1999 DRAFTING REQUEST

Bill

Received: **01/13/2000**

Received By: **kunkemd**

Wanted: **As time permits**

Identical to LRB:

For: **Michael Huebsch (608) 266-0631**

By/Representing:

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **John Stolzenberg**

Alt. Drafters:

Subject: **Public Util. - telco and cable**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Prohibiting governmental subdivisions from providing certain Internet and telecommunications services

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kunkemd 01/13/2000	chanaman 01/13/2000		_____ _____			S&L
/1			jfrantze 01/13/2000	_____ _____	lrb-docadmin 01/13/2000	lrb-docadmin 0 l/28/2000	

FE Sent For: **01/28/2000.**

<END>

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/?	kunkemd		1/13	1/13			

FE Sent For:

<END>

1999 DRAFTING REQUEST

Bill

Received: **07/09/1999**

Received By: **kunkemd**

Wanted: **Soon**

Identical to LRB:

For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **Tom Engels, WI State Telcom. Ass**

Alt. Drafters:

Subject: **Public Util. - telco and cable**

Extra Copies:

Cancel 01-13-00 per MDK they lost "Jacket" new # 99-4210

Pre Topic:

No specific pre topic given

Topic:

Prohibiting municipal telecommunications utilities

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Reauired
/1	kunkemd 07/09/1999 kunkemd 07/12/1999	wj ackson 07/12/1999 wj ackson 07/12/1999	martykr 07/12/1999	_____ _____ _____ _____	lrb_docadmin 07/12/1999		S&L
/2	kunkemd 09/16/1999	wjackson 09/17/1999	mclark 07/12/1999	_____ _____	lrb_docadmin 07/12/1999		S&L
/3	kunkemd 09/28/1999	wjackson 09/28/1999	mclark 09/17/1999	_____ _____	lrb-docadmin 09/17/1999		S&L
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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
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/7		/8 wmj 1/12	jfrantze 10/25/1999	_____ _____	lrb-docadmin 10/25/1999	lrb_docadmin 10/25/1999	S&L

FE Sent For:

<END>

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Wanted: **Soon**

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By/Representing: **Rob Richard**

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **Tom Engels, WI State Telcom. Ass**

Alt. Drafters:

Subject: **Public Util. - telco and cable**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Prohibiting municipal telecommunications utilities

Instructions:

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/2	kunkemd 09/16/1999	wjackson 09/17/1999	mclark 07/12/1999	_____ _____	lrb-docadmin 07/12/1999		S&L
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/4	kunkemd 0912911999	wj ackson 09/29/1999	jfrantze 09/28/1999	_____ _____	lrb-docadmin 09/29/ 1999		S&L

10/25 10/25

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/6		cmh 10/25 /7	kfollet 10/20/1999	_____ _____	lrb-docadmin 10/20/1999	lrb-docadmin 10/20/1999	S&L

FE Sent For:

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/1	kunkemd 0710911999 kunkemd 07/12/1999	wjackson 07/12/1999 wjackson 07/12/1999	martykr 07/12/1999	_____ _____ _____ _____	lrb-docadmin 07/12/1999		S&L
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FE Sent For: kjf 10/20 kjf 10/20

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For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

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May Contact: **Tom Engels, WI State Telcom. Ass**

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Subject: **Public Util. - telco and cable**

Extra Copies:

PA: please jacket

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No specific pre topic given

Topic:

Prohibiting municipal telecommunications utilities

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/4		/5 9/29 WLJ	jfrantze 09/28/1999	_____ _____	lrb-docadmin 09/29/1999		S&L

9/29 kjf 15ff/km 9/29

1999 DRAFTING REQUEST

Bill

Received: **07/09/1999**

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Wanted: **Soon**

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For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

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May Contact: **Tom Engels, WI State Telcom. Ass**

Alt. Drafters:

Subject: **Public Util. - telco and cable**

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/3		/4 9/28 WLJ	mclark 09/17/1999	_____ _____	lrb_docadmin 09/17/1999		S&L

FE Sent For:

9/28 9/28 MRC/IS 9/28

1999 DRAFTING REQUEST

Bill

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Wanted: **Soon**

Identical to LRB:

For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **Tom Engels, WI State Telcom. Ass**

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/2			mclark 07/12/99	_____ _____	lrb-docadmin 07/12/99		S&L

FE Sent For: MRC 9/17 MRC/cmh 9/17

<END>

1999 DRAFTING REQUEST

Bill

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Wanted: **Soon**

Identical to LRB:

For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **Tom Engels, WI State Telcom. Ass**

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Subject: **Public Util. - telco and cable**

Extra Copies:

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Prohibiting municipal telecommunications utilities

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/1	kunkemd 07/9/99	wjackson 07/12/99	martykr 07/12/99	_____ _____	lrb_docadmin 07/12/99		S&L

FE Sent For: /2 wlj 7/12 mrc 7/12 mrc/sf 7/12

<END>

1999 DRAFTING REQUEST

Bill

Received: **07/9/99**

Received By: **kunkemd**

Wanted: **Soon**

Identical to LRB:

For: **Stephen Freese (608) 266-7502**

By/Representing: **Rob Richard**

This file may be shown to any legislator: NO

Drafter: **kunkemd**

May Contact: **Tom Engels, WI State Telcom. Ass**

Alt. Drafters:

Subject: **Public Util. - telco and cable**

Extra Copies: MES

Pre Topic:

No specific pre topic given

Topic:

Prohibiting municipal telecommunications utilities

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Reauired
/?	kunkemd	/1 wlj 7/12	km 7/12				
			km 1/13				

FE Sent For:

<END>

99-3264/

Kunkel, Mark

From: Richard, Rob
Sent: Thursday, July 08, 1999 1:49 PM
To: Kunkel, Mark

Mark:

I have a draft that I need done, and I believe you would be the one to do it since you cover public utilities,

Apparently there is a situation in Winnebago County where the county is building and operating a telecommunications utility. Their original intent was to connect local government, fire, police, etc with a fiber optic line to better facilitate communications. They are now beginning to connect private industry to the system as well. Many see this as anti-competitive because private companies would be shut out of the bidding process and could be locked out of right-of-way access.

There is a general fear that this type of activity could potentially spread throughout the state very quickly.

Please draft a bill that would prevent municipalities from establishing and operating a telecommunications utility.

Because of the timely nature of this issue, I would like to request this as a rush for a leadership office. It is rather important that we have some language as soon as you can put it together. I do understand that you are busy with the budget, so I really appreciate any time you can give to this project.

If you need to know any technicalities or legislative intent regarding this draft, it is best to call Tom Engels of the WI State Telecommunications Assc. at 833-8866, or you can call me as well.

Thank you for your attention to this request!

Sincerely,

Rob Richard
Administrative Assistant
Office of Rep. Freese
266-7502

PSC tel/co lawyer
Mike Zarda
7-3591

Ray

Muni Telco

Aug 1
Fiber optics to businesses

State af Wisconsin
1999 - 2000 LEGISLATURE

LRB-3264/1
MDK:...:...
WLJ

0-NOTE

by WED 7/14, if possible

1999 BILL

Gen cat

AN ACT. ...; **relating to:** telecommunications services provided by cities, villages, towns and counties.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

Under this bill, a city, village, town or county may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a city, village, town or county from owning, operating, managing or controlling any plant or equipment used to furnish telecommunications services within this state directly or indirectly to the public.

For further information ***see*** the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.50 (4) of the statutes is renumbered 196.50 (4) (a).

SECTION 2. 196.50 (4) (b) of the statutes is created to read:

196.50 (4) (b) 1. In this paragraph, "municipality" means a city, village, town or county.

