BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI.

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
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. 10,628

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REPORT AND ORDER

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

ATTACHMENT 1

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, 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 was 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 State 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.

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 a 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).

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

auth rized trustees appointed in the instruments of their auth rization. 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 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. Rusbeck 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) from electricity, was $1,248,051.85, and from gas was $744,702.07. All sales for the same period of heat (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 was $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 cost 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 engineering fees and $58,000.00 increase in the annual depreciation over the amount which Gas & Electric [illegible]port for depreciation annually.

Therefore, for 1944, Gas & Electric after deducting from $2,52),608.58, (gross revenue) all the operating costs, or $2,072,050.41, left Gas & Electric $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%, 2½%, and 2¾% 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 5% 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 is 2.6% and to commercial consumers outside is 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

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.

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.

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. Dimitt 335 Mo. 330, 78 SW (2) 841 (decided in 1934) holds that cities, in rendering electric service outside of the 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, equipments 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 * * *" (Emphasis 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 those gas and electric transmission lines in

plant outside of the city limits and used to serve consumers outside of the City. The contention was made in the briefs in the Mendel 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 5½% 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 wherein 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.

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 ~~xxxxxx~~ 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.

Again the operation of those 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 those of its inhabitants and incidentally to sell this service outside the City without impairing the use inside. The case of Spoon 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 those same facilities was full protection for the City to proceed.

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.

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.

BY THE COMMISSION

(SEAL)

Willard B. Leavitt m. f.
Willard B. Leavitt,
Secretary.

Osburn, Chr., Henson and McClintock CC. Concur.
Williams C. concurs in the result.
Wilson C. dissents in a separate opinion.

Dated at Jefferson City this 4th day of August, 1945.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

August 4, 1945

CASE NO. 10,614 & 10,628

Honorable Henry Carr, Mayor
Springfield, Missouri

Clerk, Springfield School Dist.
Springfield, Missouri

Springfield Gas and Electric Company
Nee & Stone, Attorneys
Woodruff Building
Springfield, Missouri

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Presiding Judge, County Court
Greene County
Springfield, Missouri

Mr. Ted Hutchins
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C. H. Walker & Co.
Mr. Godfrey B. Simonds
32 Custom House
Providence, R. I.

Gentlemen:

Enclosed find certified copy of Report and/or Order in the above numbered case, receipt of which please acknowledge on the attached blank.

Very truly yours,

Willard B. Leavitt

Willard B. Leavitt,
Secretary

cc:

Mr. Arthur W. Allen, Attorney, Woodruff Building, Springfield, Mo.
Nee & Stone, Attorneys, Woodruff Bldg., Springfield, Missouri
Springfield Newspapers, Inc., Springfield, Missouri

DISSENTING OPINION OF COMMISSIONER WILSON

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 utilities industry to regulate and little need for a Public Service Commission.

Pursuant to the first hearing in this case the Commission on March 23, 1945 issued its Report and Order granting the application 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. Pizzel, 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. Fizzel, 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, 103 S.W. 2d 733, 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. Fissell 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, 259 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 those 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, 298 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 that 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 v. 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 water works 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 analogous 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 criticised 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 Sholbina, 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 Sholbina, 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. 845.:

> ". . . 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. Knimo, 180 Mo. loc. cit. 322, 79 S.W. 140, 143 (quoting Dillon, Municipal Corp. vol. 1 (4th Ed.) p. 145a)"

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

"Sec. 6008 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. 6009 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

(Underscoring by writer.)

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 the public utility operated by the city. . ."

In the case of State vs. Orear, 277 Mo. 305, 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 (p 12) 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 Sholbina is a city of the fourth class. Section 7642 R.S. Mo. 1929, which is the same as Section 7787 R.S. Mo. (Underscoring by writer)

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. 291), 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 author-

ized (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 815.)

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. Refering 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 falacy

in this re soning 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 consistant, 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

(Underscoring by writer.)

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."

Each of the aforesaid subsection contain 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 language 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

(Underscoring by writer.)

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 Consititution and the laws of the State of Missouri. . . ."

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 Mondry 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

(Underscoring by writer.)

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 2,891 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 $84,607 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 has 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 5½ 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 Spoas 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 Spoas case is not in point and is so recognized by the Supreme Court in the opinion in Taylor vs. Pimmitt in which the Court says, l.c. 844,:

> "The Missouri cases mentioned by appellant (Spoas 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. 815) 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 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 Sub-

section 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."

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 con-

(Underscoring by writer.)

> stitution 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 thiscase 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 those 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 got 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 those 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. Rops, 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. Rops 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 exhorbitant 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 case 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 in 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 MacWilson
Commissioner