can operate as a public utility outside the city limits, and that conclusion does not follow as of course. Under the most recent decision of the Supreme Court of Missouri upon this subject, *Taylor vs. Dimmitt*, 336 Mo. 330, 78 S.W. (2d) 841, decided in 1934, which case has never been criticized or overruled, I am of the opinion that the city of Springfield cannot lawfully serve the electric and gas customers located outside the corporate boundaries, and for that reason the proposed transfer would be detrimental to the public interest. The case of *Taylor vs. Dimmitt* involved a question of whether or not the city of Shelbina, Missouri, a city of the fourth class, which owns and operates a municipal electric plant and having a surplus of electric energy from its municipal plant, could construct, maintain and operate an electric transmission line for the purpose of furnishing service to consumers residing in Lakenan, an unincorporated village located approximately five miles from the city limits of Shelbina, and also to furnish service to consumers along such proposed electric transmission line. The Court held that a municipality in rendering electric service to consumers outside the corporate boundaries performs no municipal function, but enters a field of private business, and authority for such action must clearly appear; that a municipality has no implied power to engage in private business; and that the city of Shelbina was without statutory authority to construct, maintain and operate a transmission line for the purpose of furnishing service to consumers outside its corporate boundaries. In that case the Court said, l. c. 843:

> ". . . cities in owning, operating, and maintaining electric utilites act in their proprietary, or business, as distinguished from governmental capacity. In rendering electric service to consumers outside their corporate boundaries, they perform no municipal function, but depart from the primary objects for which they have existence, and enter a field of private business. Authority for such, we think, should clearly appear."

also:

> "Even as to governmental functions, Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law;"

also:

> "'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) Those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) Those essential to the declared objects and purposes of the corporation—not

simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied,' St. Louis v. Kaime, 180 Mo. loc. cit. 322, 79 S. W. 140, 143 (quoting Dillon, Municipal Corp. vol. 1 (4th Ed.) p. 145:)"

The city of Springfield, Missouri is a city of the second class and the applicable statutes are as follows:

"Sec. 6605 R. S. Mo. 1939,:

". . . Any city of the second class in this state may purchase, receive and hold property, both real and personal, within and without such city, *for any public use or purpose* . . ."

"Sec. 6609 R. S. Mo. 1939,:

"*XV.* To procure by purchase, condemnation, gift or otherwise, within the city or beyond the limits thereof, property for use of the city *in and for the performance of its functions*, and to manage and regulate the use thereof; . . .

"*XXXVI.* To acquire by condemnation, purchase, gift, lease or otherwise, property, real and personal, within such city and beyond the limits thereof . . . for the erection, construction, maintenance and operation of gas plants and systems, heat plants and systems, electric light plants and systems . . . electric or other power plants and systems, to be used *in supplying the city and its inhabitants with light, heat and power; and for any other public use or purpose*, . . .

"*XXXVII.* To acquire by condemnation, purchase, gift, lease or otherwise, property real and personal within such city or beyond the limits thereof, and to establish, construct, maintain, add to, equip, improve, own, control, regulate, and operate . . . electric light systems, electric or other heat systems, electric or other power systems, electric or other railways, . . . and transportation systems of any kind, . . . and all public utilities not herein enumerated and everything required therefor; . . . to sell . . . gas, electric current, and all products of any public utility operated by the city . . ."*

In the case of *State vs. Orear*, 277 Mo. 303, 210 S.W. 392, the city comptroller of Kansas City contended that the purpose for which the proceeds of ice plant bonds were to be used was not a public purpose, and, therefore, there was lacking both legislative and constitutional authority to use therefor public moneys raised by public taxation. The Court in that case said, l.c. 395,:

"That there must be authority in the charter of Kansas City, either express or clearly implied, permitting that municipality to engage in making and selling ice, before it can legally do so is settled by the repeated adjudications in this state." (citing cases)

*Italics added.

I am unable to find any charter or statutory provision, express or implied, which authorizes the city of Springfield to engage in the private business of conducting a public utility.

It is stated in the majority opinion, p. 145, that the electric and gas properties located outside the city limits are relatively small in amount; that the operation of these properties outside this city is incidental to the operation of the principal parts of the system located inside the city; and the opinion is expressed that the city of Springfield can lawfully own and operate that part of the property located outside the city limits so long as it operates the entire gas and electric properties primarily for the purpose of supplying electricity and gas for its own needs and the needs of its inhabitants and is incidentally selling surplus electricity and gas to nonresidents without impairing the usefulness of its gas and electric properties for said primary purpose, citing the Supreme Court decisions in *Speas vs. Kansas City,* 329 Mo. 184, 44 S. W. (2d) 108; *City of Springfield, Missouri, Petitioner, Appellant* vs. *Harry Monday, et. al., Respondents,* No. 39,356,* and Section 6609 *XXXVII* and Section 7787 R. S. Mo. 1939. The question of importance here is not how much of the electric and gas properties is located outside the city limits. All of the electric and gas properties could lawfully be located outside the city limits if they were operated for the purpose of supplying electricity and gas to the electric and gas consumers within the city limits. It is the business conducted in serving the consumers outside the city limits which is unlawful. As stated above neither the Springfield case nor the provisions of Section 6609, *XXXVII* R. S. Mo. 1939 authorize the conducting of such private business. In the *Speas* case the plaintiffs as resident taxpayers of Kansas City, Missouri sought to have adjudged unconstitutional all provisions of said City's charter by which it and its officers and agents are authorized to supply water to nonresidents and to perpetually enjoin said City and its officers and agents from supplying water to nonresidents. The plantiffs' petition alleged, among other things, that the City had constructed certain water mains running to and along the boundary line of Missouri and Kansas where Kansas City, Missouri adjoins Johnson County, Kansas; that the City had placed water meters at the State line (which is also the city limits); that the purchaser of the water from Kansas City was charged the lowest consumer rate, known as a combination rate based on the total consumption of water; and that the purchaser retailed and distributed the water to in-

*185 S. W. (2d) 788—Ed.

dividual residents and citizens of the residential district of Johnson County, Kansas at a higher and more profitable rate than that paid to defendant, Kansas City, Missouri, but which rate was lower than that charged to and paid by the great majority of the resident taxpayers or citizens of Kansas City, Missouri. The petition also contained the general allegation that Kansas City, Missouri was selling and distributing large quantities of water to various other nonresident and noncitizen consumers, the names of whom were unknown to plaintiffs. The petition further complained that by reason thereof there had been frequent shortages of water for the use of citizens and taxpayers of Kansas City, Missouri, and that no part of the expenditures for the water distribution system had been, or would be, paid by nonresident users and consumers of water. In passing upon the questions presented in that case, the Court said, l.c. 113,:

> "Is the charter power of Kansas City to supply water to nonresidents in conflict with its charter power to acquire and to operate waterworks for public purposes only or with the constitutional provision that taxes may be used for public purposes only? We think not, because the charter power of Kansas City to supply water to nonresidents may be exercised, as was doubtless intended by the framers of its charter, for the benefit of the city and its inhabitants. In other words, if Kansas City acquired and is operating its waterworks primarily for the purpose of supplying water for its own needs and the needs of its inhabitants, and is incidentally selling surplus water to nonresidents, without impairing the usefulness of its waterworks for said primary purpose, such exercise of its charter power to supply water to nonresidents is not inconsistent with its charter power to acquire and to operate waterworks for public purposes only, nor with the constitutional provision that taxes may be used for public purposes only."

The question involved in the *Speas* case was the constitutionality of the charter provisions authorizing the selling of surplus water to nonresidents. That case did not hold that a municipal corporation can lawfully conduct a public utility business serving consumers outside the city limits, nor does Kansas City's charter authorize the conducting of such a private business.

The majority opinion in this case also cites Section 7787, R. S. Mo. 1939. That section is the same as Section 7642, R. S. Mo. 1929, which is applicable to any city in the State which owns and operates any electric light or power plant, including cities of the second class, such as Springfield, cities of the fourth class, such as Shelbina, and cities under special charters, such as Kansas City. That Section provides as follows:

"Sec. 7787. Cities empowered to sell light and power.—Any city in this state, which owns and operates any electric light or power plant, may, and is hereby authorized and empowered to supply electric current from its light or power plant to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor for such time and upon such terms and under such rules and regulations as may be agreed upon by the contracting parties. (R. S. 1929, sec. 7642.)"

This section, above quoted, was considered by the Supreme Court of Missouri in its most recent case upon this subject, *Taylor vs. Dimmitt,* supra, decided January 7, 1934, almost three years later than the *Speas* case. The *Speas* case which is cited in the majority opinion in this case is not in point and is so recognized by the Supreme Court in the opinion in *Taylor vs. Dimmitt* in which the Court says, l.c. 844,:

"The Missouri cases mentioned by appellant (Speas v. Kansas City, 329 Mo. 184, 44 S.W. (2d) 108; Public Service Commission v. Kirkwood, 319 Mo. 562, 4 S.W. (2d) 773; and McMurry v. Kansas City, 283 Mo. 479, 223 S.W. 615) do not involve the issue upon which this case turns."

At the hearing in Case No. 9067, *Public Service Commission vs. Springfield Gas and Electric Company and Springfield Traction Company,* before this Commission on the 14th and 15th days of February, 1944* the evidence showed that the electric department was then serving approximately 21,462 domestic, commercial and power consumers in Springfield and the rural area lying within said eight miles of the City's corporate limits, and that the gas department was serving approximately 11,759 city and rural consumers as of December 31, 1943. The evidence in the case before us does not show the number of consumers outside the city limits nor income derived therefrom, but certainly a number of large power users are located outside the city limits, including the Frisco railroad shops and two government hospitals, the Medical Center for Federal Prisoners and O'Reilly General Hospital.

If the city of Springfield could lawfully conduct a private business to serve the consumers eight miles beyond the city limits, why could it not serve ten, fifteen, twenty-five or even one hundred miles beyond the city limits?

Aside from the legal aspects of the proposed transfer, which would leave a considerable number of the present consumers of

*See 26 Mo. P.S.C. 484—Ed.

Springfield Gas and Electric Company, including large power users, without electric and gas service, and being for that reason detrimental to the public interest, after a careful analysis of the transcript of the evidence in this case, it is my opinion that the evidence fails in other respects to show that the transfer would be in the public interest. In fact, the record on the whole is very inadequate. No reasonable showing was made as to any public benefit to be derived from this purchase which would offset the definite losses which will result to the school district, road districts and to the county as a consequence of the acquisition of these properties by the municipality. No actual plan has been adopted by the City regarding the rates to be charged and there is no guarantee that the reduction which this Commission has required to be made by allowing credits will be made permanent. If such a guarantee were made, it would be no additional benefit in view of this Commission's outstanding order. No improvement in service is anticipated, and statements were made that the service now is very satisfactory. Mayor Carr stated, "The present management has given wonderful service for a number of years." No economy of operation is anticipated and the entire personnel of the Springfield Gas and Electric Company is to be retained. The only economy which was discussed was the savings in taxes. The amount of such savings is largely defined by the loss in tax revenue to the school district, road districts, the county and the Federal Government. None of these parties who will suffer a loss in revenue will receive equivalent benefits. If the tax savings within the City are not passed on to the public in rate reductions or through reductions in taxes, even this saving is doubtful.

Vague references were made to Utopian power rates which were to bring new industries to Springfield, but cross-examination disclosed that no schedules had been prepared to bring about these low rates nor was it shown that such reductions could be made without imposing a burden on the residential and other consumers.

Mr. John Randolph, General Counsel of the Missouri Public Service Commission, asked Mayor Carr on cross-examination: (R.-82)

"Q. Mayor Carr, you said you thought there would be many benefits that would come out of municipal ownership in this case. You expected to lower rates, have you made any definite studies of what you can do in that respect?"

To which the Mayor answered:

"A. No, we haven't, and the reason is we haven't as yet secured the property and there is plenty of time to do that. I don't see why it is necessary to do that before you get the property."

I have no doubt that the Mayor and other city officials sincerely hope to reduce rates as they have testified were the City to acquire the property herein involved, but the operation of public utility properties is a highly technical business and rates are not reduced by wishes. Witnesses stated that new industries had been forced to choose other locations because of the high power rate at Springfield, and it was stated that a large tire plant had located in Oklahoma instead of at Springfield because the Oklahoma location offered a four-mill power rate. It was inferred that the acquisition of the electric utility properties by the City would enable it to reduce power rates in order to compete in the acquisition of new industries.

Our records show that during 1943, the Company purchased power from The Empire District Electric Company in an amount of $84,836 which covered 12,807,560 kilowatt hours. This purchased power cost the Company .656 per kilowatt hour. If these new industries which are to be attracted to Springfield by the suggested four-mill rate actually are obtained, it is logical to assume that the amount of power purchased will be increased in order to supply this additional demand. If the four-mill rate is offered to these power consumers, it can only be done by passing the difference between .656 and .4 on to the domestic and commercial users which could easily result in requiring an increase for those types of consumers in order to offer the low rate which the City desires for the purpose of attracting new industries. Certainly, the benefit to domestic and commercial customers would be doubtful in that event.