2. Notwithstanding par. (a), no city, village, town or county may construct, own, operate, manage or control any plant or equipment used to furnish telecommunications services within this state directly or indirectly to the public.

SECTION 3. 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE;** USE OF **STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (a), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own, acquire and construct any water power and hydroelectric power plant, within or without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be

imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

History: 197.5 c. 147 s. 54; 1979 c. 89,323; 1981 c. 390; 199 a. 184; 1995 a. 158; 1997 a. 27.

SECTION 4. 198.22 (6) of the statutes is amended to read:

198.22 (6) **ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) (a), to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject, however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

History: 1971 c. 108 ss. 5, 6; 1971 c. 125 s. 523; 1971 c. 164; 1979 c. 323; 1985 a. 29; 1991 a. 316; 1993 a. 184; 1997 a. 254.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/1dn
MDK:
WLJ

Representative Freese:

It is my understanding that, at present, no municipality is providing telecommunications services to the public. If this is not correct, or if a municipality begins to provide such services before the bill goes into effect, then the bill should be revised to deal with such a municipality. For example, the bill could be revised to allow such a municipality to continue to provide telecommunications services while prohibiting other municipalities from entering the telecommunications market. Another way to deal with the issue might be to require such a municipality to withdraw from the telecommunications market over a period of time. This 2nd approach might also have to deal with any investment in telecommunications that has been made by such a municipality. Please contact me if you wish to pursue these approaches.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/1dn
MDK:wlj:km

July 12, 1999

Representative Freese:

It is my understanding that, at present, no municipality is providing telecommunications services to the public. If this is not correct, or if a municipality begins to provide such services before the bill goes into effect, then the bill should be revised to deal with such a municipality. For example, the bill could be revised to allow such a municipality to continue to provide telecommunications services while prohibiting other municipalities from entering the telecommunications market. Another way to deal with the issue might be to require such a municipality to withdraw from the telecommunications market over a period of time. This second approach might also have to deal with any investment in telecommunications that has been made by such a municipality. Please contact me if you wish to pursue these approaches.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

1999 - 2000 LEGISLATURE

LRB-3264/1
MDK:wlj:km

by WED 7/14

D-NOTE

2

RM NOT RUN

1999 BILL

Regen

AN ACT ~~*to renumber*~~ 196.50 (4); ***to amend*** 198.12 (6) and 198.22 (6); and ***to create*** 196.50 (4) (b) of the statutes; **relating to:** telecommunications services provided by cities, villages, towns and counties.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town,

Under this bill, a city, village, town or county may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a city, village, town or county from owning, operating, managing or controlling any plant or equipment used to furnish telecommunications services within this state directly or indirectly to the public.

For further information ***see*** the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.50 (4) of the statutes is renumbered 196.50 (4) (a).

SECTION 2. 196.50 (4) (b) of the statutes is created to read:

196.50 (4) (b) 1. In this paragraph, "municipality" means a city, village, town or county.

2. Notwithstanding par. (a), no city, village, town or county may construct, own, operate, manage or control any plant or equipment used to furnish telecommunications services within this state directly or indirectly to the public.

SECTION 3. 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (a), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own, acquire and construct any water power and hydroelectric power plant, within or without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be

imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

SECTION 4. 198.22 (6) of the statutes is amended to read:

198.22 (6) **ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) (a), to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject, however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/2dn
MDK:...:...

Representative Freese:

This version, which is identical in substance to LRB-3264/l, corrects a drafting error with respect to the use of a definition. If you have any questions, please contact me.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/2dn
MDK:wlj:mrc

July 12, 1999

Representative Freese:

This version, which is identical in substance to LRB-3264/l, corrects a drafting error with respect to the use of a definition. If you have any questions, please contact me.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-013 1
E-mail: Mark.Kunkel@legis.state.wi.us

"Refusal to instruct on the emergency rule deprived plaintiff Geis of a possible defense for her position on the highway. Under the evidence most favorable to her, the emergency instruction would have demonstrated to the jury that she had met the burden of going forward with evidence to justify her improper position on the highway. • * * "5

[8] We conclude it was prejudicial error not to give the emergency instruction in view of the evidence in the record.

A new ttial is granted but only on the issues raised by the plaintiff's complaint and the cross complaints of the co-defendants with respect to the negligence of Sandra Seal, Nicholas Grosskopf, and Stokely-Van Camp, Inc. No issue is raised on this appeal as to plaintiff Gage's negligence or damages, and therefore a new trial as to such issues is unnecessary.

The questions pertaining to the signaling instruction and the form of the verdict are not reached because we are granting a new trial as a result of the failure to give the emergency instruction.

Judgment reversed and cause remanded for, a new ttial consistent with this opinion.

37 Wis.2d 96

CITY OF SUN PRAIRIE, a municipal oorporatlon, Appellant,

v.

The PUBLIC SERVICE COMMISSION of Wisconsin et al., Respondents.

Supreme Court of Wisconsin.

Nov. 28, 1967.

City brought proceeding to review a declaratory ruling of the Public Service Commission that landlord in furnishing heat, light, wafer, and power to its tenants in large apartment complex was not a "public utility" within meaning of statute. The Circuit Court for Dane County, Edwin M. Wilkie, J., entered judgment affirming the ruling of the Public Service Commission, and the city appealed. The Supreme Court, Currie, C. J., held that the landlord was not a "public utility" within meaning of statute and was not under the jurisdiction of the Public Service Commission.

Judgment affirmed.

I. Statutes ⇐220

Construction given to statute by court becomes part thereof, unless Legislature subsequently amends statute to effect a change.

2. Publio Service Commissions ⇐6.3

Landlord, which furnished heat, light, water, and power to tenants in large apartment complex, was **not** a "public utility" within meaning of statute and was not under jurisdiction of Public Service Commission. W.S.A. 196.01(1).

See publication **Words** nnd **Phrases** for other judicial **constructions and** defiuitiono.

Proceeding by plaintiff city of Sun Prairie to review a declaratory ruling of the Public Service Commission of Wisconsin that the project of defendant Brooks Equipment Leasing, Inc. (hereinafter "Brooks") in furnishing heat, power, light, and water to its tenants in its multiple apartment complex does not hring Brooks within the definition of a "public utility" as defined by sec. 196.01(1), Stats. Lewis P. Brooks, its president, was also joined as a party defendant. Because Brooks was not a public utility, the commission determined Brooks was not within its jurisdiction and did not require a certificate of convenience and necessity.

The city of Sun Prairie, which is a public utility operating under an indeterminate permit to furnish electric heat, light and power to the public within its boundaries, made application to the commission for such declaratory ruling on July 23, 1964. Brooks was then the owner of a 15-acre parcel of land in the city of Sun Prairie on which it proposed to construct a 240-unit apartment project housed in 15 buildings that will house up to 1,000 people. Heat, light, water and power will be supplied by Brooks to all tenants in the project. Natural gas will be purchased by it to operate engines which will drive four electrical generators with a total capacity of 500 kilowatts. Heat-recovery equipment will utilize waste heat from the engines to furnish low-pressure steam to heat and air condition all 240 apartment units. No water, electricity, or heat will he supplied to adjoining landowners'or to the public generally. The rents paid by the tenants will cover the expense of the utility services, so that they will not be separately billed for same. Brooks will rent an apartment "to any responsible person" who is able to pay the rent.

After the commission made its declaratory ruling, the city of Sun Prairie petitioned the commission for a rehearing. Upon the denial of such petition, the city then instituted the instant review 'proceeding in circuit, court.

By judgment entered February 13, 1967, the circuit court affirmed the declaratory ruling of the commission, and the city has appealed.

The Wisconsin Gas Company, which sells gas to Brooks for use in its project, appeared in the proceedings before the commission and in the review before the circuit court, and opposed the city's petition.

Petersen, Sutherland, Axley & Brynelson, Madison, Wilmer E. Trodahl, City Atty., Sun Prairie, for appellant.

Bronson C. La Follette, Atty. Gen., William E. Torkelson and Clarence B. Sorenson, Madison, for Public Service Comm.

Stafford, Rosenbaum, Rieser & Hansen, Madison, for Brooks and Brooks Equipment Leasing.

Foley, Sammond & Lardner, Vernon A. Swanson, and N. J. Lesselyoung, Milwaukee, for respondents Wis. Gas Co.

CURRIE, Chief Justice.

The issue on this appeal is whether the landlord of a large complex which furnishes heat, light, water and power to its tenants is a public utility within the definition of sec. 196.01(1), Stats., so as to be under the jurisdiction of the Public Service Commission. This statute defines a public utility as follows :

"'Public utility' means ahd embraces every corporation, company, ihdividual * * * town, village or city that may own, operate, manage or control • * any part of a plant or equipment, within the state * * * for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. * * *"

We deem Cawker v. Meyer[1] to be determinative of the result. In that case the landlord constructed a building in the city of Milwaukee to be rented for stores, offices, and light manufacturing purposes. A steam plant was installed therein to generate heat, electric light and power to be furnished to the tenants and occupants of the building who desired such utility service. Since the landlord was unable to dispose of all the heat and electricity to his, tenants, he entered into contracts with three adjoining property owners to furnish them heat and power.

The Wisconsin Railroad Commission, which had jurisdiction over public utilities

5. Id. 32 Wis.2d at page 591, 146 N.W.2d ot page 405.

1. (1911), 147 Wis. 320,133 N.W. 157, 37 L.R.A.,N.S., 510.

at that time, contended that the landlord was a "public utility" as defined in sec. 1797m-1, Stats. (now sec. 196.01(1), Stats.). The commission argued that the furnishing of heat, light, and power "to any one else than to one's self is furnishing it to the public within the meaning of the statute." [2] This court stated:

"* * * It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the Legislature sought to regulate, but the furnishing bf those commodities to the public; that is, to whoever might require the same. Wisconsin River Improvement Company v. Pier, 137 Wis. 325, 118 N.W. 857, 21 L.R.A.,(N.S.), 538. The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility. But whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one * * * On the other hand, a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming under the letter or the intent of the law. In the instant case, the purpose of the plant was to serve the tenants of the owners, a restricted class, standing in a certain contract relation with them, and not the public * * *

* * * * * *

"* * * The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'public' must'be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him.

"* * * [The statute] was not intended to affect the relation of landlord and tenant, or to abridge the right to contract with a few neighbors for a strictly incidental purpose, though relating to a service covered by it." [3]

Ch. 499, Laws of 1907, which provided for the regulation of public utilities and contained the definition of "public utility" found in sec. 1797m-1 (now sec. 196.01(1), Stats.) had become generally known as the Public Utilities Law.[4] The commission to which this regulation had been entrusted was the then recently-created Wisconsin Railroad Commission. John Barnes was the first chairman of this regulatory commission. It is noteworthy that when the *Cawker* Case reached the court in 1911, Barnes was then a member of this tribunal and concurred in the decision.

[1] The statutory definition of "public utility" in sec. 1797m-1 has not been amended in any relevant portion since this court's decision in *Cawker*, and the same definition may be found today in sec. 196.01(1), Stats. This court has long been committed to the principle that a construction given to a statute by the court becomes a part thereof, unless the legislature subsequently amends the statute to effect a change.0

2. Id. at p, 324, 133 N.W. at p. 158.

3. Id. at pp. 324-328, 133 N.W. at p. 158.

4. see crow. Legislative Control of Public Utilities in Wisconsin, 18 Marquette Law Review (1933), 80.

5. Moran v. Quality Aluminum Casting Co. (1967), 34 Wis.2d 542. 556, 150 N.W.2d 137: Mednis v. Industrial Comm. (1965), 27 Wis.2d 430, 444, 134 N.W.2d 416; Hahn v. Walworth County (1961), 14 Wis.2d 147, 154, 109 N.W.2d 653, 04 A.L.R.2d 618; Meyer v. Industrial Comm. (1961), 13 Wis.2d 377, 382, 108 N.W.2d 556; Thomas v. Industrial Comm. (1943), 243 Wis. 231, 240, 10 N.W.2d 206, 147 A.L.R. 103; Milwaukee County v. City of Milwaukee (1933). 210 Wla. 336, 341. 240 N.W. 447: Eau Claire National Dnnk v. Benson (1900), 106 Wls. 024, 627-628, 82 N.W. 604.

[2] The courts of California,[6] Missouri,[7] Ohio,[8] and Pennsylvania s have similarly held that a landlord who furnishes utility service to his tenants is not a public utility within the definition thereof contained in the applicable state law. Appellant has been unable to cite a single authority to the contrary.

We consider the Pennsylvania court's recent decision in Drexelbrook Associates v. Pennsylvania Public Utility Commission [10] to be highly significant in view of appellant's argument that the rule announced in *Cawker* should not be extended to a large apartment complex such as the instant one. Drexelbrook Associates is the owner of a real estate development known as Drexelbrook. It is a garden-type apartment village with 90 buildings containing 1,223 residential units, 9 retail stores, and a club with a dining room, swimming pool, skating rink and tennis courts. The Pennsylvania Supreme Court held that the tenants of a landlord, although many in number, do not constitute "the public" within the meaning of Pennsylvania's Public Utility Law, but constitute rather a defined, privileged and limited group. The court held that the proposed service of electricity to them thus would be private in nature.

As in the instant appeal, it was argued in the *Drexelbrook Associates Case* that regulation was desirable to protect the interest, of the tenants in so large an apartment: complex. In disposing of this argument the Pennsylvania court stated :

"The controlling consideration is not whether regulation is desirable, but whether appellant [Drexelbrook Associates] is subject to regulation under the Public Utility Law." [11]

Judgment affirmed.

6. Story v. Rlchardaon (1921), 186 Cal. 162. 198 P. 1057, 18 A.L.R. 750.

7. State ex rel. Cirese v. Public Service Commission of Missouri (Mo.App.Ct. 1944), 178 S.W.2d 788.

6. Jonas v. Swetland Co. (1928), 110 Ohio St. 12. 162 N.E. 45.

0. Drexelbrook Associates v. Pennsylvania Public Utility Commission (1965), 418 Pa. 430, 212 A.2d 237.

IO. Supra, footnote 0.

Il. Id. nt pp. 441-442, 212 A.2d at p. 242.

CAWKER et al. v. MEYER et al., Railroad Com'rs.

(Supreme Court of Wisconsin. Nov. 14, 1911.)

1. STEAM (§ 1*)—"PUBLIC UTILITY."

That the owner of an office and manufacturing building sells to three neighbors surplus heat. light. and power. left after supplying his tenants, does not render the operation of the plant, which was intended to supply his own building only, a "public utility." within Laws 1907. c. 499, §§ 1797m—1 to 1797m—108, regulating public utilities.

[Ed. Note.-For other cases, see Steam, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, Vol. 8, p. 7774.]

2 STEAM (§ 1*)—"PUBLIC UTILITY."

Whether a plant furnishing heat, light. or power is a "public utility." within Laws 1907, c. 499, §§ 1797m—1 to 1797m—108, regulating public utilities, does not necessarily depend upon the number of consumers; it being sufficient that the plant is devoted to the use of all the members of the public who may require it.