On the 24th day of April, 1944 the Commission issued a report and order wherein the Springfield Gas and Electric Company was ordered to reduce the gross operating revenue of its electric department for the year of 1944 by refunding, or by allowing credit on future bills to customers, until the amount of $304,000 shall have been refunded. Prior to issuing that order, the Commission held a hearing at which the City of Springfield appeared by its attorney, Mayor and members of the council, and a group of commercial and industrial electric consumers appeared by their attorney, Mr. Fred A. Moon. It was claimed originally by the industrial users that the power rates in the city of Springfield were not comparable to the power rates in the State of Missouri generally, but that the domestic and other rates were comparable to such rates throughout the State, and it was contended that the total rate reduction should go to the large power users. Mr. Moon requested time in which to

prepare as an exhibit a study showing comparison of power rates in Missouri, and time was granted for that purpose. Thereafter, the industrial users secured the services of an electrical engineer to analyze the power rates of Springfield as compared with other cities in Missouri, and after said analysis was completed, Mr. Moon advised the Commission that he found both the domestic and power rates were comparable to the same classes of rates in other cities in Missouri and not out of line. At a prior hearing in the same case on February 14th and 15th, 1944, Mr. Louis W. Reps, who testified on behalf of the Chamber of Commerce, asked that whatever rate reduction might be ordered be allocated to industrial power users and commercial light users. In his testimony Mr. Reps said, ". . . our residential rate is very much in line. In fact, we advertise at the time that it is the lowest in Missouri . . . " (R. 132-133). I refer to previous records before this Commission for the purpose of pointing out that there is little to justify the belief that this proposed change of ownership can greatly benefit the rate situation within the city of Springfield.

The evidence shows that there has been appointed a group of businessmen, or so-called Advisory Board, described by the Mayor as ". . . made up of some of our good citizens", but which has no authority in law. We have no reason to doubt the competency of these businessmen in their respective lines of business, but the record shows that only one of them has ever had any public utility experience, and that he is not connected with any utility at the present time.

The purchase price proposed in this case is $6,750,000. Some comment was made at the hearing regarding the fairness of this amount, and it was suggested that the City was paying more than nine hundred thousand dollars in excess of the price which had been offered by an individual and had been accepted by Federal for the common stock of the company.

This Commission in 1944, after an audit of the Springfield Company, fixed a rate base upon which the earnings of the electric and gas departments should be computed. No equivalent finding was made for the heating and transportation departments. The rate bases which were fixed in 1944, plus adjustments applicable thereto during the year of 1944, amount to $5,499,009 for the electric and gas departments. If we add to this amount the adjusted investment in the heating department and the recorded investment in the transportation department, the maximum amount which

could be justified as value of this property would be $6,009,077. This amount is approximately six hundred sixty-five thousand dollars less than the agreed purchase price in this case.

An analysis of the balance sheet of this Company for December 31, 1943, discloses that the earned surplus, plus the common capital stock liability, amounts to $299,446.70. This is an accepted method of determining common stock equity in a property. These figures, however, are not representative of the equity value as there are items of acquisition adjustment in a substantial amount which would have to be considered in a determination of this nature. However, ignoring these, it seems evident that the offer by an individual of a consideration of $650,000 for the common stock of this Company was at least an adequate consideration and that the price which is proposed herein seems exorbitant and to the extent of the excess over fair value is contrary to the public interest of the citizens of Springfield.

In the rate base figures quoted above are included an amount slightly in excess of one hundred thousand dollars for cash working capital and material and supplies which amounts might reasonably be deducted in the above computation in view of the terms of the purchase contract which in substance provide that assets of this nature may be offset by the assumption of liabilities of the corporation.

The question as to the sentiment of the public at Springfield was discussed and opinions were stated on both sides. No actual test of this sentiment has been made. A vote was proposed on this matter at which time a consideration considerably in excess of the present one was involved. This vote was prevented by injunction. Since that time the consideration involved seems to have been reduced by more than one million dollars but is still some nine hundred thousand dollars in excess of a bid which was made by an individual and accepted by Federal. Possibly the public, if given an opportunity to vote, might register its objection to this large difference in consideration.

In addition to all of the other inadequacies of this record, in the haste with which this case has been presented and heard, I doubt if due process of law has been accorded to all interested parties. At the beginning of the hearing of this case, at intervals throughout the hearing and at the close of the hearing, Counsel for the preferred stockholders requested additional time in which to present the case of the three hundred preferred stockholders. In view of the fact that this hearing was set upon less than ten-days'

notice as required by the Rules of Practice and Procedure before the Commission and the statement of one of the Counsel that he had read the petition for the first time on the morning of the hearing, in my opinion the request for continuance was reasonable. Also, I note that there are road districts within Greene County which will be deprived of certain taxes so that there is a possibility that there may be interested parties who received no notice of the hearing.

For the reasons above stated, I dissent from the majority report and order and it is my opinion that the proposed transfer would be detrimental to the public interest and contrary to the public welfare.

AGNES MAE WILSON, Commissioner.

In the matter of the application to the Missouri Public Service Commission under Rule 14 of the Missouri Public Service Commission for certificate of public convenience and necessity authorizing the construction, extension, acquisition or operation of lines of railroad by BEVIER & SOUTHERN RAILROAD COMPANY in Macon and Randolph Counties, Missouri.

In re application for certificate of public convenience and necessity, authorizing BEVIER & SOUTHERN RAILROAD COMPANY to extend its railroad over tracks owned by Binkley Mining Company of Missouri, and already constructed and being between mile post 9.412 Station and mile post 15.53 Station.

Case No. 10,562
Case No. 10,617
Decided March 21, 1945

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1 **Public Utilities, §20—Railroads, §2.** A railroad serving only one customer, the owner of its stock, is in effect a private carrier, and common carrier status should not be granted such private operations merely to provide the ownership with the rights and benefits to be obtained from such status.

2 **Certificate of Convenience and Necessity, §31.1—Railroads, §5.** A railroad serving only one customer, the owner of its stock, was granted a certificate of convenience and necessity because the proposed operation was merely a change in one of long standing and provisions were made to insure that no advantage would accrue to the owner of the stock.

afforded, and that the application to maintain and operate should be granted.

It is, therefore,

Ordered: 1 That the Bevier & Southern Railroad Company is hereby granted a certificate of convenience and necessity as a common carrier of freight and is hereby authorized to lease, maintain and operate the line of railroad of the Binkley Mining Company of Missouri, in Macon and Randolph Counties, Missouri, between Milepost 9.412 and Milepost 15.53, as described above, as such a common carrier.

Ordered: 2. That Bevier and Southern Railroad Company is hereby authorized to maintain and operate existing grade crossings located on the trackage of the Binkley Mining Company at points designated as Mileposts 9.648, 11.019, 11.381, 12.654, 13.751, 15.106, and 15.477.

Ordered: 3. That the above crossings shall be protected by standard crossing signs and maintained in accordance with the statutes.

Ordered: 4. That this report and order shall take effect ten days after this date and that the Secretary of the Commission forthwith serve certified copies of same on all parties interested herein and that each of said parties shall notify the Commission before the effective date of this order in the manner prescribed in Section 5601, R.S. Mo. 1939, whether the terms of said report and order are accepted and will be obeyed.

WILLIAMS, Chr.; HENSON, ARENS, and WILSON, CC, Concur.

In the matter of an investigation by the Public Service Commission of Missouri of the disposition by the SPRINGFIELD GAS & ELECTRIC COMPANY of all of its works and system to the City of Springfield, Missouri.

Case No. 10,628
Decided April 4, 1945
(Henson, Commissioner, dissenting)

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1 Certificate of Convenience and Necessity, §81—Electric, §5. An electric and gas company which had apparently sold its utility properties without prior authority from the Commission was ordered to show cause why such transfer was not unlawful and void and, also, to show cause why it should not be ordered to resume operation thereof in the rendition of public utility service.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

Information having come to this Commission that the Springfield Gas & Electric Company of Springfield, Missouri, has disposed of the whole of its works or system necessary or useful in the per-

formance of its duties to the public and that said works or system have been acquired by the City of Springfield, Missouri; that such disposition of its works or system by the Springfield Gas & Electric Company has been made by it without having first secured from the Commission and order authorizing it so to do as required by Section 5651, R.S. Mo. 1939. The Commission is, therefore, of the opinion that it should fully investigate the purported disposition of the works or system of said Springfield Gas & Electric Company to the City of Springfield by causing said Springfield Gas & Electric Company to appear before this Commission on a day certain and to show cause, if any there be, why its works or system have been disposed of without first having obtained an order of the Commission authorizing it so to do and to show further cause why such disposition is not unlawful and void under the provisions of said Section 5651, R.S. Mo. 1939, and, therefore, detrimental to the public interest and to show further cause why said Springfield Gas & Electric Company should not be ordered by the Commission to resume the operation of its properties, works and systems and to continue to render utility services to the people of the city of Springfield, Missouri, and its surrounding territory under the certificate of public convenience and necessity heretofore issued to said company by this Commission.

It is, therefore,

Ordered: 1. That Springfield Gas & Electric Company be and it is hereby ordered and directed to appear before the Public Service Commission of Missouri at its hearing room in Jefferson City, Missouri, at 10:00 a.m. on Monday, April 9, 1945, and then and there show cause, if any there be, why the Springfield Gas & Electric Company has disposed of its works or system necessary or useful in the performance of its duties to the public without having first secured from the Public Service Commission of Missouri an order authorizing is so to do and show further cause why such disposition of its works or system is not unlawful and void and show further cause, if any there be, why the Public Service Commission of Missouri, should not issue its order requiring the Springfield Gas & Electric Company to resume its operations and service to the public as a public utility under its certificate of convenience and necessity heretofore issued by the Public Service Commission of Missouri.

Ordered: 2. That this order shall take effect on this date and that the Secretary of the Commission shall forthwith serve on all interested parties a certified copy of this order.

WILLIAMS, Chr., WILSON and ARENS, CC., Concur.
HENSON, C., dissents in a separate opinion.

DISSENTING OPINION

I dissent for the reason, mainly, that this course is wholly unnecessary at this time and tends to confuse, if indeed it does

not overlap, the issues before this Commission in the pending case No. 10,614, which is to be heard five days hence. That case, among other things, asks our approval of the transfer of the works and system in question. Whether after that hearing we shall grant or shall withhold such approval, we have ample authority to include in our Order when made therein, an Order to our General Counsel to pursue any and every statutory remedy which could possibly be spawned as a result of this show cause order now made and if necesary to do so, to then bring into the matter the Springfield Gas & Electric Company. Our authority to embark upon the enforcement of these statutory remedies is to be found in Sections 5661 and 5710, R.S. Mo. 1939, neither of which place any time limit which would prevent the determination, after that case is heard, whether or not we should also embark upon such a course or upon the one which has been instigated by the above Report and Order. Even if the works and system of said Springfield Gas and Electric Company have been transferred, there is no hint that as a result thereof the utility services have ceased or been impaired in the least nor is it suggested that either is threatened or that this Report and Order will prevent or cure it. Our paramount interest, mainly, is in services.

Without the slightest intention on my part to condone an unlawful act, if any, it is still my humble judgment that these utility services will be more nearly assured by a determination of our course, after hearing the pending Case No. 10,614, the results of which can be reviewed, during which time the Courts can protect the services, rather than making the above Report and Order, which may unnecessarily and possibly cast doubt and uncertainty in the public mind on the entire situation until our decision on the merits in Case No. 10,614 is made.

CHARLES L. HENSON, Commissioner.

In the matter of the citation of TOEDEBUSCH TRANSFER, INC., to show cause why Certificate and Permit No. T-774 heretofore issued to it should not be suspended and revoked.

Case No. T-774
Decided April 30, 1945

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1 **Certificate of Convenience and Necessity, §101—Evidence, §4—Motor Carriers, §5.1.** In a proceeding commenced by the Commission issuing an order re-

[4] The canopy as constructed is a direct violation of General Order No. 24, but in view of the record before us, we are unable to conclude that construction at a clearance of 8 feet 6 inches is practicable, or that unusual hazard results from the structure now in place.

Having given careful consideration to all the record in this case, we are of the opinion and find that it merits our approval and that we should authorize the maintenance and operation of the said construction heretofore made.

It is, therefore,

Ordered: 1. That Kansas City Terminal Railway Company is hereby authorized to maintain and operate a canopy alongside and between Tracks 28 and 29, Kansas City Union Station, Kansas City, Missouri, with horizontal clearances of 5 feet from center lines of tracks 28 and 29 at elevations of 15 feet 5 inches and over above top of rail, and varying from 8 feet 6 inches to 5 feet between the elevations of 13 feet and 15 feet 5 inches above top of rail, all in accordance with the location shown and dimensions given on Exhibits A and B as received in evidence.

Ordered: 2. That Kansas City Terminal Railway Company shall at all times maintain signs, on or near the canopy and illuminated during hours of darkness, warning railway company employees and others of the reduced clearances.

Ordered: 3. That this report and order shall take effect ten days after this date and that the Secretary of the Commission shall forthwith serve certified copies of same on all parties interested herein and that each of said parties shall notify the Commission before the effective date of this order in the manner prescribed in Section 5601, R.S. Mo. 1939, whether the terms of said report and order are accepted and will be obeyed.

OSBURN, Chr., WILLIAMS, HENSON, WILSON and MCCLINTOCK, CC., Concur.

In the matter of the application of the CITY OF SPRINGFIELD, MISSOURI, a municipal corporation, for an order authorizing it immediately upon its acquisition of all of the common stock of Springfield Gas and Electric Company, to cause said Springfield Gas and Electric Company to be dissolved and liquidated and its net assets and properties to be conveyed, transferred and distributed to the City of Springfield, Missouri, as the holder of all of the common stock of said Company, and permitting said Springfield Gas and Electric Company to cease operation as a public utility.

In the matter of an investigation by the Public Service Commission of Missouri of the disposition by the SPRINGFIELD GAS AND ELECTRIC COMPANY of all of its works and system to the City of Springfield, Missouri.

Case No. 10,614
Case No. 10,628
Decided August 4, 1945
(Wilson, Commissioner, dissenting)

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1 **Certificate of Convenience and Necessity, §7, §81—Security Issues, §79.** In a proceeding involving the transfer of properties of a utility to a city, it was stated that the Commission is without power to require that preferred stock be called at its call price rather than at its liquidating price.