[Ed. Sate.-For other cases, see Steam, Dec. Dig. § 1.*]

3. WORDS ARD PHRASES—"PUBLIC."

"Public" means of or belonging to the people at large. relating to or affecting the whole people of a state. nation or community, not limited to any particular class of the community, and means more than the limited class defined by the relation of landlord and tenant, or by nearness of location. as neighbors.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5771–5772.]

Appeal from Circuit Court, Dane County; E. Ray Stevens. Judge.

Action by Sarah M. Cawker and another against B. H. Meyer and others, Railroad Commissioners. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

Action to restrain the Railroad Commission of Wisconsin from enforcing the provisions of chapter 499, Laws of 1907, adding sections 1797m—1 to 1797m—108 to Stats. 1898, as against the plaintiffs. The complaint alleged:

"First. That these plaintiffs are, and at all the times hereinafter mentioned were, duly qualified and acting as executors of and trustees under the last will and testament of E. Harrison Camker, deceased, and under and by virtue of letters testamentary, duly issued to them' out of the county court in and for the county of Milwaukee, in the state of Wisconsin. and that these plaintiffs are. and at all times hereinafter mentioned were, as such executors and trustees, the owners in fee simple and in possession of certain real estate known and described as lot numbered eleven (11). and the south half of lot. numbered twelve (12). In block numbered fifty-seven (57). in the fourth ward of the city of Milwaukee, county of Milwaukee, and state of Wisconsin.

"Second. That said defendants are, and for some time last past were, the duly appointed and qualified members of the Railroad Commission of Wisconsin.

"Third. These plaintiffs further show that, in or about the year 1896, these plaintiffs **caused to be erected and constructed upon said premises a certain building, known as** the Cawker building, designed and intended by these plaintiffs to be rented for stores, offices. and light manufacturing purposes. That at the time of the erection of said building, as aforesaid, these plaintiffs caused to be installed therein a steam plant for the generation of heat. electric light, and power. for the purpose of heating and lighting said building, and furnishing electric light and power to such of the tenants and occupants of said building as should desire the same.

"Fourth. That, in order to operate said **steam** plant with economy, it is necessary to operate the same so as to generate heat, light. and power to the full capacity of said plant. and that after the completion of said building and the installation therein of said steam plant these plaintiffs found that they were unable to make use of the full capacity of said power plant in the heating and lighting of said building. and in furnishing to the tenants thereof as much light and power as said tenants desired to purchase, and that. in order to operate said plant with economy, it would be necessary for them to dispose of their surplus heat, light, and power to other persons.

"Fifth. These plaintiffs further show that, for the purpose of enabling them to operate their said plant with economy. they entered into contracts with three persons occupying premises adjacent to said Cawker building. to furnish them with light and power from their said plant. to wit, Otto Pietsch Dye Works. F. H. Feldman. and G. Logemann & Son Company. and that they also entered into a contract with said G. Logemann & Son Company to furnish to said G. Logemann & Son Company steam heat. for the purpose of heating the premises immediately adjoining **said Cawker building on the north, and** that the furnishing of such heat, light. and power to said three persons. or corporations. is merely incidental to the furnishing of heat. light, and power for their own use in said Cawker building, and for the use of the tenants occupying said Cawker building, and for the purpose of enabling these plaintiff% to operate their said power plant economically.

"Sixth. These plaintiffs further show that they have not at any time applied for or received any permit from the city of Milwaukee to make use af any street or alley in said city, nor hare they ever held themselves out as able to or williug to furnish light, heat. and power to the public. or to any person or persons. other than the persons above named. or their predecessors in the occupancy of the premises now occupied by said three persons. That there are two public utilities in said city of Milwaukee

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

engaged in the production, transmission, delivery, and furnishing of heat and light, operating under intermediate permits.

"Seventh. These plaintiffs further show that said defendants have demanded of these plaintiffs that they comply with the provisions of chapter 499, Laws of 1907, and the various acts amendatory thereof, entitled 'An act to create section 1797m—1 to 1797m-108, inclusive, Statutes of 1898. giving the Wisconsin Railroad Commission jurisdiction over public utilities, providing for the regulation of such public utilities, appropriating a sum sufficient to carry out the provisions of this act, and repealing certain acts in conflict with the provisions hereof,' and have threatened to cause the Attorney General of the state of Wisconsin to prosecute these plaintiffs under the provisions of said act, in case of their failure or neglect to comply therewith; and these plaintiffs further show that they are advised and believe that said chapter 499 of the Laws of 1907, and of the several acts amendatory thereof, are not applicable to these plaintiffs, or to any person or persons operating a light, heat, and power plant under conditions similar to those uuder which these plaintiffs are operating their said heat. light. and power plant in said Cawker building; that the provisions of said act. if applied to these plaintiffs. would render the operation of their said plant so expensive and burdensome as to compel these plaintiffs to cease the operation thereof. or to operate the same at a considerable loss to these plaintiffs; that if said act should he construed to be applicable to these plaintiffs, these plaintiffs are liable under the provisions thereof to forfeit a sum. not leas than $100, nor more than $1.000. per day. for each and every day during which they hare, since the passage and publication of said act. or shall in the future, fail to comply with the provisions of said act; that the penalties so imposed are unreasonable and void, and are so large that the enforcement of said penalties against these plaintiffs might amount to a confiscation of the entire trust estate in their hands. to the irreparable injury of these plaintiffs and of the beneficiaries under the trust, by virtue of which these plaintiffs hold the premises hereinafter described; and that these plaintiffs have no adequate remedy at law.

"Wherefore, these plaintiffs pray the judgment of this court that said defendants. and each of them, their successors in office. and their agents, servants, and employés be forever restrained and enjoined from enforcing, or seeking to enforce, the provisions of said chapter 499, Laws of 1907, as against these plaintiffs, or from making any order or orders under and by virtue of the authority vested in them by said act, requiring these plaintiffs to do or perform any act required by the provisions of said public utility law, or from in any manner interfering with the operation by these plaintiffs of their said heat, light, and power plant, and for such other and further relief as may be just and equitable, and for their costs in this action."

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and from an order overruling the demurrer they appealed.

L. H. Bancroft, Atty. Gen., and Russell Jackson, Deputy Atty. Gen., for appellants. Ryan, Ogden & Bottum (Lewis M. Ogden, of counsel), for respondents.

VINJE, J. (after stating the facts as above). [1] From the allegations of the complaint set out in the foregoing statement of facts, it appears that plaintiffs built a plant for the purpose of furnishing the tenants of their own building with heat, light, and power; that the completed plant proved to be large enough, when economically run, to furnish more heat, light, and power than the tenants of their own building required, and that they sold the surplus to three of their adjoining neighbors. Does the operation of such a plant, under such circumstances, constitute a public utility, within the meaning of the statute? Section 1 thereof defines a public utility as follows: "The term 'public utility' as used in this act. shall mean and embrace every corporation. company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every town, village or city that now or hereafter may own, operate, manage or control any plant or equipment, or any part of a plant or equipment within the state for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat. light, water or power, either directly or indirectly, to or for the public." The state claims that by furnishing heat, light. and power to the tenants of their own building the plaintiffs became a public utility; that the furnishing of such commodities to any one else than to one's self is furnishing it to the public, within the meaning of the statute. It is obvious that such a construction is too narrow, for it would constitute the owner of every building furnishing heat or light to tenants, as well as every honseholder who rents a heated or lighted room, a public utility. The Legislature never contemplated such a construction to be given the words "public utility." They must receive a construction that will effectuate the evident intent of the Legislature, and not one that will lend to a manifest absurdity. It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the Legislature sought to regulate. but the furnishing of those commodities to the public; that is, to whoever might require the same. Wisconsin River Improvement Company v. Pier, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 588. The use to which the plant, equipment, or some portion thereof is put must be for the

public, in order to constitute it a public utility.

[2] But whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public, as where a plant is built and operated for furnishing power to the public generally, but for a time finds one consumer who uses it all. If the product of the plant is intended for and open to the use of all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility. On the other hand, a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming either under the letter or the intent of the law. In the instant case the purpose of the plant was to serve the tenants of the owners, a restricted class, standing in a certain contract relation with them, and not the public. The furnishing of power, light, and heat to a few neighbors was incidental merely and limited to them. Should plaintiffs, however, enlarge their field of service, it is by no means certain that they would remain exempt from the operation of the law. And, having come within its provisions, they would be required, to the extent of the capacity of their plant, to serve any one making a demand upon them, under such regulations as the Railroad Commission might lawfully prescribe. Wisconsin River Improvement Company v. Pier, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538.

[3] It is very difficult, if not impossible, to frame a definition for the word "public" that is simpler or clearer than the word itself. The Century Dictionary defines it as: "Of or belonging to the people at large; relating to or affecting the whole people of a state, nation or community; not limited or restricted to any particular class of the community." The New International defines it as: "Of or pertaining to the people; relating to or affecting a nation, state or community at large." The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word "public" must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him.

While we find it quite easy to ascertain the true spirit and intent of the law, yet we deem it inexpedient and unsafe to attempt to define in more specific terms than the statute what does and what does not constitute a public utility. Each case will depend upon its own peculiar facts and circumstances, and must be tested by the statute in the light of such facts and circumstances. The law should receive a construction that will effectuate its true purpose, however difficult that may be. No resort should be had to any arbitrary standard, or to any fixed line of demarcation, on the ground that they are easy of application, or for any other reason. The statute was intended to include those, and only those, who furnished the commodities therein named to or for the public. It was not intended to affect the relation of landlord and tenant, or to abridge the right to contract with a few neighbors for a strictly incidental purpose, though relating to a service covered by it.

The conclusions we have arrived at render it unnecessary to determine whether or not the statute unreasonably abridges the right to contract, and whether or not that portion of it prescribing penalties is unconstitutional, on the ground that they are excessive.

Order affirmed.

GETTY v. VILLAGE OF ALPHA4.

(Supreme Court of Minnesota. Oct. 27, 1911. On Rehearing, Sov. 27, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ SO*)-PROCEEDINGS—SUMMONS.

The summons in this action was issued by a justice of the peace, and provided that it should be served by delivering a copy thereof to the chief executive officer, or in his absence to the clerk of the village. *Held*, the summons was sufficient for two reasons: First, the direction as to the manner of service may be treated as surplusage; second, the manner of service prescribed was in accordance with section 4107, c. 77, which controlled, in the absence of any prorision in chapter 75 for the service of a summons upon municipalities.

[Ed. Note.-For other cases, see Justices of the Peace, Cent. Dig. §§ 251–257; Dec. Dig. § 50.*]

2. JUSTICES OF THE PEACE (§ 145*)—APPEAL-DECISIONS REVIEWABLE.

Any aggrieved person may appeal from a judament in a justice court upon questions of law-and fact, when the amount claimed in the complaint exceeds $30, whether the decision is upon questions of law or upon the merits.

[Ed. Note.-For other cases, see Justices of the Peace, Cent. Dig. §§ 479–489; Dec. Dig. § 145.*]

Appeal from District Court, Jackson County; James H. Quinn, Judge.

Action by Peter M. Getty against the Village of Alpha. From a judgment for plaintiff, defendant appeals. Affirmed.

Knox & Faber, for appellant. E. H. Nicholas, for respondent.

LEWIS, J. Plaintiff commenced this action in the justice court to recover the value of services, alleged at $32, performed for the defendant. The defendant appeared specially before the justice and objected to the ju-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CHAPTER 196

REGULATION OF PUBLIC UTILITIES

196.01 Definitions. As used in this chapter and ch. 197, unless the context requires otherwise:

(1 b) "Access service" means the provision of switched or dedicated access to a local exchange network for the purpose of enabling a telecommunications provider to originate or terminate telecommunications service. "Access service" includes unbundled local service provided to telecommunications providers.

(ld) "Alternative telecommunications utility" means any of the following:

(a) Cable television telecommunications service providers.

(b) Pay telephone service providers.

(c) Telecommunications resellers or resellers.

(d) Radio common carriers.

(f) Any other telecommunications provider if the commission finds that the service offered by the telecommunications provider is available from other telecommunications providers within this state directly or indirectly to the public.

(lg) "Basic local exchange service" means the provision to residential customers of an access facility, whether by wire, cable, fiber optics or radio, and essential usage within a local calling area for the transmission of high-quality 2-way interactive switched voice or **data** communication. "Basic local exchange service" includes extended community calling and extended area service. "Basic local exchange service" does not include additional access facilities or any discretionary or optional services that may be provided to a residential customer. "Basic local exchange service" does not include cable television service or services provided by a cellular mobile radio telecommunications utility or any other mobile radio telecommunications utility.

(1 j) "Basic message telecommunications service" meanslong distance toll service as provided on January 1. 1994, on a **direct–** dialed, single-message, dial-l basis between local exchanges in this state at tariff rates. "Basic message telecommunications service" does not include any wide-area telecommunications service, **800–prefix** service, volume, dedicated, discounted or other interoffice services or individually negotiated contracts for telecommunications service.

(1 m) *"Broadcast service" means the one-way transmission to the public of video or audio programming regulated under 47 USC 301 to 334 that is provided by a broadcast station, as defined in 47 USC 153 (dd), including any interaction with a recipient of the programming as part of the video or audio programming offered to the public.

(1 p) "Cable television service" means the one-way transmission to subscribers of video programming regulated under 47 USC 521 to 559 that is provided by, or generally considered comparable to programming provided by, a television broadcast station or other programming services that make information available to all subscribers generally and includes any subscriber interaction required for the selection of video programming or other program services.

(1 **r)** "Cable television telecommunications service provider' means a person who provides one or more telecommunications services but who, during **the** previous taxable year, received at least 90% of his or her gross income in the particular television franchise area in which telecommunication services are provided from the operation of a cable television system subject in whole or in part to 47 USC 521 to 559.

(2m) "Commission" means the public service commission.

(3) "Indeterminate permit" means any grant, directly or indirectly, from the state to any public utility of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of any public utility service.

(3e) "lnterlata" means between local access and transport areas.

(3r) "Intralata" means within the boundaries of a local access and transport area.

(4) "Municipality" means any town, village or city wherein property of a public utility or any part thereof is located.

(4m) "Pay telephone service provider" means a person who owns or leases a pay telephone located on property owned or leased by that person and who otherwise does not offer any telecommunications service directly or indirectly to the public.

(5) "Public utility" means every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. "Public utility" does not include **a** cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water to its members only. "Public utility" includes any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains and any person, except a governmental unit, who furnishes services by means of a sewerage system either directly or indirectly to or for the public. "Public utility" includes a telecommunications **utility.** "Public utility" does not include a holding company, as defined in s. 196.795 (1) (h), unless the holding company furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas. "Public utility" does not include any company, as defined in s. 196.795 (1) **(f),** which owns, operates, manages or controls a telecommunications utility unless the company furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas. "Public utility" does not include a cellular mobile radio telecommunications utility.

(5m) "Radio common carrier" means a common carrier in the domestic public land mobile radio service licensed by the federal communications commission under 47 CFR 21 .O to 21.909 or 22.900 to 22.921 to receive and transmit signals from transmitters within a specified geographic area.