2 **Certificate of Convenience and Necessity, §82—Security Issues, §15, §26.** There is no statute requiring approval of the Commission before a city may acquire the common stock of a utility serving it; however, before the properties of the utility can be transferred, the Commission must give its approval.

3 **Certificate of Convenience and Necessity, §7, §81—Security Issues, §15.** Where a municipality had sold revenue bonds and had acquired the common stock and preferred stock of the utility serving it with the proceeds thereof and said utility's properties had subsequently been transferred to the city without the approval of the Commission, it was stated that the Commission is without jurisdiction to unscramble the transactions and restore the status quo ante.

4 **Certificate of Convenience and Necessity, §81—Evidence, §6.** A contention that it would not be in the public interest to approve the transfer of utility property to a municipality for the reason that the municipality would not be able lawfully to operate the properties beyond the city's limits was rejected because the premise so advanced is not definitely and positively established.

5 **Certificate of Convenience and Necessity, §81.** A contention that the operation of the properties might get into politics is no basis for finding that the transfer of utility properties to a municipality is detrimental to the public interest.

6 **Certificate of Convenience and Necessity, §8, §18—Public Utilities, §31.** It has been held that a city of the second class may operate utility properties located outside of its limits as an incident to its municipal operation of like properties within its limits.

7 **Certificate of Convenience and Necessity, §8, §18—Public Utilities, §31,** Although it stated that incidental operations by a city of utility properties located outside of its limits probably were lawful, the Commission recommended that such properties be sold to private concerns for operation in order to eliminate any controversy with respect thereto.

8 **Certificate of Convenience and Necessity, §81, §81.2—Electric, §5—Gas, §7.** Although the necessary acts (except the obtaining of Commission approval) to effect the transfer of the properties of a utility company to a City owning the stock thereof and to effect the dissolution of said utility had been accomplished, the utility was expressly authorized to consummate the transactions after it was found that the proposed acquisition of the properties by the city was in the public interest.

APPEARANCES:

Arch Johnson for Preferred Stockholders of Springfield Gas and Electric Company.

A. P. Stone, Jr., and *Ted Beezley* for City of Springfield.

Robert Fizzell for City of Springfield and Springfield Gas and Electric Company.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

The above closely related Cases No. 10,614* and No. 10,628 were heard upon due and proper notice before members of the Commission April 9th and 10th, 1945, and without objection, on a joint record. At that time Case No. 10,614 was heard *anew* on the application after the Commission had on March 26, 1945, granted a rehearing by an Order which set aside the Report and Order dated March 19, 1945 (based upon a hearing on March 7, 1945) in that case.

The application was filed on March 1, 1945, by the City of Springfield asking for an Order of this Commission authorizing it immediately upon the acquisition of all the common stock of the Springfield Gas and Electric Company to cause said Springfield Gas and Electric Company to be dissolved and liquidated and its net assets and properties to be conveyed, transferred and distributed to the City of Springfield, Missouri, as the holder of all said common stock, and permitting said Springfield Gas and Electric Company to cease operation as a public utility. Prior to the first hearing on March 7, 1945, fourteen preferred stockholders of the Springfield Gas and Electric Company filed in their own behalf, and of others similarly situated, an answer protesting the granting of the application, while the Springfield Gas and Electric Company filed a disclaimer.

Case No. 10,628* was instigated by this Commission on its own Motion on April 4, 1945, in which it ordered and required the Springfield Gas and Electric Company, on or before April 9, 1945,

*Reported herein.

to Show Cause, if any, why it had (on March 26, 1945) disposed of its works or system necessary and useful in the performance of its duties to the public without having first secured from the Public Service Commission an Order authorizing it so to do. The Springfield Gas and Electric Company by its counsel (identical to the counsel for the applicants in 10,614) filed an Answer in Case No. 10,628 at the hearing on April 9, 1945, admitting the disposition of the works and system of the said Springfield Gas and Electric Company without having first secured an Order from this Commission so to do, and undertaking to explain and justify such course.

In both cases all interests appearing were represented by counsel at the hearing, and the General Counsel of this Commission also appeared thereat for this Commission.

Time was extended beyond the hearing for all interested to file briefs and all interests have done so.

STATEMENT

The facts relevant to both cases are so interwoven and involved that we deem it advisable to state the facts and dispose of both cases in one report but to include orders separately disposing of each. As hereinafter used, the term "City" will refer to the applicant, City of Springfield, Missouri; the term "Gas & Electric" to the Springfield Gas and Electric Company; and the term "Federal" to the Federal Light and Traction Company.

Gas & Electric is a Missouri public utility corporation engaged in supplying electricity, gas, heat and transportation to consumers within the City and gas and electricity to consumers outside the City, except that it furnishes no gas to industrial users outside the City. It holds our certificate of convenience and necessity therefor.

Federal is a corporation of the State of New York which owned and controlled all the common stock of the incorporated Gas & Electric, consisting of 50,000 shares without par value. It owned all of such common stock except seven shares which its officers and directors owned for qualifying purposes and it controlled such stock.

The City is a municipal corporation under the laws of the State of Missouri, in that it is an incorporated City of Missouri of the second class. The City by its officials, during the year 1944, undertook to acquire Gas & Electric's physical properties used in

such services in order to own and to operate the same under a municipal ownership plan. But, failing in that, it contracted with Federal to buy all the 50,000 shares of the common stock of Gas & Electric for the base purchase price of $6,750,000.00 out of which all mortgage and other indebtedness and the preferred stock of Gas & Electric were to be retired. Other adjustment provisions of the purchase price are not material here and will not be covered herein. The City proceeded upon the theory that after the acquisition of all of the common stock and the dissolution of Gas & Electric, the City would thereby become the owner of the desired property and facilities. Such means of acquisition, and also the issuance of revenue bonds by the City, were approved by our Supreme Court in *City of Springfield vs. Monday et al.*, 185 S.W. (2d) 788. Appropriate ordinances had been enacted by the City covering its entire plan. The Court held in that case that the City could only own and hold such stock for the purpose of acquisition of the property by the means aforesaid and that the execution of such revenue bonds without a vote of the people of the City was lawful. The Monday case (decided February 7, 1945) became a finality when the Motion for a Rehearing filed therein was overruled on March 5, 1945, and when the Circuit Court of Greene County, Missouri, on March 24, 1945, entered its judgment by direction of the Supreme Court that the City is lawfully authorized to issue such revenue bonds.

[1] As a result of the hearing of Case No. 10,614 on March 7, 1945, this Commission issued a Report and Order on March 19, 1945* fully approving the application but *conditioned* upon the preferred stock being called at its *call* price of $115 per share. We proceeded on the theory that, if we were authorized to permit the dissolution, we were authorized also, and as a part thereof, to require the retirement of the preferred stock at the *call* price stated. Both the City and the preferred stockholders, mainly attacking the condition imposed as being beyond our jurisdiction, timely filed Motions for Rehearing. On March 26, 1945, the Commission issued its Order sustaining all the Motions for Rehearing, setting aside the Report and Order of March 19, 1945, and setting Case No. 10,614 for *rehearing* on notice for Monday, April 9, 1945. All now seem to be agreed that if we again approve the application, we have no jurisdiction to again attempt in the same manner to protect these preferred stockholders by such a condition and that point now drops out of this Case. (No. 10,614).

*Reported herein.

Protestants' opposition is not upon personal and pecuniary interest but for public interest as will later be disclosed.

On March 23 and 24, 1945, the City of Springfield received bids for the issuance of $6,750,000.00 utility revenue bonds and sold $6,200,000.00 thereof for $6,632,500.00 which last named sum was paid to the City in Kansas City, Missouri, on the morning of March 26, 1945. This was sufficient, with adjustments, to enable the City to close the deal with Federal, which was paid the adjusted balance of the contract price and the 50,000 shares of common stock were delivered to the City. The $550,000.00 excess of authorized revenue bonds were never issued and were cancelled.

Thereupon and during the forenoon of March 26, 1945, at Kansas City, Missouri, at a meeting of the directors of Gas & Electric, the old board of Directors and Officers of Gas & Electric resigned and a new board of Board of Directors and new officers were chosen, which included the Mayor, the four Commissioners, the City Clerk, and City Attorney of the city.

Then and there the Directors authorized the retirement, at the fixed retirement price of 102%, all the outstanding bonds of Gas & Electric secured by First Mortgage aggregating $4,014,000.00 principal and also the retirement of all the outstanding preferred stock, (consisting of 11,286 shares, par $100.00 per share or $1,128,600.00) at the liquidating price of $100.00 per share, both by deposits with the respective authorized trustees appointed in the instruments of their authorization. At the same time, in recognition of the fact that the *call* price for the retirement of this preferred stock was fixed at $115.00 per share, an escrow deposit was made, with the consent of Federal, with the First National Bank of Kansas City, Missouri, for the difference between the liquidating price of $100.00 and the call price of $115.00 per share, or $169,290.00, in order to protect the rival claimants (Federal and the preferred stockholders) while the issues between them respecting the retirement price of the preferred stock could be litigated. All these deposits were then made and the first mortgage securing such 5% bonds has been released of record. The adjusted balance of $1,156,705.13 remained due, and was paid to Federal for these 50,000 shares so delivered to the City.

The new Directors then and there took steps to dissolve the Gas & Electric Corporation, (the City as the sole stockholder assenting thereto) and also ordered the execution of a deed of conveyance by Gas & Electric to the City of all its property and assets of every kind.

Promptly (on March 26, 1945) the Springfield Gas and Electric Company, by Albert Ayre, its President duly authorized, executed a deed of conveyance, conveying all the Gas & Electric's property of every kind and character to the City. The deed was filed on March 28, 1945, in the Recorder's office of Greene County, Missouri. On March 26, 1945, Albert Ayre as President and F. E. Rosback as Secretary of Gas & Electric executed purported Articles of Dissolution which were on March 26, 1945, sent to the Secretary of State of the State of Missouri and were filed on March 30, 1945, in the Recorder's Office of Greene County, Missouri.

All the conduct of the City's officers as above delineated are fortified by ordinances and minutes of the City Council meetings shown in evidence, and the transactions of both the old and the new Board of Directors of Gas & Electric, as we have set them forth, are based upon the minutes of such meetings, which were introduced in evidence, and all seem to be impervious to any objection or criticism as to form. At least none has been suggested. None is anticipated since protestants alleged that all this was done, and without any Order of this Commission. Hence we have omitted a lot of unnecessary detail from a mass of documentary evidence introduced.

The operating revenue received by Gas & Electric in 1944, from sales (both within and without the City) of electricity, was $1,248,051.85, and from gas was $744,702.07. All sales of heat for the same period (all within the City) was $20,935.26 and all sums received for the same period for transportation was $509,919.39, some unknown amount of which arose from fares collected outside the City for inbound passengers on the one extended line out of many which runs less than a mile beyond the City limits. The aggregate of this revenue was $2,523,608.57. This included $26,733.25 paid by the City for electricity and $623.54 for gas. Had the City been operating all these facilities during the year 1944 and had not paid itself the two amounts last mentioned, the City's operating revenue would have been $2,496.251.78, assuming the sales would be the same.

During the same period (the year 1944) Gas & Electric's total operating revenue deductions were $2,072,050.41. On the other hand the City's operating deductions for 1944 would have been $1,721,471.64. This is due to the fact that the costs of the City's operations would have been decreased by $414,578.77, which Gas & Electric paid out, consisting mostly of taxes which could not have been imposed upon a municipality but increased by $6,000.00 en-

gineering fees and $58,000.00 increase in the annual depreciation over the amount which Gas & Electric sets apart for depreciation annually.

Therefore, for 1944, Gas & Electric after deducting from $2,523,608.58 (gross revenue) all the operating costs, or $2,072,050.41, had $451,558.16 earnings for interest on indebtedness, dividends and surplus. For the same period the adjusted gross revenue for all sales, if the City had operated it, of $2,496,251.76, less all operating costs, or $1,721,471.64, would have left the City $774,780.14 earnings, out of which interest and a sinking fund to meet the maturities of the revenue bonds should be provided.

The annual interest of Gas & Electric on its $4,014,000 5% bonds is $200,700.00 while the interest on revenue bonds issued by the City, $6,200,000.00 principal at 2%, 2¼%, and 2½%, is estimated at $140,000 annually.

The foregoing comparisons indicate that the City would have more funds with which to pay a less amount of interest and to provide for the retirement of the bonds than Gas & Electric operations which merely met its interest—with outstanding bonds and preferred stock remaining static as to principal.

Public witnesses testified that, upon the expectation of lower rates to result from such savings, consumer sentiment favors this application, but with some sentiment to the contrary. These witnesses practically all admitted on cross-examination that some consumers were fearful that "politics" would enter into the election of the Mayor and City Council and influence the future operations, and that they had heard others express the same concern. The two witnesses called by the preferred stockholders testified to the same effect.

The properties outside of the City consists of electric and gas transmission lines and incident equipment for service and are in place and in use. Such comprises 5¼% of the value of the whole property involved. There are 315 "pole miles" or more than one half the "pole miles" of the electric system. Some of these lines run as far as eight miles beyond the city limits. However, on account of the fact that the pole lines within the City carry from 10 to 25 wires while the pole lines beyond the City are single phase carrying only two wires, the "wire miles" of the property are only 15% of the wire miles of the whole electric system. Electricity sales for commercial consumers outside the City is 1.10% of all commercial sales within and without the City.

Electricity sales to industrial consumers outside the City is 34.2% of all sales to industrial consumers within and without the City. There are 2881 domestic consumers, 365 commercial consumers, and four industrial consumers outside the City.

There are 5.95 miles of gas mains outside the City which is 1.3% of the total value of all the gas properties within and without the City. There are 260 domestic and nine commercial, and no industrial consumers, of gas outside the city limits. The sales of gas to domestic consumers outside the City are 2.6% and to commercial consumers outside are 18.8% of all sales of gas within and without the City.

The transportation lines are 37 to 38 miles within the City and one line goes about one mile beyond the limits. We have no evidence of the income for this transportation outside the City. All the heating service is within the City.

OPINION

[2] There is no statute which required any order or permission from this Commission before the City could acquire the common stock of Gas & Electric. But before there can be any transfer of these facilities of the Gas & Electric corporation by any means, it is necessary that there be obtained an Order from this Commission approving the transfer, Sec. 5651, R.S. Mo. 1939, and nothing was held in the *Monday Case* to the contrary. All contentions to the contrary are overruled.

A transfer of facilities of this character should be permitted if the transfer is in the public interest or if it is not detrimental to the public interest.

[3] At the outset it is well to point out that all this common stock of Gas & Electric has been lawfully acquired by the City, and it has the certificates thereof. Revenue bonds, the principal and interest of which can be retired only from the profitable operation of the plant, and not from taxation, have been lawfully issued and, upon the assurances of the *Monday case,* have been sold to investors at a high premium. From the proceeds of the bonds, the mortgage lien on the Gas & Electric properties has been paid off and discharged and the lien released of record. Also from such proceeds, the retirement of the preferred stock has been fully provided for and Federal has been paid its price for all the common stock of Gas & Electric which has been delivered to the City. We are not given any jurisdiction by which we could, by any possible

order or orders, unscramble these transactions and restore the *status quo ante.*

No disposition which it is possible for us to make of these two cases can remove the City from this picture. If in Case No. 10,614 we approve the application, the City will directly own the properties. If we refuse to approve the application or should, in Case No. 10,628, order the Springfield Gas and Electric Company to cease in its efforts to dissolve and order it to take over and to operate the properties, the City would still remain the sole owner of the incorporated Gas & Electric Company which owns the property. And if the City undertook to operate the corporation, although its owner, it would be conducting an *ultra vires* operation. *Monday Case, supra.* If this application is approved, the protestants insist that the City's operation as proposed beyond the City limits will be illegal and likewise an *ultra vires* operation.

[4] As a reason for us not to approve the application in Case No. 10,614, the protestants assert the *premise,* and contend, that the City cannot lawfully acquire, and certainly cannot lawfully operate, utility facilities lying outside of the city limits for the purpose of serving consumers at any points beyond the city limits. Upon that *premise* it is argued that it is not in the public interest, and is detrimental thereto, to approve the proposed transfer. But, after a review of the cases and the statute presently to be reviewed, we do not regard the *premise* as being so definitely and positively established that we should rely upon it as a basis for refusing to approve the transfer.

It is true that the case of *Taylor vs. Dimmitt,* 335 Mo. 330, 78 SW (2d) 841 (decided in 1934), holds that cities, in rendering electric service outside of their corporate boundaries perform no municipal function and that authority therefor should clearly appear, for the reason that a municipality would have no implied power to render such service; that Missouri cities have and can exercise only such powers as are conferred by express or implied provisions of law and that the city, as to implied powers, has only those necessarily or fairly implied in, or incident to the powers expressly granted. Such principles have been the *law* of Missouri for a long time. In applying the principles thus enunciated, the Court held, in that case, (a taxpayers' suit), that the fourth class city there involved did not have the lawful authority to erect a transmission line beyond its borders to serve consumers thereat because no such authority had been expressly or impliedly granted to cities of that class. The *result* in that case, however, is not necessarily the

result to be reached herein. In this case, we are dealing with a city of the second class to which Subsection 37 of Section 6609, R.S. Mo. 1939 is applicable. If it gives the power to cities of the second class to acquire, and to operate, facilities beyond the city limits to serve consumers at points outside of the city, then this application could not be denied upon the ground suggested.

Said subsection 37 of Sec. 6609, reads as follows:

> "To acquire by condemnation, purchase, gift, lease or otherwise, property real and personal within such city or *beyond the limits thereof*, and to establish, construct, maintain, add to, equip, improve, own, control, regulate and *operate* * * * gas plants * * * electric light systems, electric or other heat systems, electric or other power systems * * * and all other public works, equipment and institutions and *all public utilities not herein enumerated* and everything required therefor; * * * to *sell gas, electric current and all products of any public utility operated by the city* * * *" (Italics ours)

The *Monday case, supra,* (decided in 1945) involved the legality of revenue bonds issued by this city the proceeds from the sale of which were to be used to purchase (through the means aforesaid), all the facilities of Gas & Electric, which included these gas and electric transmission lines in place outside of the city limits and used to serve consumers outside of the City. The contention was made in the briefs in the *Monday case* that the bonds should not be approved because the City could not lawfully operate the facilities beyond the City limits to serve consumers beyond the borders of the City. The Supreme Court gave this unequivocal answer:

> "Their objection that parts of the distribution lines go beyond the City limits is answered by the express authorization to go beyond the limits in Subsection 37, Section 6609".

We are bound by this interpretation of Subsection 37 by our Supreme Court, and need not discuss the point made in applicant's reply brief (filed July 10, 1945) that the authorization can also be implied from the express provisions of the Subsection, for the result would be the same. Neither should we extend this Opinion to discuss the argument, which has been advanced, that this ruling was a mere *obiter dictum* nor speculate on the possibility that at some future time it might be modified or overruled so that the City cannot legally operate these properties outside of its borders to serve consumers thereat.

Suffice it to say that, if such should occur while the City is so operating outside its borders, such operation would be an *ultra*

vires act only as to such outside properties, which constitute only 5¼% to 6½% (in value) of the entire properties, and the operation of the remainder of the property within the City would not thereby be so tainted, which is unlike the situation whereïn the *ultra vires* taint would permeate the whole operation if, as pointed out, the City should operate the corporation. In the event these operations outside the City should subsequently be held to be *ultra vires,* it would not mean that these outside consumers could never have service, for many methods of providing service to them would be available, including service by a qualified operator to whom the City might sell these outside facilities.

[5] There is no evidence tending to show that the operations within the City would be, or ever have been, adversely affected on account of the services rendered to those outside the City. Nor are there any contentions, other than these discussed, that the proposed transfer insofar as it applies to operations within the City is detrimental to the public interest, except the suggestion that the operations might "get into politics." However, this Commission should not deny this application on the theory that the people of this City are incapable of self government.

Our approval of this application will invest the City with the direct ownership of the facilities and the cost of operating the same should be greatly reduced by tax and other savings. This should enhance the profits and either accelerate the payment and retirement of the revenue bonds or reduce the rates to consumers or both. If the application is not approved or if we require the incorporated Gas & Electric Company to resume operations, both the benefits mentioned will be greatly restricted if not entirely eliminated, and, in effect, we would be driving the city into the *ultra vires* act of operating a corporation. Since this city, under the decision of the *Monday case* is the lawful owner of capital stock of the corporation which owns the property (and thereby is indirectly the owner of the property), it seems clear to us that, if there were no other reasons, it is in the public interest that the City should be permitted to shed the corporate shell of Gas & Electric so as to be able, by its direct ownership and operation, to make the suggested operational savings for the benefit of the consumers. If, however, the operation of these facilities must continue, as we believe unnecessarily, by the corporation and at added expense it would to an extent reduce the value of the facilities to the City which has paid all or more than their value, and impair the value, as well as the means and the speed of the payment and retirement,

of the revenue bonds which were sold to investors only after the *Monday case* had become a finality as to the legality thereof. The profits of the operation are the only source from which the investors may expect the payment of principal and interest on the bonds.

Under all the testimony, it is the opinion of this Commission that it is in the public interest, and not detrimental thereto, that the transfer of the facilities should be authorized.

[6] Again the operation of these properties outside the City are incidental to the operations of the properties within the City. All properties, within and without the City, are operated as a unit and the electricity and gas which it is necessary to purchase can be obtained at a lower rate on account of the quantity used, which should benefit all consumers within and without the City. The operations will be for supplying service for the City's own needs and that of its inhabitants and incidentally to sell this service outside the City without impairing the use inside. The case of *Speas vs. Kansas City,* 329 Mo. 184, 44 S.W. (2d) 108, holds this to be lawful.

The "Show Cause Order" in Case No. 10,628 was issued to bring back into the case the Springfield Gas & Electric Company which had previously disclaimed interest, and also to give those who participated in this premature action in making the transfer an opportunity to explain the reason therefor. The main defense in the Show Cause Order was furnished by Special Counsel for the City who directed the course. We are impressed from his sworn testimony that he sincerely believed that while an Order of this Commission was desirable, it was not necessary in advance of the execution of the deed. We are also convinced that he sincerely believed the *Monday case* involving these same facilities was full protection for the City to proceed.

[7] Before closing this Opinion, it is well that we make a clarifying statement on one of the points involved and leave a suggestion thereon. Respecting the legal right of the City to operate these facilities beyond its borders to serve consumers thereat, it should be noticed that we have only held that our *Supreme Court* (in the *Monday case*) *has ruled* that the City can so operate these facilities, and that we are bound to follow that case.

But if the City could, without sacrificing value, sell these outside facilities to a qualified purchaser, to whom we could issue a certificate of convenience and necessity, this troublesome question and possibly others would be eliminated and the expense of possible future litigation saved.

[8] We are of the opinion that for the reasons stated the Show Cause Order in Case No. 10,628 should be dismissed and that the application in Case No. 10,614 should be sustained.

Entertaining these views, it is, therefore,

Ordered: 1. That Case No. 10,628 be and the same is hereby dismissed.

Ordered: 2. That in Case No. 10,614 permission, consent, and authority be and it is hereby granted allowing the Springfield Gas and Electric Company to be dissolved and liquidated and its assets and properties to be conveyed, distributed and transferred to the City of Springfield, Missouri, from and after which the Springfield Gas and Electric Company shall cease to operate as a public utility and its Certificate of Convenience and Necessity granted by this Commission shall thereupon cease and come to an end.

Ordered: 3. That this order shall be in effect fifteen days from the date hereof, and that the Secretary of the Commission shall forthwith serve certified copies of same upon all interested parties.

OSBURN, Chr., HENSON and MCCLINTOCK, CC., concur.
WILLIAMS, C. concurs in the result.
WILSON, C. dissents in a separate opinion.

DISSENTING OPINION

I cannot agree with the majority Report and Order in this case because the proposed transfer would be unlawful and contrary to certain provisions of both the old and new constitutions of Missouri and would be detrimental to the public interest and contrary to the public welfare.

This case, in my opinion, is one of great importance, involving the utility properties in the fourth largest city in the State and the electric, gas and transportation services to the City of Springfield's more than sixty-thousand inhabitants and electric service to others within an area of eight miles beyond the city limits in all directions. This case, indeed, is of importance to the whole utility industry and to the public generally, for if the conclusions reached in the majority Report and Order were the law and were to be followed, then there would be no limit to the field in which municipal utilities could engage in business, and public utility corporations, the product of free enterprise might as well retire from business within the State of Missouri. With the exception of public transportation, there would soon be little left of the utility industry to regulate and little need for a Public Service Commission.

Pursuant to the first hearing in this case the Commission on March 19, 1945 issued its Report and Order granting the applica-

tion and also requiring that the preferred stock of Springfield Gas and Electric Company upon dissolution of that corporation be redeemed at the call price of $115 per share. This Report and Order was by its terms made effective on March 24, 1945. This Report and Order was concurred in by a majority of the Commission to which I dissented.

On March 23, 1945 motions for rehearing were filed by the preferred stockholders and by the city of Springfield. On the same day, after the filing of the said motions for rehearing, the Commission issued its order extending the effective date of the Report and Order dated March 19, 1945 to March 29, 1945. On March 26, 1945 the preferred stockholders filed an amended motion for rehearing. Also on said March 26, 1945 the Commission issued its order sustaining the motions for rehearing, set aside the Report and Order approving the application and set the cause for rehearing on Monday, April 9, 1945 at 10:00 a. m.

During the afternoon of March 26, 1945 Mr. Robert B. Fizzell, special counsel for the City of Springfield, called the Chairman of the Commission by telephone from Kansas City and told him that the city had just completed its deal with the Federal Light & Traction Company under its contract for the purchase of the common stock of the Springfield Gas and Electric Company and that the Springfield Gas and Electric Company had transferred all of its properties to the city of Springfield. This transaction was had and completed on the same day that the Commission granted the aforesaid rehearing. The transfer of the properties of Springfield Gas and Electric Company to the city was made without any order of this Commission authorizing the transfer. It was this action on the part of the city officials of Springfield and the officers and directors of Springfield Gas and Electric Company that prompted the Commission's order in Case No. 10,628 requiring the Springfield Gas and Electric Company to appear before the Commission on Monday, April 9, 1945 and show cause why it had disposed of its works or system necessary or useful in the performance of its duties to the public without having first secured from the Public Service Commission an order authorizing it so to do.