(6) "Railroad" has the meaning given under s. 195.02.

(7) "Service" is **used** in its broadest and most inclusive sense.

(8) "Small telecommunications utility" means any telecommunications utility or a successor in interest of a telecommunications utility that provided landline local and access telecommunications service as of January 1, 1984, and that has less than 50,000 access lines in use in this state.

(8m) 'Telecommunications carrier" means any person that owns, operates, manages or controls any plant or equipment used to furnish telecommunications services within the state directly or indirectly to the public but does not provide basic local exchange service, except on a resale basis. "Telecommunications carrier" does not include an alternative telecommunications utility, a cellular mobile radio telecommunications utility or any other mobile radio telecommunications utility.

(8p) '"Telecommunications provider" means any person who provides telecommunications services.

(9) 'Telecommunications reseller" or "reseller" means a telecommunications utility **that** resells message telecommunications service, wide-area telecommunications services or other telecommunications services which have been approved for reselling by the commission.

(9m) '"Telecommunications service" means the offering for sale of the conveyance of voice, data or other information at any frequency over any part of the electromagnetic spectrum, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such communication and including the regulated **sale of** customer premises equipment. 'Telecommunications service" does not include cable television service or broadcast service.

(10) 'Telecommunications utility" means any person, corporation, company, cooperative, partnership, association and lessees, trustees or receivers appointed by any court that owns, operates, manages or controls any plant or equipment used to furnish telecommunications services within the state directly or indirectly to the public. 'Telecommunications utility" does not include a telecommunications carrier.

(12) 'Transmission facility" means any plant or equipment used to carry telecommunications services by wire, optics, radio signal or other means.

(13) "Wide–area telecommunications service" means the offering of message–based telecommunications service using a

CHAPTER 196.

REGULATION OF PUBLIC UTILITIES.

196.01 Definitions. As **used in chs. 196 and 197, unless the context requires otherwise :**

(1) "Public utility" means and embraces every corporation, company, individual, association, **their lessees, trustees or receivers appointed by any court, and every sanitary** district, town, **village or city that may own, operate, manage or control any toll bridge or any plant or equipment or any part of a plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery or**

furnishing of heat, light, water or power either directly or indirectly to or for the public. No co-operative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water to its members only shall be deemed a public utility under this. definition. The term "public utility" as herein defined includes any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains. Any privately owned public utility which furnishes sewer services or sewer facilities may elect to have the public service commission establish suitable and proper rates for its services.

(2) "Municipal council" means and embraces the common council or the sanitary commission or the town or village board of any town, village or city wherein the property of the public utility or any part thereof is located.

(3) "Municipality" means any town, village or city wherein property of a public utility or any part thereof is located.

(4) "Service" is used in its broadest and most inclusive sense,

(5) "Indeterminate permit" means and embraces every grant, directly or indirectly, from the state to any public utility, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of any public utility service, and such permit shall continue in force until the municipality shall exercise its option to purchase, or until it shall be otherwise terminated according to law.

(6) "Railroad" has the meaning attributed to it by section 195.02.

History: 1961 c. 60.

196.02 Commission's **powers. (1) The** commission is vested with power and jurisdiction to supervise and regulate every public utility in this state? and to do all things necessary and convenient in the exercise of such power and jurisdiction.

(2) The commission shall provide for a comprehensive classification of service for each public utility, and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility is required to conform its schedules of rates, tolls and charges to such classification.

(3) The commission shall have power to adopt reasonable rules and regulations relative to all inspections, tests, audits and investigations.

(4) (a) The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and may obtain from any public utility all necessary information to enable the commission to perform its duties.

(b) Each public utility shall furnish to the commission in such form and at such times as the commission shall require, the following information respecting the identity of the holders of its voting capital stock, in order to enahle the commission to determine whether such holders constitute an affiliated interest within the meaning of this chapter: The names of each holder of one per eentum or more of the voting capital stock of such public utility; the nature of the property right or other legal or equitable interest which the holder has in such stock; and any other similarly relevant information which the commission shall prescribe and direct.

(e) In the event any public utility shall fail to furnish the commission with information required of it by the commission, the commission may issue an order directing the delinquent public utility to furnish such information forthwith, or to show good cause why such information cannot be obtained. Failure of any public utility to comply with such order of the commission shall be deemed a violation of this chapter, within the meaning of section 196.66.

(5) The commission or any commissioner or any person employed by the commission for that purpose shall, upon demand, have the right to inspect the hooks, accounts, papers, records and memoranda of any public utility, and to examine, under oath, any officer, agent or employe of such public utility in relation to its husiness and affairs. Any person other than one of said commissioners, who shall make such demand, shall produce his authority to make such inspection.

(6) The commission may require, by order or subpoena, served on any public utility as a summons is served in circuit court., the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said public utility without the state, or verified copies in lieu thereof, if the commission shall so order. Any public utility failing or refusing to comply with any such order or subpoena shall, for each day it shall so fail or refuse, forfeit not less than fifty dollars nor more than five hundred dollars.

CHAPTER 196.

REGULATION OF PUBLIC UTILITIES.

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furnishing of heat, light, water or power either directly or indirectly to or for the public. No co-operative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water to its members only shall be deemed a public utility under this deflnition. The term "public utility" as herein defined includes any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains. Any privately owned public utility which furnishes sewer services or sewer facilities may elect to have the public service commission establish suitable and proper rates for its services.

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(4) "Service" is used in its broadest and most inclusive sense,

(5) "Indeterminate permit" means and embraces every grant, directly or indirectly, from the state to any public utility, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of any public utility service, and such permit shall continue in force until the municipality shall exercise its option to purchase, or until it shall be otherwise terminated according to law.

(6) "Railroad" has the meaning attributed to it by section 195.02.

History: 1961 c. 60.

196.02 Commission's powers. (1) The commission is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

(2) The commission shall provide for a comprehensive classification of service for each public utility, and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility is required to conform its schedules of rates, tolls and charges to such classification.

(3) The commission shall have power to adopt reasonable rules and regulations relative to all inspections, tests, audits and investigations.

(4) (a) The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and may obtain from any public utility all necessary information to enable the commission to perform its duties.

(b) Each public utility shall furnish to the commission in such form and at such times as the commission shall require, the following information respecting the identity of the holders of its voting capital stock, in order to enable the commission to determine whether such holders constitute an affiliated interest within the meaning of this chapter: The names of each holder of one per centum or more of the voting capital stock of such public utility; the nature of the property right or other legal or equitable interest which the holder has in such stock; and any other similarly relevant information which the commission shall prescribe and direct.

(c) In the event any public utility shall fail to furnish the commission with information required of it by the commission, the commission may issue an order directing the delinquent public utility to furnish such information forthwith, or to show good cause why such information cannot be obtained. Failure of any public utility to comply with such order of the commission shall be deemed a violation of this chapter, within the meaning of section 196.66.

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WISCONSIN TRACTION, LIGHT, HEAT & POWER CO. v. GREEN BAY & MISSISSIPPI CANAL CO. et al.

(Supreme Court of Wisconsin. Oct. 20, 1025.)

1. **Property ⟸5—Public utility's real estate personalty.**

That which in other ownership would be real estate is, when owned and used by a public utility, personal property.

2. **public service commissions ⟸6—Determination of question whether corporation is public utility not dependent on corporation's attitude or that of railroad commission; "public utility."**

Determination of question whether a corporation is a public utility, as defined by St. 1923, § 196.01. is not dependent on attitude which corporation may itself assume by either submitting to or refusing to submit to jurisdiction or control of railroad commission, nor whether such commission has assumed control and jurisdiction or foiled or refused so to do.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

3. **Public service commissions ⟸6—No precise formalities to be undergone before corporation becomes public utility.**

There are no precise formalities which must be undergone before a corporation becomes a public utility, and default in which is an insuperable barrier to its becoming such.