It now appears in the record without dispute that on March 23 and 24, 1945 the city of Springfield received bids for an issue of utility revenue bonds, the proceeds from which were to be used to purchase the common stock of Springfield Gas and Electric Company under the terms of its contract with the Federal Light & Traction Company. After receiving the bids, $6,200,000 of the

bonds were sold to one Carlton D. Beh Company. Following the receipt of bids for these bonds, the city officials, together with their attorney Mr. Fizzell, went to Kansas City, Missouri where they proceeded to close the transaction for the purchase of the common stock of Springfield Gas and Electric Company. Upon completion of this transaction they proceeded to elect the mayor, members of the city council, the city clerk and the city attorney as purported directors and officers of the Springfield Gas and Electric Company to replace the former directors and officers of the Company who resigned. The new directors and officers of the corporation, then being also the principal officials of the city of Springfield, authorized the transfer of all the physical properties of Springfield Gas and Electric Company to the city of Springfield and also executed a warranty deed dated March 26, 1945, purporting to convey to the city of Springfield for a named consideration of $1.00 and other valuable considerations all of the properties of Springfield Gas and Electric Company. This deed was signed and acknowledged by Albert Ayre as the purported president of the company and attested by F. E. Rosback as purported secretary, the acknowledgment being taken by a notary public in Springfield, Missouri. At the time Albert Ayre was also commissioner of public property and public utilities for the city and F. E. Rosback was city clerk. This purported deed was recorded in the office of the recorder of deeds for Greene County, Missouri on March 28, 1945. Also on March 26, 1945 the aforesaid Albert Ayre as purported president and F. E. Rosback as purported secretary of the Company executed purported articles of dissolution of the corporation, which said articles of dissolution were sent to the Secretary of State at Jefferson City, Missouri on March 26, 1945 and filed in the Office of the recorder of deeds of Greene County, Missouri on March 30, 1945.

Under Section 5651 R.S. Mo. 1939, this purported transfer is void. The language of that statute is as follows:

> "No gas corporation, electrical corporation or water corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void . . ."

It is plain that the deed from the Springfield Gas and Electric Company to the city of Springfield purporting to convey all of the Company's properties to the city is a nullity. It is undisputed that there was no effective order of this Commission authorizing the transfer at the time the purported transactions were had on March 26, 1945.

Since the purported transfer included all of the Company's properties, it cannot be said that this was a disposition of properties not necessary or useful in the performance of the Company's duties to the public under that part of Section 5651 where no order of the Commission is required, nor can it be said that this was a good faith purchase on the part of the city with a belief that Springfield Gas and Electric Company was authorized to make the transfer so as to bring the transaction within the holding in *Dearborn Electric Light & Power Company vs. Jones,* 7 Fed. 2d 806. I say this because the city's application for an order authorizing that to be done which was done was still pending on March 26, 1945, that being the day when the rehearing was granted upon the city's application for rehearing. The Commission's order theretofore issued had not yet by its terms become effective and was set aside when the rehearing was granted. All of these facts were well known to the city's officials on March 26, 1945, so that good faith and lack of knowledge do not exist as an excuse.

The opinion of the Supreme Court of Missouri in the case *City of Springfield vs. Monday,* 185 S.W. 2d 788, which is relied upon by counsel for the city of Springfield and the Springfield Gas and Electric Company herein, contains nothing which purports to set aside or construe Section 5651, R.S. Mo. 1939, nor can I find any statement in that opinion which purports to hold that said Section 5651 has no application to the facts in this case. I can find nothing in that opinion, nor in said Section 5651, which makes any exception of a sale and transfer of a utility corporation's properties to a city even though the city may own the corporation's common stock. I find no other decision of our appellate courts which supports the opinion of counsel in this respect.

Mr. Fizzell in his brief filed with the Commission contends that because the city of Springfield owned all of the common stock of Springfield Gas and Electric Company, the sale and transfer of the properties of the Company to the city was not such a sale and transfer as comes within the provisions of Section 5651. In support of this argument he cites two cases, to-wit, *People ex rel. Third Avenue Railway Company vs. Public Service Commission,* 203 N.Y.

299, 96 N.E. 1011, and *Philadelphia Trust Company vs. Northumberland County Traction Company*, 258 Pa. 152, 101 Atl. 970. Both of these cases involve a foreclosure of a mortgage upon utility properties, which mortgage was given prior to the enactment of the Public Service Commission laws. As a necessity to the completion of the foreclosures, the properties covered by the mortgages were transferred pursuant to the mortgage sale and each court held that such a transfer need not be approved by the Public Service Commission. Both cases turned on the point that the mortgages were a valid contract when made and that the subsequent enactment of the Public Service Commission laws could not change the terms of that contract and could not prevent the enforcement of the contract.

I fail to see where these cases have any bearing whatever upon the applicability of Section 5651 to the sale and transfer of the properties of Springfield Gas and Electric Company to the city of Springfield. I might add at this point that if the argument that the transfer of the properties from the Company to the city was in effect a municipal transaction solely within the jurisdiction of the city council of Springfield and therefore Section 5651 had no application is a sound proposition of law, then there was no need to seek the approval of such transfer by this Commission and any order of the Commission approving same would be superfluous. I am unable to understand the logic of counsel when he argues in one breath for an order of the Commission approving the transfer as provided in Section 5651 and in the next breath argues that the transfer was of such nature that the Commission has no jurisdiction because Section 5651 has no application thereto.

In the case of *Cooper County Bank vs. Bank of Bunceton*, 221 Mo. App. 814, 288 S.W. 95, a decision by the Kansas City Court of Appeals wherein a mortgage had been given upon the utility properties of the Bunceton Ice, Light & Fuel Company without first obtaining an order of the Public Service Commission approving the encumbrance, the Court held the mortgage was void under the provisions of Section 10,483, R.S. Mo. 1919, which is now the aforesaid Section 5651 of the 1939 Revision without any interim amendments. It was urged as a point in that case that an order of the Public Service Commission could be obtained after the mortgage had been given which would validate the mortgage. As to this point the Court of Appeals said at l. c. 99:

> "It was also urged as a defense that plaintiff, as the owner of the deed of trust in controversy, failed to procure its validation by the Public Service Commission. We find no law, nor are we cited to any, whereby the Public Service Commission is given power to validate a deed of trust

which is void under the statute. The statute declares than an incumbrance made other than in accordance with the statute is void, and, being void, the commission is not authorized to make it valid. In Van Shaack v. Robbins, 36 Iowa, 201, the court said:

> 'Where the word (void) is used to secure a right to or confer a benefit on the public, it will, as a rule, be held to mean null and incapable of confirmation. But, if used respecting the rights of individuals capable of protecting themselves, it will often be held to mean voidable only.'

"See, also, 40 Cyc. 214."

That case has been cited with approval by the Supreme Court in *Webster et al vs. Joplin Waterworks Company,* 352 Mo. 327, 177 S.W. (2d) 447, wherein Division No. 2 of the Supreme Court held void an attempted transfer by an individual owner of a waterworks system to a corporation without an order of the Public Service Commission authorizing such transfer. The corporation in that case was caused to be formed by the individual who owned the waterworks system and he was the principal stockholder, president and general manager of the corporation, a situation quite analagous to that of the city as an owner of the common stock of Springfield Gas and Electric Company. That decision turns solely on the provisions of the aforesaid Section 5651, R.S. Mo. 1939.

I can reach no other conclusion but that the purported transfer under the laws of Missouri is void. A rehearing having been granted by the Commission, the parties and the utility properties herein involved are in the same situation as though no hearing had previously been held and no attempted transfer had been made. The case is, therefore, before the Commission upon the question as to whether the proposed transfer would be in the public interest. In my dissenting opinion of March 19, 1945, I have expressed my views rather fully upon this issue and I now reaffirm and adopt my reasons substantially as therein set out.

Although the Supreme Court of Missouri has recently held that the city of Springfield may issue public utility revenue bonds for the purchase of the common stock of the Springfield Gas and Electric Company from the Federal Light & Traction Company, (*City of Springfield, Missouri, Petitioner, Appellant, vs. Harry Monday, et al., Respondents,* 185 S.W. (2d) 788, the Court did not hold that the city can operate as a public utility outside the city limits, and that conclusion does not follow as of course. Under the most recent decision of the Supreme Court of Missouri upon this subject, *Taylor vs. Dimmitt,* 336 Mo. 330, 78 S.W. (2d) 841, decided in 1934, which case has never been criticized or overruled, I am

of the opinion that the city of Springfield cannot lawfully serve the electric and gas customers located outside the corporate boundaries, and for that reason the proposed transfer would be detrimental to the public interest. The case of *Taylor vs. Dimmitt* involved a question of whether or not the city of Shelbina, Missouri, a city of the fourth class which owns and operates a municipal electric plant and having a surplus of electric energy from its municipal plant, could construct, maintain and operate an electric transmission line for the purpose of furnishing service to consumers residing in Lakenan, an unincorporated village located approximately five miles from the city limits of Shelbina, and also to furnish service to consumers along such proposed electric transmission line. The Court held that a municipality in rendering electric service to consumers outside the corporate boundaries performs no municipal function, but enters a field of private business, and authority for such action must clearly appear; that a municipality has no implied power to engage in private business, and that the city of Shelbina was without statutory authority to construct, maintain and operate a transmission line for the purpose of furnishing service to consumers outside its corporate boundaries. In that case the Court said, l. c. 843,:

> " . . . cities in owning, operating, and maintaining electric utilities act in their proprietary, or business, as distinguished from governmental capacity. In rendering electric service to consumers outside their corporate boundaries, they perform no municipal function, but depart from the primary objects for which they have existence, and enter a field of private business. Authority for such, we think, should clearly appear."

also:

> "Even as to governmental functions, Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law;"

also:

> " 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' St. Louis v. Kaime, 180 Mo. loc. cit. 322, 79 S.W. 140, 143 (quoting Dillon, Municipal Corp. vol. 1 (4th Ed.) p. 145:)"

The city of Springfield, Missouri is a city of the second class and the applicable statutes are as follows:

"Sec. 6605 R.S. Mo. 1939,:

". . . Any city of the second class in this state may purchase, receive and hold property, both real and personal, within and without such city, *for any public use or purpose* . . . "

"Sec. 6609 R.S. Mo. 1939,:

"XV. To procure by purchase, condemnation, gift or otherwise, within the city or beyond the limits thereof, property for use of the city *in and for the performance of its functions*, and to manage and regulate the use thereof; . . .

"XXXVI. To acquire by condemnation, purchase, gift, lease or otherwise, property, real and personal, within such city and beyond the limits thereof . . . for the erection, construction, maintenance and operation of gas plants and systems, heat plants and systems, electric light plants and systems . . . electric or other power plants and systems, to be used *in supplying the city and its inhabitants with light, heat and power; and for any other public use or purpose*, . . .

"XXXVII. To acquire by condemnation, purchase, gift, lease or otherwise, property real and personal within such city or beyond the limits thereof, and to establish, construct, maintain, add to, equip, improve, own, control, regulate, and operate . . . electric light systems, electric or other heat systems, electric or other power systems, electric or other railways, . . . and transportation systems of any kind, . . . and all public utilities not herein enumerated and everything required therefor; . . . to sell . . . gas, electric current, and all products of any public utility operated by the city . . . " (Italics added)

In the case of *State vs. Orear*, 277 Mo. 303, 210 S.W. 392, the city comptroller of Kansas City contended that the purpose for which the proceeds of the ice plant bonds were to be used was not a public purpose, and, therefore, there was lacking both legislative and constitutional authority to use therefor public moneys raised by public taxation. The Court in that case said, l.c. 395,:

"That there must be authority in the charter of Kansas City, either express or clearly implied, permitting that municipality to engage in making and selling ice, before it can legally do so is settled by the repeated adjudications in this state." (citing cases)

I am unable to find any charter or statutory provision, express or implied, which authorizes the city of Springfield to engage in the private business of conducting a public utility.

In the majority Report and Order an attempt is made to distinguish the case of *Taylor vs. Dimmitt*, supra, from the present

case on the ground that the city of Springfield is a city of the second class while the city of Shelbina is a city of the fourth class. Section 7642 R.S. Mo 1929, which is the same as Section 7787 R.S. Mo. 1939, was cited by the Supreme Court of Missouri in *Taylor vs. Dimmitt.* This statute is applicable to any city in the State which owns and operates any electric light or power plant including cities of the second class, such as Springfield, cities of the fourth class such as Shelbina and cities under special charters such as Kansas City. That section provides as follows:

> "Sec. 7787. Cities empowered to sell light and power.—Any city in this state, which owns and operates any electric light or power plant, may, and is hereby authorized and empowered to supply electric current from its light or power plant to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor for such time and upon such terms and under such rules and regulations as may be agreed upon by the contracting parties. (R.S. 1929, sec. 7642.)"

The Supreme Court in *Taylor vs. Dimmitt,* 78 S.W. (2d) 841, l.c. 842, 844 and 845, discusses this statute as well as Sections 7643 and 7644 R.S. Mo 1929 (Sections 7788 and 7789 R.S. Mo. 1939) as follows:

> "The authority of Missouri cities to engage in the electric utility business was thus limited until 1911. In 1911, now sections 7642, 7643, and 7644, R.S. 1929, were enacted (Laws 1911, p. 351), constituting the whole of an act of the Legislature, under the title: 'An Act to amend article twenty-three, chapter eighty-four, Revised Statutes of Missouri, 1909, entitled 'Water-works, light and power plants,' by adding thereto three new sections to be known as sections 9904a, 9904b, 9904c, authorizing cities owning light plants to supply other cities, persons and corporations with electric current; authorizing cities to procure electric current from other such cities; and authorizing cities to construct lines for conveying said current outside the limits of said cities.'" (l.c. 842)
>
> "By section 7643 the Legislature authorized certain cities in this state to procure electric current from cities owning and operating an electric light and power plant. Having conferred the necessary authority upon the cities within the act to 'supply,' on the one hand, and 'procure,' on the other, electric current, the Legislature then proceeded to provide the means whereby the current was to be transmitted. The act presents a completed plan for accomplishing its purpose and should be read as a whole. It expressly authorized (section 7644 (Mo. St. Ann. sec. 7644, p. 6031)) the city procuring the electric current to conduct said current 'from the city' supplying the same, and 'for that purpose to erect' the necessary appliances and fixtures 'along, across or under any of the public roads, streets and waters * * *,' as well as all other apparatus and devices 'necessary for and in conducting said current from the city agreeing to supply the same into its own limits in, upon, over and through

any territory of this state outside, as well as within, the limits of said city. * * *' No such authority is conferred upon the city supplying the electric current. The fact that the title of the act of 1911 provides: '* * * and authorizing cities to construct lines for conveying said current outside the limits of said cities,' when considered with the provisions of the act conferring such authority only upon the cities procuring electric current, precludes the implication that such lines are to be constructed by the supplying city. The title is broad enough to permit the vesting of such power in the city supplying the electric current, and the failure of the act to bestow the same leads to the conclusion the Legislature intended no such power to vest in the city supplying the current. The apparent logical conclusion to be drawn from the legislation is that the Legislature knowingly and purposely withheld (see Pub. Serv. Comm. v. Kirkwood, 319 Mo. loc. Cit. 568, 4 S.W. (2d) loc. cit. 775) from the city owning the plant the authority to construct, maintain, and operate an electric transmission line outside its corporate limits for the purposes within the act. Thus interpreted the legislation is in harmony with the dominant and primary purpose of municipal government. Absent, as here, any authority to extend its distribution system, it will not do to say that the supplying city may construct transmission lines to supply 'persons and private corporations,' while such authority is withheld from it in supplying municipal corporations." (l.c. 844 and 845.)

It was contended in the majority opinion that Subsection XXXVII of Section 6609 R.S. Mo. 1939 authorized the city to conduct a public utility business outside the city limits. Referring to Subsection XXXVII the majority opinion states, "If it gives the power to cities of the second class to acquire, and to operate, facilities beyond the city limits to serve consumers at points outside of the city, then this application could not be denied upon the ground suggested," citing Subsection XXXVII, Section 6609 R.S. Mo. 1939. The fallacy in this reasoning is that this section only gives the city power to purchase and acquire property beyond the city limits, and does not give the city power to operate and conduct a public utility business outside the city limits. Under said section when read together with other applicable statutes and *Taylor vs. Dimmitt*, supra, electric current can be sold by the city only at the city limits.

"Provided always that the interpretation is reasonable and not in conflict with the legislative intent," says Corpus Juris, 59 C.J. 995-998, "it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible." Under this rule it is important

to consider some of the other subsections of Section 6609. Subsection XV of said section reads as follows:

> "XV. To procure by purchase, condemnation, gift or otherwise, within the city or beyond the limits thereof, property *for use of the city, in and for the performance of its functions*, and to manage and regulate the use thereof; and to sell, lease or otherwise dispose of the same."

This subsection limits the purchase of property to that to be used by the city only in the performance of its functions, and since the conducting of a public utility business outside the city limits is not a municipal function but a private business it follows that the interpretation put upon Subsection XXXVII by the majority report and order is inconsistent with the provisions of said Subsection XV. It is also to be noted that Subsection XXXVI limits the use of property outside the city limits to supplying *the city and its inhabitants* with light heat and power, and "for any other *public* use or purpose . . ."

Other subsections of the aforesaid Section 6609 can well be noted at this juncture. Subsection XXXV reads as follows:

> "To provide the *city and its inhabitants* with water; to prevent the water supply of the city from becoming polluted or contaminated, and for this purpose such *city shall have jurisdiction as far beyond the limits as is necessary*."

Subsection XLI reads as follows:

> "To provide for the inspection of milch cattle and dairies, whether kept within the city or without the city limits *from which milk or milk products are sold within the city*, and to provide for the inspection and regulation of bakeries, confectioneries and places of refreshment."

Subsection XLIV reads as follows:

> "To create a board of public health and sanitation, and to make regulations, by ordinance, to preserve and promote the general health of the citizens; said board shall cause to be enforced *within the city, and within four miles thereof*, all laws, regulations and ordinances designed to preserve, promote and protect the general health of the inhabitants of the city, and the spread within the city of contagious, infectious and other diseases and, in case of emergency menacing the public health, to make and cause to be enforced *within the city and within four miles thereof* all rules and regulations they deem necessary to meet such emergencies and to perform such other duties as may be prescribed by ordinance."

Subsection LIX reads as follows:

> "To regulate, restrain and prevent the discharge of firearms, fireworks, rockets or other combustible materials in the city, and to regulate the keeping, storage and use of powder, dynamite, guns, guncotton, nitroglycerine, fireworks and other explosive materials and substances *in the city, or within two miles of the limits thereof*." (Italics added)

Each of the aforesaid subsections contains specific language authorizing the city to go beyond its corporate limits for specified purposes and the power of the city as given by said subsections to go beyond the limits is limited and confined by specific language. If the legislature was so careful in drafting this act to use specific language in authorizing the city to go beyond its limits for certain municipal purposes, it is a logical presumption that if the legislature intended by Subsection XXXVII to authorize the city to engage in the business of a public utility outside its corporate area, it would have said so in specific langauge that would need nothing read into it by interpretation and it would have specified how far beyond its limits the city could go in conducting such a business just as was done in the aforementioned other subsections of Section 6609.

In order to hold that Subsection XXXVII authorized the city to operate a public utility business outside the city limits, something must be read into that subsection which is not to be found in the language thereof.

Evidently the framers of the ordinance of the city of Springfield which authorized the issue of bonds for the purpose of purchasing the common stock of Springfield Gas and Electric Company and thereby acquiring its physical properties recognized that the city of Springfield was not authorized to conduct a public utility business to serve customers outside its city limits, because the language of the ordinance wherein it states the purpose of the ordinance and the bonds to be issued thereunder reads as follows:

> ". . . it being the purpose of the city of Springfield, Missouri, to provide funds as soon as possible for the purpose of paying the cost of purchasing and acquiring the electric, gas and bus transportation systems *serving the city of Springfield, Missouri, and its inhabitants*, and to do so in compliance in all respects with the Constitution and the laws of the State of Missouri, . . ." (Italics added)

It is my view that the foregoing language of the ordinance limits the city to the purchase of only those utility properties which serve the city and its inhabitants and Subsection XXXVII cannot now be misconstrued into enlarging the scope and purpose of the ordinance beyond its language—regardless of any language in the Monday case.

Additional facts were presented upon the rehearing of this case on April 9, 1945 with reference to the distribution lines located outside the city limits. The evidence presented at the hearing on March 7, 1945 did not show the number of consumers outside

the city limits or the income derived therefrom. However, the evidence presented upon the rehearing shows that during the year 1941 315 miles of electric distribution lines of Springfield Gas and Electric Company were located outside the city limits of Springfield representing approximately fifty-seven per cent of the total of distribution lines of the entire property. On this 315 miles of distribution lines outside the city limits are connected 815 distribution transformers representing approximately forty-eight per cent of the total number of distribution transformers on the entire property. Mr. E. S. Williver, vice-president and general manager of Springfield Gas and Electric Company, testified that 2,881 domestic consumers are served electricity outside the city limits representing 16.2 per cent of the Company's total domestic consumers; 365 commercial consumers are located outside the city limits representing 11.2 per cent of the Company's total commercial consumers; 5 industrial consumers are served outside the city limits, representing 16.7 per cent of the Company's total industrial consumers. The Company's revenues derived from the service of domestic consumers outside the city limits for the year 1941 was $84,667 representing 16.4 per cent of the Company's revenues derived from all domestic consumers; the revenues from commercial consumers was $6,037 representing 1.1 per cent of the revenues derived from all commercial consumers. The revenues from industrial consumers outside the city limits was $84,630 representing 34.2 per cent of the Company's revenues derived from all industrial consumers. Mr. E. S. Williver testified that there have been no material changes in the Company's operations since 1941 up to the present time which would materially change these figures.

An attempt was made to minimize the extent of the business outside the city by testimony to the effect that only 5¼ per cent of the total book value of the properties owned by the Company is located outside the city limits. As I have previously pointed out in my opinion of March 19, it is not the value of the property located outside the city limits which is of importance, but it is the fact that the business conducted in serving the consumers outside the city limits, which the evidence shows is substantial, is unlawful.

The majority Report and Order refers to the operation of these properties outside the city limits as "incidental." I cannot agree that this is a proper appellation. I call the operation of these properties a very substantial part of the business of the Springfield Gas and Electric Company. Nor can I agree with the application

of the decision in *Speas vs. Kansas City,* 329 Mo. 184, 44 S.W. (2d) 108, to the present case. In the Speas case the plaintiffs, as resident taxpayers of Kansas City, Missouri sought to have adjudged unconstitutional all provisions of said City's charter by which it and its officers and agents are authorized to supply water to nonresidents and to enjoin perpetually said City and its officers and agents from supplying water to nonresidents. The plaintiffs petition alleged, among other things, that the City had constructed certain water mains running to and along the boundary line of Missouri and Kansas where Kansas City, Missouri adjoins Johnson County, Kansas; that the City had placed water meters at the State line (which is also the city limits); that the purchaser of the water from Kansas City was charged the lowest consumer rate known as a combination rate based on the total consumption of water, and that the purchaser retailed and distributed the water to individual residents and citizens of the residential district of Johnson County, Kansas at a higher and more profitable rate than that paid to defendant, Kansas City, Missouri but which rate was lower than that charged to and paid by the great majority of the resident taxpayers or citizens of Kansas City, Missouri. The petition also contained the general allegation that Kansas City, Missouri, was selling and distributing large quantities of water to various other nonresident and noncitizen consumers, the names of whom were unknown to plaintiffs. The petition further complained that by reason thereof there had been frequent shortages of water for the use of citizens and taxpayers of Kansas City, Missouri, and that no part of the expenditures for the water distribution system had been, or would be paid by nonresident users and consumers of water. In passing upon the questions presented in that case the Court said, l.c. 113,:

> "Is the charter power of Kansas City to supply water to nonresidents in conflict with its charter power to acquire and to operate waterworks for public purposes only or with the constitutional provision that taxes may be used for public purposes only? We think not, because the charter power of Kansas City to supply water to nonresidents may be exercised, as was doubtless intended by the framers of its charter, for the benefit of the city and its inhabitants. In other words, if Kansas City acquired and is operating its waterworks primarily for the purpose of supplying water for its own needs and the needs of its inhabitants, and is incidentally selling surplus water to nonresidents, without impairing the usefulness of its waterworks for said primary purpose, such exercise of its charter power to supply water to nonresidents is not inconsistent with its charter power to acquire and to operate waterworks for public purposes only, nor with the constitutional provision that taxes may be used for public purposes only."

The question involved in the Speas case was the constitutionality of the charter provisions authorizing the selling of surplus water to nonresidents. That case did not hold that a municipal corporation can lawfully conduct a public utility business serving consumers outside the city limits, nor does Kansas City's charter authorize the conducting of such a private business. The Speas case is not in point and is so recognized by the Supreme Court in the opinion in *Taylor vs. Dimmitt* in which the Court says, l.c. 844,:

> "The Missouri cases mentioned by appellant (Speas v. Kansas City, 329 Mo. 184, 44 S.W. (2d) 108; Public Service Commission v. Kirkwood, 319 Mo. 562, 4 S.W. (2d) 773; and McMurry v. Kansas City, 283 Mo. 479, 223 S.W. 615) do not involve the issue upon which this case turns."

It is my opinion that the interpretation placed upon Subsection XXXVII by the majority Report and Order is neither reasonable nor sound. If the city of Springfield could lawfully conduct a private business to serve the consumers eight miles beyond the city limits, why could it not serve ten, fifteen, twenty-five or even one hundred miles beyond the city limits? If there is no limit to the area which may be served by a municipal utility, could not the city of Springfield purchase the properties of all of the rural electric co-operatives within the State of Missouri and thus serve rural electric consumers throughout the State? Could not the city of Columbia purchase the electric properties and serve the city of Moberly, for instance, or the city of Jefferson City? If a city is to be permitted to engage in private business beyond its corporate limits, then the question arises as to how far beyond its limits the city may go with such an endeavor. Conceivably and logically if a city can thus go one mile beyond its limits, it would have the authority to extend its business operations throughout the whole area of the State. The primary reason for having city limits is to confine the city's operations to those limits. That seems to be the intent and purpose of the statutory and case law dealing with this subject and the reason why the above mentioned statutes dealing with the municipal ownership of utility properties outside a city's limits confine the use solely to the service of inhabitants of the city. The language from the Supreme Court's opinion in the bond validation case (Monday case) quoted in the majority Report and Order, i.e.:

> "Their objection that parts of the distribution lines go beyond the city limits is answered by the express authorization to go beyond the limits in Subsection XXXVII of Section 6609. We therefore overrule these contentions."

does not change the law on this point as it is determined in *Taylor vs. Dimmitt.* The quoted language is the only language in the bond case that might reflect upon the point under consideration and the meaning of that language is readily understood when the issue upon which the court was passing is understood. The sole issue in that case was the validity of the bonds the city was issuing for the purpose of purchasing the common stock of Springfield Gas and Electric Company in order that it might by that means *acquire* the Company's properties. As an objection to the validation of the bonds, the point was made that some of the Company's properties were outside of the city limits. In answer to this objection the Court used the above quoted language merely to point out that Subsection XXXVII of Section 6609 of the city's charter authorized the city to *acquire* and *own* property beyond the city limits. The opinion gave no consideration to what use was to be made of those properties.

It is my opinion that the proposed transfer would leave a large number of the present consumers of Springfield Gas and Electric Company, including a large number of power users, without electric and gas service and for that reason would be detrimental to the public interest.