4. **Navigable waters ⟸4 — State trustee of navigable waters for people.**

The state. under ordinance of 1787 and Constitution, is a trustee of the navigable waters within its confines, not merely for people of this state, but for the United States, and federal authority is paramount.

5. **Waters and water courses ⟸271—Corporation furnishing and selling water power in effect dedicates such to public use.**

When a corporation enters field of furnishing and selling water power, created by dams in the state's navigable waters, it. in effect. dedicates such to public use. especially in view of Laws 1915. c. 380, placing subject-matter of Milldam Act under control of railroad commission.

6. **Eminent domain ⟸47(I)-Canal company owning right to surplus water of river and furnishing hydroelectric power to public held "public utility," so that its property was protected from condemnation.**

Canal company. whose valuable asset was right to own and use surplus water of a river. subject to primary right of United States government to regulate and control amount thereof as needed for navigation purposes. rather than its real estate adjacent to the river, *held* to constitute a "public utility" within St. 1923, § 196.01, especially where it undertook to furnish directly or indirectly hydroelectric power for lighting and heating purposes to the public. and hence its property was protected from condemnation proceedings by another public utility under sections 32.013220.

Appeal from Circuit Court, Outagamie County; Edgar V. **Werner, Judge.**

In the matter of the **application of** the Wisconsin Traction, Light, Heat & Power Company for condemnation of property belonging to the Green Bay & Mississippi Canal Company and others. From *an* order granting the relief prayed for. and from an Order denying defendant's motion to set such order aside. defendant appeals. Reversed and cause remanded, with tlirections.

The petitioner, respondent here? Wisconsin Traction, Light, Heat & Power Company, hereinafter called the Traction Company, institutetl condemnation proceedings under the eminent domain statute, seeking condemnation of certain lands and water powers appurtenant thereto, and certain easements, estates, or interests therein, for its purposes in the operation by it as a public utility of a street and interurban railway, and furnishing electric light and power to the public. The petition in said matter was verified July 14. 1924, and notice of hearing on the same was served on the appellant herein August 9. 1024, and 'hearing had in September, 1924. The real estate involved was a narrow strip about 1,600 feet long in the city of Appleton bordering on the Fos river, the United States dam in said river, and the Unitecl States canal.

The dam here in question is one of Several on the Fox river which are kept Up and maintained by the United States government for the declared purpose of aiding the navigation of said river, in which clams the Green Bay & Mississippi Canal **Company, hereafter** called the Canal Company, has an interest, such interests being based upon the reservations contained in a certain deed of September 18, 1872, by the Canal Company to the United States government. A history of the transactions relating to the situation of the Canal Company and its predecessor in title with the United States government, the state of Wisconsin and others, may be found in Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 143 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004; Green Bay & M. Canal Co., v. Patten Paper **CO.**, 172 U. S. 58, 19 S. Ct. 97, 43 L. Ed. 364 ; Id., 173 U. S. 179, 19 S. Ct. 316, 43 L. Ed. 658 : Green Bay & M. Canal Co. v. Kaukauna Water Power Co., TO Wis. 635. 35 s. W. 529. 36 N. W. 828 ; Green Bay & M. Canal Co. v. Kaukauna Water Power Co.. 90 Wis. 370. 61 N. W. 1121. 63 S. W. 1019. 2s L. R. A. 443. 48 Am. **St.** Rep. 937; Patten Paper Co. v. Green Bay & M. Canal Co.. 104 Wis. 24, 83 N. W. 1119.

The conveyance with its reservations by the Canal Company to the United States government in 1872, so far as here material, is as follows:

"In consideration of the sum of one hundred and forty-five thousand dollars paid by the United States of America, the said party of the second part the receipt whereof is hereby acknowledged, the Green Bay & Mississippi Canal Company, the said party of the first part, hath granted, bargained and sold and by these presents doth grant, bargain and sell unto the said United States of America, the party of the second part, the following described property rights, franchises, etc., situate in the state of Wisconsin, and described as follows, to wit: All and singular its property and rights of property in and to the line of water communication between the Wisconsin River aforesaid and the mouth of the Fox River, including its locks, dams, canals and franchises saving and excepting therefrom and reserving to the said party of the first part the following described property rights and portion of franchises, which in the opinion of the secretary of war and of Congress are not needed for public use, to wit: First, all of the personal property of said company, and particularly all of such property described in the list or schedule attached to the report of said arbitrators and now on file in the office of the secretary of war to which reference is here made whether or not such property be appurtenant to said line of water communication. Second, also all that part of the franchises of said company, viz., the water powers created by the dams, and by the use of the surplus waters not required for the purpose of navigation with the rights of protection and preservation appurtenant thereto and the lots pieces or parcels of land necessary to the enjoyment of the same and those acquired with reference to the same all subject to the right to use the water for all purposes of navigation as the same is reserved in leases heretofore made by said company."

In 1901 a lease was executed by the Canal Company to the Traction Company of a certain portion of the real estate in question, with a grant of the right to use for hydraulic power one-half of the flow of Fox river not required for navigation at the upper or Grand Chute dam in Appleton (the United States government dam hereinbefore mentioned), less and excepting therefrom a flow of 9,500 cubic feet of water per minute previously deeded to Appleton Edison Light Company, Limited, and other small quantities theretofore leased. The maximum period in said lease was 100 years, and requiring notices of option on the part of the lessee at IO-year intervals, one of which was given in 1921. The questions raised and discussed as to the meaning and effect of certain of the clauses therein contained we do not set out because not passed upon or decided here,

The upper portion of the real estate here involved, that is, the portion abutting on the United States government dam, is, under the terms of the lease, subject to be withdrawn from the same upon the Canal Company acquiring the right to use or lease more than one-half of the flow of said river at such dam; such other one-half being controlled by the Kimberly Clark Company since 1845.

Beyond the property covered by the terms of the lease, but within the area proposed to be taken by the condemnation proceedings, is a strip belonging to the Canal Company, but which has been and is now occupied and used by the Traction Company as tenant at will, and beyond that again, and at the extreme end of the strip, is a piece of land theretofore leased by the Canal Company to another corporation whose rights thereto however have been acquired by the Traction Company, but which lease expires by its terms May 26. 192'7.

After entering into possession the Traction Company invested between $900,000 and $1,-000.000 in flumes, tail races, electrical equip ment, boiler house, generators, switchboards, substations, handling equipment, railroad tracks, coal yards, etc., and used a combined steam and water power with the usual kind of machinery and equipment in a modern public utility, and is now serving the cities of Neenah and Menasba with street railway service and 21 neighboring municipalities with electric light and power, and is planning large and extensive additions to its plant in order to extend and enlarge its service.

It appears from the testimony that by virtue of the transaction with the United States government in 1572 the Canal Company had an interest in 11 power sites along the Fox river, all subject to the paramount right and control of the United States government as above indicated. Two of such sites were as yet undeveloped, and on the remainder the Canal Company has 11 customers, including the Traction Company; the arrangement between such several customers and the Canal Company being all by private contract or lease, some of which have still long periods of time to run. It owns some water wheels at the lower site in Appleton in the plant of the Interlake Pulp & Paper Company, one of its lessees. Since about 1907 OR one of the sites in the city of Kaukauna it has owned buildings, generators, and wheels, all of which were *on* February 1, 1923, leased by the Canal Company to the city of Kaukauna, a municipal corporation and public utility, for public utility purposes, specifying certain real estate on the side of the river at Kaukauna, together with the hydraulic canal leading from the pond created by the United States government dam across the Fox river at said city, together with the buildings on said real estate, "including the hydroelectric power plant on said lots known as the 'Badger Plant,' " together with machinery and personal property, including the water wheels, gates, flumes, bulkheads. etc., used or useful in the operation of said plant and belonging to the lessor, together with the "right to take and use through the said canal and Badger plant for hydraulic, hydroelectric, or other powers, so much of the flow of the Fox river at all stages as it comes to the dam as may be in excess of that taken under the dominant rights of the United States, etc.