Since the purported transfer is void and no authorized transfer took place before the recent adoption of the present constitution of the State of Missouri, it is unconstitutional under Section 23 of Article VI of the Constitution of Missouri for the city of Springfield to own the stock of the Springfield Gas and Electric Company. Said Section 23 provides as follows:

> "Section 23. *No* county, *city* or other political corporation or subdivision of the state *shall own or subscribe for stock in any corporation or association,* or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution." (Italics added)

The language of this section is very plain. It means that the city of Springfield cannot own stock in any corporation. All of the proceedings in connection with the purported transfer have been attended with haste. The first hearing upon this application, at the request of the city, was set upon less than ten-days' notice as required by the Rules of Practice and Procedure before the Commission, and after motions for rehearing had been filed and on the very date the motions for rehearing were sustained, the purported transfer took place. Counsel for the city of Springfield testified as follows:

"Well, March 29, was the date on which the new constitution would become effective, and there are provisions in the new constitution which I felt would be urged as a ground for further litigation. I felt that it was very important from the standpoint of the City to consummate its purchase of the stock before the new constitution became effective or else we might be involved in another year or two of litigation, which is very expensive from the City's standpoint. It loses the profits and income of the property which are certainly in excess of half a million dollars a year. I therefore recommended that the sale be consummated before the twenty-ninth of March." (R.-177-178 Apr. 10.)

The city officials and special counsel were so apprehensive of the effect of the new constitution that although this is a public matter and one of interest to all of the citizens of Springfield they left the city of Springfield and went to Kansas City in order to avoid litigation and there attempted to complete the transfer of the properties herein involved.

Although the Supreme Court in the Monday case ruled that the city of Springfield had authority to issue bonds to purchase all of the common stock of Springfield Gas and Electric Company in order to become the owner of its physical utility properties in spite of Section 6 of Article IX of the Constitution of Missouri then in effect which prohibited a city from becoming a subscriber to the capital stock of any corporation, it appears that Section 47 of Article IV of said constitution which provides as follows was not cited or considered by the Court:

"Section 47. The General Assembly shall have no power to authorize any county, city, . . . to become a stockholder in such corporation, association or company . . ."

Although the record of the rehearing is voluminous, the testimony consists principally of a recital of the details of the purported transfer and a recital by counsel for the city of Springfield of his understanding of the law. There is still very little in the record upon the real issue in the case which is whether or not the proposed transfer would be detrimental to the public interest. No reasonable showing was made as to any public benefit to be derived from this purchase which would offset the definite losses which will result to the school district, road districts and to the county as a consequence of the acquisition of these properties by the municipality. No actual plan has been adopted by the city regarding the rates to be charged and there is no gaurantee that the reduction which this Commission has required to be made by allowing credits will be made permanent. If such a guarantee were made, it would

be no additional benefit in view of this Commission's outstanding order. In fact, on July 20, 1945 this Commission received a letter from the city attorney of the city of Springfield enclosing a profit and loss statement for June, 1945 and also for a period from March 26, 1945 to June 30, 1945 and also a newspaper clipping from a Springfield newspaper "reflecting the city's plans for an early rate reduction and the progress being made toward that end." The letter contains a request that the letter and enclosures be made a part of the record in the case herein, if permissible under Commission procedure. The record in this case is now closed and, of course, neither the letter nor the enclosures can be considered a part of the record upon which the Commission can base a decision. However, having read the newspaper article, I can but observe that it appears from this article that the city of Springfield has not even continued the rate reduction by means of a refund which was ordered by this Commission. No improvement in service is anticipated, and statements were made that the service now is very satisfactory. Mayor Carr at the hearing on March 7, stated, "The present management has given wonderful service for a number of years." No economy of operation is anticipated and the entire personnel of the Springfield Gas and Electric Company is to be retained. The only economy which was discussed was the savings in taxes. The amount of such savings is largely defined by the loss in tax revenue to the school district, road districts, the county and the Federal Government. None of these parties who will suffer a loss in revenue will receive equivalent benefits. If the tax savings within the city are not passed on to the public in rate reductions or through reductions in taxes, even this saving is doubtful.

I am unable to agree with Mr. Bennett, Commissioner of Revenue, that the loss of $500,000 per year in taxes by the school district, county, state and the Federal Government is a public benefit. Such an interference in the tax policy of the Nation in view of our huge National debt would be detrimental to the public interest.

It was admitted that under municipal ownership employees of the Springfield Gas and Electric Company upon becoming city employees would lose their Social Security benefits, and the evidence shows that wage increases were contracted for ranging from ten to fifteen dollars per month based on a forty hour week as an attempted compensation for this loss.

Vague references were made to Utopian power rates which were to bring new industries to Springfield, but cross-examination

disclosed that no schedules had been prepared to bring about these low rates nor was it shown that such reductions could be made without imposing a burden on the residential and other consumers.

Mr. John Randolph, General Counsel of the Missouri Public Service Commission, asked Mayor Carr on cross-examination: (R.-82, March 7)

"Q Mayor Carr, you said you thought there would be many benefits that would come out of municipal ownership in this case. You expected to lower rates, have you made any definite studies of what you can do in that respect?"

To which the Mayor answered:

"A No, we haven't, and the reason is we haven't as yet secured the property and there is plenty of time to do that. I don't see why it is necessary to do that before you get the property."

Witnesses stated that new industries had been forced to choose other locations because of the high power rate at Springfield and it was stated that a large tire plant had located in Oklahoma instead of at Springfield because the Oklahoma location offered a four-mill power rate. It was inferred that the acquisition of the electric utility properties by the city would enable it to reduce power rates in order to compete in the acquisition of new industries.

Our records show that during 1943 the Company purchased power from The Empire District Electric Company in an amount of $84,836 which covered 12,807,560 kilowatt hours. This purchased power cost the Company .656 per kilowatt hour. If these new industries which are to be attracted to Springfield by the suggested four-mill rate actually are obtained, it is logical to assume that the amount of power purchased will be increased in order to supply this additional demand. If the four-mill rate is offered to these power consumers, it can only be done by passing the difference between .656 and .4 on to the domestic and commercial users which could easily result in requiring an increase for those types of consumers in order to offer the low rate which the city desires for the purpose of attracting new industries. Certainly, the benefit to domestic and commercial customers would be doubtful in that event.

On the 24th day of April, 1944 the Commission issued a Report and Order wherein the Springfield Gas and Electric Company was ordered to reduce the gross operating revenue of its electric department for the year of 1944 by refunding, or by allowing credit on future bills to customers, until the amount of $304,000 shall have been refunded. Prior to issuing that order the Commission held a hearing at which the city of Springfield appeared by its attorney,

Mayor and members of the council, and a group of commercial and industrial electric consumers appeared by their attorney, Mr. Fred A. Moon. It was claimed originally by the industrial users that the power rates in the city of Springfield were not comparable to the power rates in the State of Missouri generally, but that the domestic and other rates were comparable to such rates throughout the State, and it was contended that the total rate reduction should go to the large power users. Mr. Moon requested time in which to prepare as an exhibit a study showing comparison of power rates in Missouri and time was granted for that purpose. Thereafter, the industrial users secured the services of an electrical engineer to analyze the power rates of Springfield as compared with other cities in Missouri, and after said analysis was completed Mr. Moon advised the Commission that he found both the domestic and power rates were comparable to the same classes of rates in other cities in Missouri and not out of line. At a prior hearing in the same case on Feburary 14th and 15th, 1944 Mr. Louis W. Reps, who testified on behalf of the Chamber of Commerce, asked that whatever rate reduction might be ordered be allocated to industrial power users and commercial light users. In his testimony Mr. Reps said, ". . .our residential rate is very much in line. In fact, we advertise at the time that it is the lowest in Missouri. . ." (R. 132-133). I refer to previous records before this Commission for the purpose of pointing out that there is little to justify the belief that this proposed change of ownership can greatly benefit the rate situation within the city of Springfield.

The evidence shows that there has been appointed a group of businessmen, or so-called Advisory Board, described by the Mayor as ". . .made up of some of our good citizens.", but which has no authority in law. We have no reason to doubt the competency of these businessmen in their respective lines of business, but the record shows that only one of them has ever had any public utility experience, and that he is not connected with any utility at the present time.

The purchase price proposed in this case is $6,750,000. Some comment was made at the hearing regarding the fairness of this amount, and it was suggested that the city was paying more than nine hundred thousand dollars in excess of the price which had been offered by an individual and had been accepted by Federal for the common stock of the company.

This Commission in 1944, after an audit of the Springfield Company, fixed a rate base upon which the earnings of the electric

and gas departments should be computed. No equivalent finding was made for the heating and transportation departments. The rate bases which were fixed in 1944, plus adjustments applicable thereto during the year of 1944, amount to $5,499,009 for the electric and gas departments. If we add to this amount the adjusted investment in the heating department and the recorded investment in the transportation department, the maximum amount which could be justified as value of this property would be $6,009,077. This amount is approximately six hundred sixty-five thousand dollars less than the agreed purchase price in this case.

An analysis of the balance sheet of this Company for December 31, 1943, discloses that the earned surplus, plus the common capital stock liability, amounts to $299,446.70. This is an accepted method of determining common stock equity in a property. These figures, however, are not representative of the equity value as there are items of acquisition adjustment in a substantial amount which would have to be considered in a determination of this nature. However, ignoring these, it seems evident that the offer by an individual of a consideration of $650,000 for the common stock of this Company was at least an adequate consideration and that the price which is proposed herein seems exorbitant and to the extent of the excess over fair value is contrary to the public interest of the citizens of Springfield.

In the rate base figures quoted above are included an amount slightly in excess of one hundred thousand dollars for cash working capital and material and supplies which amounts might reasonably be deducted in the above computation in view of the terms of the purchase contract which in substance provide that assets of this nature may be offset by the assumption of liabilities of the corporation.

The question as to the sentiment of the public at Springfield was discussed and opinions were stated on both sides. No actual test of this sentiment has been made. A vote was proposed on this matter at which time a consideration considerably in excess of the present one was involved. This vote was prevented by injunction. Since that time the consideration involved seems to have been reduced by more than one million dollars but is still some nine hundred thousand dollars in excess of a bid which was made by an individual and accepted by Federal. Possibly the public, if given an opportunity to vote, might register its objection to this large difference in consideration.

For the reasons above stated I dissent from the majority Report and Order and it is my opinion that the proposed transfer is unlawful and unconstitutional and that it would be detrimental to the public interest and contrary to the public welfare.

Agnes Mae Wilson

Commissioner

In the matter of the application of CITY OF FERGUSON, Missouri, to construct grade separation over Wabash Railroad Company tracks at Dade Avenue, to abandon a grade crossing at Adams Avenue, and to construct a grade crossing near Elizabeth Avenue, all in Ferguson, Missouri.

Case No. 9926
Decided August 22, 1945
(Supplemental Report and Order No. 1)

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1 Crossings, §33—Railroads, §8. The Commission's failure to set a date for the completion of an authorized grade separation structure is an undesirable practice.

2 Crossings, §12—Railroads, §8. The Commission stated with respect to an order authorizing a grade separation with no completion date prescribed therein that prior to commencement of construction, it has authority to rescind such orders if after a considerable lapse of time, it learns that conditions have changed making the construction undesirable.

3 Crossings, §33. The Commission declined to prescribe in its order authorizing a grade separation an indefinite completion date, but it stated that an extension of time might be granted if materials and labor were not available within the allowed period of time.

APPEARANCES:

Forrest Boecker for Wabash Railroad Co.
Robert B. Snow for City of Ferguson.
Guido Moss for the Commission.

SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This case is again before the Commission upon application filed on April 11, 1945, by the City of Ferguson, a municipal corporation of St. Louis County, Missouri, for an order authorizing

San Francisco Railway Company near Tower Grove Station in St. Louis, Missouri, be and is hereby set aside and for nought held.

Ordered: 2. That J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, be and they are hereby ordered to construct, maintain, and operate an interlocking plant at the grade crossing of the Missouri Pacific Railroad Company's track with the tracks of the St. Louis-San Francisco Railway Company near Tower Grove Station in St. Louis, Missouri, in accordance with the plans filed with the Commission within six months of the effective date of this order.

Ordered: 3. That the actual work of construction, maintenance, and operation of the interlocking plant be carried out by J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, and that rearrangement of properties of the respective roads made necessary because of the installation of the plant be performed by the railroad owning the property.

Ordered: 4. That the cost of rearrangement of property of the respective roads incidental to the construction of the interlocker shall be borne by the party incurring the cost, and that the cost of construction, maintenance, and operation of the interlocking plant be divided as follows:

J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, 66 2/3 per cent.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, 33 1/3 per cent.

Ordered: 5. That the portion of the cost of the construction, maintenance, and operation of the interlocking plant to be borne by the Trustee for the Missouri Pacific Railroad Company be paid in monthly installments to the Trustees for the St. Louis-San Francisco Railway Company.

Ordered: 6. That the Commission be notified of the completion of the plant as provided in General Order No. 10.

Ordered: 7. That this report and order shall take effect ten days after this date, and the Secretary of the Commission forthwith serve certified copy of same on all parties interested herein, and that each of said parties shall notify the Commission before the effective date of this order, in the manner prescribed by Section 5145 of the Public Service Commission Law, whether the terms of said report and order are accepted and will be obeyed.

JAMES, Chr.; BOYER, FERGUSON, WILSON, FRANCIS, CC., concur.

In the Matter of the Application of the SPRINGFIELD GAS & ELECTRIC COMPANY for a Certificate of Convenience and Necessity to construct, maintain and operate electric transmission and distribution lines in the County of Greene, State of Missouri.

Case No. 9645.
Decided January 31, 1939.

1 **(See Digest: Certificates of Convenience and Necessity, 12.) Electrical Utility. Blanket Certificate.** An electrical utility operating within a

municipality and in the area adjacent thereto was granted a blanket certificate of convenience and necessity to extend its service in the area surrounding the municipality as might be required by the demand of new customers, thereby eliminating the necessity of the utility making application for authority for each new extension.

2 (See Digest: Pleading, Practice and Procedure, 1-3.) **Blanket Authority. Necessity of Hearing.** A hearing was held not to be required for the proper determination of the matters involved in an electrical utility's application for blanket authority to extend its line anywhere within the area adjacent to the municipality in which it operated.

3 (See Digest: Certificates of Convenience and Necessity, 12.) **Electrical Utility. Restriction of Blanket Authority.** The Commission, in its order granting an electrical utility blanket authority to extend its lines anywhere within the area surrounding the municipality in which it operated, restricted such authority so as not to be applicable in any municipality located in such area.

REPORT AND ORDER OF THE COMMISSION.

BY THE COMMISSION:

This case is before the Commission upon the application of the Springfield Gas & Electric Company, hereinafter referred to as the applicant, for an order granting it a certificate of convenience and necessity to construct, maintain and operate, as a public utility, electric transmission and distribution lines for the purpose of furnishing electric service to the public within the area surrounding but outside of the city limits of the City of Springfield, Missouri.

[1-3] The applicant states that it is a Missouri corporation, having been authorized to and is now engaged in the business of supplying electric energy for light, heat, power and other uses to the inhabitants residing in the corporate limits of the City of Springfield, and in territory adjacent thereto, all in Greene County, Missouri. It further states that by order of the County Court of Greene County it is authorized to construct, maintain and operate electric transmission and distribution lines, and other necessary apparatus and equipment, in, along and across the public highways of said county. It now plans to make further extensions of its electric lines to new customers as the demand for the service may require, and to make extensions and changes in its present transmission and distribution lines as the need for such extensions and changes requires, said extensions and changes to be made in conformity with its extension rule that it may have on file with the Commission and in effect from time to time.

The applicant further states that because of the continued request on the part of new and prospective customers for electric service in the area described in its application, it has filed this application for a certificate of convenience and necessity to extend its lines and furnish the service throughout the area without

having to make application to the Commission for authority to construct each individual extension.

A map is attached to the application, marked Applicant's Exhibit "B," which shows in detail the area in which the applicant now seeks blanket authority to construct, maintain and operate electric lines as the public convenience and necessity may require. This exhibit shows that the area for which the certificate is sought extends from the city limits of Springfield for varying distances of approximately from five to ten miles. The applicant has furnished with the application the names of all of the corporations, mutual associations, and individuals who own and have in operation electric, telephone or communication lines that from time to time may be paralleled or crossed by the electric lines the applicant may be required to construct, maintain and operate for the purpose of extending service to new customers or into new territory within the prescribed area.

There is attached to the application, marked Exhibit "D," a copy of a letter which the applicant states has been sent to all wire using persons or corporations, notifying them of the filing of the application and its intent and purpose. There is also stated in this letter that all lines are to be constructed in conformity with the National Electrical Safety Code and as this Commission may require. It is further stated that the applicant will notify all parties whose lines may be affected at least fifteen days prior to the date any extension or alterations are made in the lines of the applicant. Letters from each of those parties have been directed to this Commission and received, stating that they waive notice of any hearing upon the matter involved in this case, and indicate no objections to the granting of the authority the applicant seeks.

The applicant states that before constructing any lines along a state highway it will secure authority from the State Highway Commission for placing lines along the right-of-way of the highway affected. In its petition it states that before making extension to or any change in its lines it will give at least fifteen days notice to any and all public utilities or utilities affected, and further commits itself that in case of failure of the parties to reach an agreement concerning such proposed change, the matter may be submitted to the Commission for arbitration and determination, as provided for in Section 118 of the Original Act creating the Public Service Commission, now Section 5241 of the Revised Statutes of Missouri, 1929.

With the information presented in the application the Commission finds that a hearing is not required for the proper determination of the matters involved, and after due consideration,

It is, therefore,

Ordered: 1. That the Springfield Gas & Electric Company be and is hereby authorized to construct, maintain and operate electric transmission

and distribution lines and system in, along, and across the highways of Greene County, and along such other routes as may be properly provided for in said County, and along private right-of-way as may be secured by the applicant, with authority to furnish electric service to all persons in the area for which this certificate is granted, and in conformity with the extension rule the applicant may from time to time have on file with the Commission and in effect, such area being fully described on the map filed with the application, marked Applicant's Exhibit "B", which is hereby referred to and made a part hereof, said area being rural territory surrounding the City of Springfield, beyond the city limits, and comprising a large part of the County of Greene County. The authority hereby granted by the Commission does not grant permission to serve within the corporate limits of any municipality unless the consent of the proper municipal authorities shall first have been obtained, and until a certificate of convenience and necessity for the operation in said municipal area shall have been secured from this Commission.

Ordered: 2. That said electric transmission and power lines and all equipment connected therewith shall be constructed so as to conform to the specific rules and regulations contained in the National Electrical Safety Code, issued by the United States Bureau of Standards, and where said transmission lines cross the tracks of any railroad company, said crossing shall be constructed so as to conform to the specific rules and regulations contained in the Commission's General Order No. 24, issued August 17, 1925. Furthermore, that said applicant herein shall maintain and operate said transmission lines and all equipment connected therewith in a reasonably safe and adequate manner so as not to endanger the safety of the public or to interfere unreasonably with the service of other aerial lines, and shall give reasonable notice to any other utility whose service might be affected by any proposed construction or change; and that the Commission fully retains jurisdiction of the parties and the subject matter of this proceeding, on the evidence now before the Commission, for the purpose of making such further order or orders as may be necessary.

Ordered: 3. Wherever said transmission lines may or do parallel aerial lines belonging to or operated by other companies or individuals or cross such line or lines or come in close proximity thereto so as to cause induction or other electrical interference, thereby making necessary changes in said line or lines or in the said line or lines of the applicant for the general benefit and safety of the public, the expense, if any accrued in making such changes shall be determined by an agreement between the parties operating such lines and the applicant, and in case of failure of the parties to reach such agreement in settlement thereof, the matter may be submitted to the Public Service Commission for arbitration and determination as provided for in Section 118 of the Original Act creating the Public Service Commission of this State, now Section 5241 of the Revised Statutes of Missouri for 1929.

Ordered: 4. That before beginning the construction of any electrical power and transmission line in the territory herein designated and before a change is made in the location, phase or voltage of any electric line that may be in operation, the applicant shall give all other utilities affected by such change or construction at least 15 days' written notice, showing in sufficient detail what the proposed construction or change will be to enable competent representatives of those utilities to determine what action the particular utility or utilities may desire to take with reference thereto.

Ordered: 5. That this order shall take effect ten days after the date hereof, and that the Secretary of the Commission shall forthwith serve on all

parties interested herein, a certified copy of this report and order, and that the applicant and all other interested parties shall notify the Commission before the effective date of this order, in the manner prescribed by Section 25 of the Public Service Commission Law (Sec. 5145, R. S. Mo. 1929), whether the terms of this order are accepted and will be obeyed.

JAMES, Chr.; BOYER, FERGUSON, WILSON, FRANCIS, CC., concur.

WEAVER W. SCHERFF. Application for an extension of regular route. (Supplemental to T-7.)

Case No. T-6528.
Decided February 1, 1939.

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1 **(See Digest: Certificates of Convenience and Necessity, 11a.) Motor Carrier Application. Duty of the Commission.** The Commission, in the determination of public convenience and necessity of a proposed motor carrier operation, must not only find the existence of convenience and necessity, but must also examine minutely the carrier seeking the authority and those carriers who might be affected by the granting of the authority.

2 **(See Digest: Certificates of Convenience and Necessity, 20-24.) Extension of Motor Carrier Authority. Inadequate Joint Service.** A motor carrier was granted authority to furnish direct service to certain points previously served by a joint service arrangement with a concurring carrier when it was shown that the latter had failed or refused to properly fulfill its obligation under the joint service arrangement and was thereby destroying the service rendered to the public by the applicant carrier.

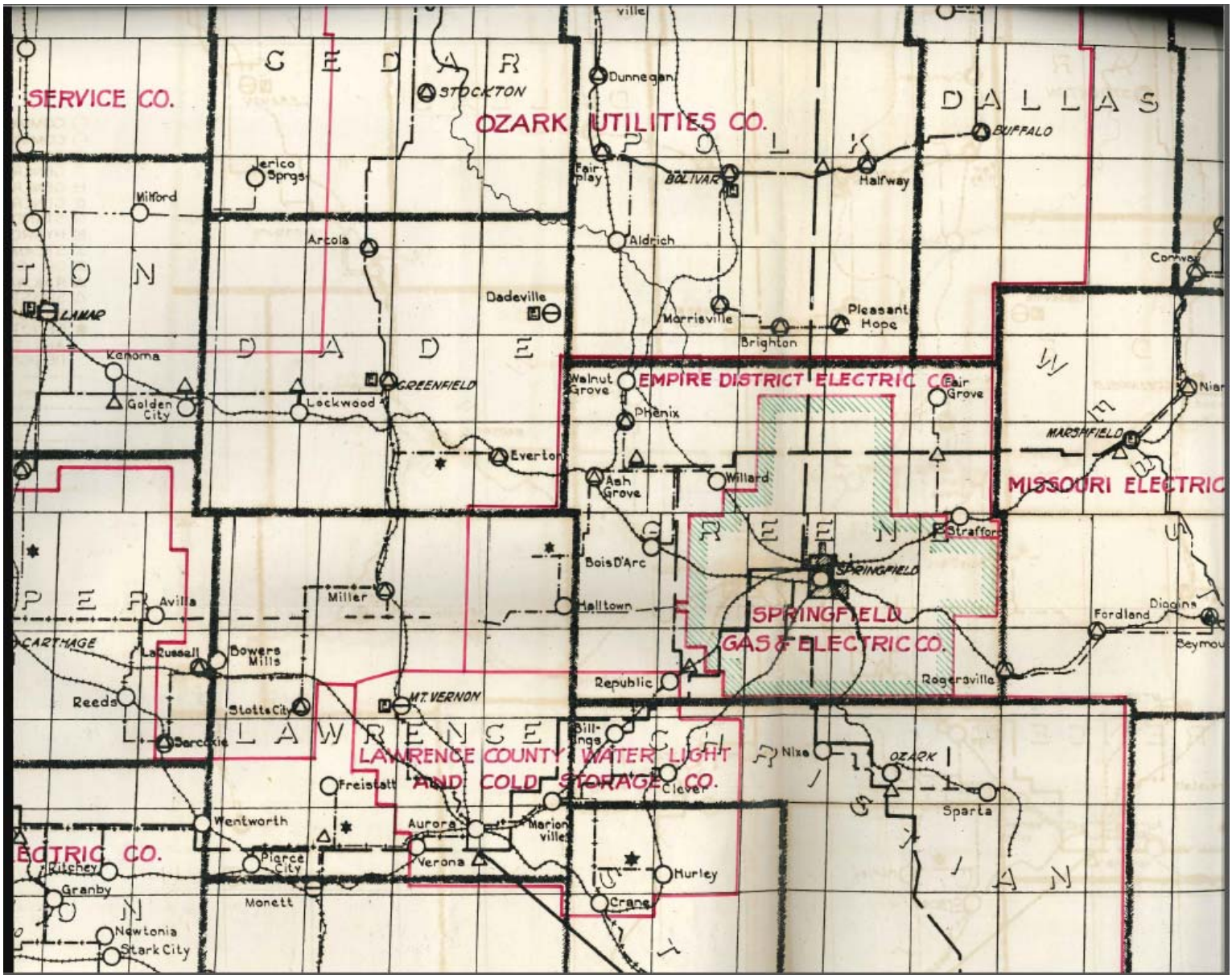
APPEARANCES:

H. H. Hoff for the Applicant.
D. D. McDonald for Schien Truck Line.
R. W. Hedrick for Missouri Pacific Railroad Company.
J. R. Rose for Spears Ship-By-Truck Company, Cole Motor Service, and William H. Yontz.

REPORT AND ORDER OF THE COMMISSION.

BY THE COMMISSION:

Weaver W. Scherff, an individual, the applicant herein, is the holder of Certificate of Convenience and Necessity and Interstate Permit No. T-7, under which he is authorized to engage in the business of transporting freight as a motor carrier between California, Missouri, and St. Louis, Missouri, over U. S. Highway No. 50 and serves the intermediate towns of McGirk and Centertown and the neighboring points of Jamestown, High Point and


SERVICE CO.
OZARK UTILITIES CO.
EMPIRE DISTRICT ELECTRIC CO.
SPRINGFIELD GAS & ELECTRIC CO.
LAWRENCE COUNTY WATER LIGHT AND COLD STORAGE CO.
MISSOURI ELECTRIC
ECTRIC CO.
CEDAR
DADE
POLK
DALLAS
LAWRENCE
GREENE
STOCKTON
Dunnegan
BUFFALO
Fair Play
BOLIVAR
Halfway
Jerico Springs
Milford
Arcola
Aldrich
Dadeville
Morrisville
Brighton
Pleasant Hope
Conway
Lamar
Kenoma
Golden City
Lockwood
GREENFIELD
Everton
Walnut Grove
Phenix
Ash Grove
Willard
Fair Grove
MARSHFIELD
Bois D'Arc
SPRINGFIELD
Straffor
Halltown
Fordland
Diggins
Avilla
Miller
CARTHAGE
LaRussell
Bowers Mills
Reeds
Stotts City
MT. VERNON
Barcelona
Republic
Rogersville
Billings
Nixa
OZARK
Sparta
Freistatt
Clever
Wentworth
Aurora
Marionville
Pierce City
Verona
Ritchey
Granby
Monett
Hurley
Crane
Newtonia
Stark City

APPENDIX B