The agreed rent was based upon designated amounts per kilowatt hour for all energy generated and used by the lessee from the two generators, or any additional water turbines and electrical generators as may be installed. It also provided that upon the city obtaining an increase in rates for electric service it will increase the rent in said lease specified by 50 per cent. of the net profit derived from such increase, and the city hound itself to furnish the lessor with annual reports of increases in rates. It also provided that in the event of the development, during the term of said lease, of any of the presently undeveloped water powers of the Canal Company "for the purpose of generating hydroelectric power, and selling the same as a public utility," then the city was. upon two years' notice to surrender the lease, etc., with certain rights reserved to the city.

A further provision gave to the Canal Company a voice as to the person or persons employed in the active management and operation of the premises, and required the dismissal by the lessees of persons found to be so unsatisfactory to the lessor.

In June, 1924, and prior to the commencement of these proceedings, the executive committee of the board of directors of the Canal Company adopted a resolution reciting, among other things, that the advantages of manufacture and sale of electrical power are now obvious and established: that the best interests of the company will be advanced by the adoption of a policy which will ultimately place the company in the electrical power field, and declaring that the policy of the Canal Company for the ensuing decade shall be: (1) The manufacture and sale of electrical power; (2) to build electrical power plants and sell their undeveloped water power sites; (3) to positively but gradually, and with due consideration of the value of the present and profitable relations with its several tenants, regain the control and use of the power sites now under direct lease, to use such sites so regained in co-operation with other properties of the company in the development of one general interconnected and intersupported electrical power system. At a special meeting of the directors of the Canal Company August 5. 1924. prior to the service upon the Canal Company of the notice of the hearing in these proceedings, it was declared to be the policy of the company:

(1) To develop present undeveloped powers of the company; (2) to develop all powers electrically; (3) to acquire possession of the properties now under lease, as the same may be done from time to time; (4) to lease all hydraulic powers, preferably to public utilities ; (5) to provide that all leases expire at about the same time; (6) thus permitting the Canal Company to take over and directly or indirectly operate the entire property as a single hydroelectric unit, preferably as a public utility. And also that it proceed to develop, if it can be accomplished along certain lines, one of the power sites (Rapide Croche) into a hydroelectric power station, and that the executive committee immediately enter into negotiations with the city of Kaukauna or some other prospective tenant with a view of leasing such power station when completed and prepare immediately in detail the cost of such proposed development. Estimates of the probable cost of machinery and equipment were made and formal bids were received for two water wheels.

The testimony further indicates that some time in the summer of 1924 an offer was made to the Railroad Commission on behalf of the Canal Company to subject itself to the jurisdiction of that Commission as a public utility. At no time prior to the hearing, however. had reports been filed by the Canal Company as a public utility.

It further appeared that in January, 1908. the Railroad Commission suggested to the Canal Company that it file its rates and charges with the Commission pursuant to the then newly enacted public utility law. Further correspondence w-as had on the subject, and the late Ephraim Mariner, then president of the company, on February 22, 1908, went into considerable detail by letter detailing the situation of the company as to its leases, and suggesting that it is not a public utility.

The petition for condemnation was in the usual form, and prayed for a hearing and a determination of the necessity for such taking. The defendant by answer among other separate defenses asserted that there was a want of jurisdiction by reason of the failure of the petitioner first obtaining from the Railroad Commission a certificate that pub lic convenience and necessity required the aequisition of defendant's property, referring to sections 32.04 and 31.15 Stats., and that it has. used and operated said property and is using and operating it as a public utility, and that if defendant and the premises are subject to the jurisdiction of the state of Wisconsin, then as to the property so leased, occupied. and used by the petitioner the defondant is a public utility by reason of chapter 396 of the Statutes of Wisconsin, and for that reason the court has no jurisdiction, and the petitioner has no right. power, or authority to condemn the property.

The hearing resulted in a determination by the judge granting the relief prayed for by petitioner. and from the order so determining, as well as from a subsequent order denying defendant's motion to set aside said former order. the Canal Company has ap pealed.

Lines, Spooner & Quarles, of Milwaukee, and Julius P. Frank, of Appleton, for appellants.

H. L. Ekern, Atty. Gen., C. A. Erikson, Deputy Atty. Gen., and Suel 0. Arnold, Asst. Atty. Gen., amici curiæ.

Olwell & Brady, of Milwaukee, for respondent.

ESCHWEILER, J. (after stating the facts as above). The Traction Company, the petitioncr below, concededly a public utility, sought to condemn certain property and rights of the appellant corporation, the Canal Company, under an exercise of the right of eminent domain, through the proceedings outlined in chapter 32, Stats. The appellant challenges the right of the Traction Company so to clo on the ground that the Canal Company is also a public utility and protected from condemnation proceedings by section 32.03, found in the same chapter, and which provides that the general power of condemnation in that chapter shall not estend, unless specifically conferred by law, to the condemnation by one public utility of the property of another.

[1] By chapter 499, Laws of 1907, enacting sections 1797m1 to 1797m109 (now found as section 106.01 et seq.), public utilities were defined, control and regulation thereof assumecl by the state, and the Railroad Commission rested with certain jurisdiction or power over them. The broad field intended to be covered and the wide sweep and scope of the powers to be thereafter exercised by the state over those who dedicate their property to public service has been often passed upon by this court, and nothing need be non added to what has been said as to such field and power, for instance in Calumet Service Co. v. Chilton, 148 Wis. 334, 337, 338, 135 S. W. 131, or perhaps to cite as illustrating the extent to which this new public policy has changed the old theories as in even sueh a substantial and fundamental branch of the law as that of real estate that it is now the law that that which in other ownership would be real estate is, n-hen owned and used by a public utility, personal property. Ireland v. T. L. T., 185 Wis. 148, 200 N. W. 643: Superior W.. L. & P. Co. v. Superior, 174 Wis. 257, 296, 181 N. W. 113, 183 9. W. "54.

A public utility, as defined in section XN.01, so far as pertinent to the situation here, is any corporation that may own, operate, manage or control any plant or equipment, or any part of a plant or equipment within the state, for the production, transmission, delivery, or furnishing of hent, light, water, or power either directly or indirectly, to or for the public.

[2] The question whether a corporation such as is the Canal Company is or is not a public utility in this state is one to be ultimately determined by the judiciary by applying the statutory definition of a public utility to the facts concerning and the physical situation of any such company. The solution of the question is not dependent upon the attitude which the corporation may itself assume by either submitting to or refusing to submit to the jurisdiction and control of the Railroad Commission; nor again, upon whether or not the Railroad Commission has as yet assumed control and jurisdiction or failed or refused so to do. See Schumacher v. 11. R. Com., 185 Wis. 303, 201 S. W. 241.

It is very clear that under the record as here presented the valuable asset of the Canal Company is the right it owns and holds to use the surplus water power of the Fos river, subject to the primary right of the United States government to regulate and control the amount thereof as needed for navigation purposes, rather than its real estate adjacent, to the river. It was this very thing that in 1901 the Traction Company included in its lease from the Canal Company, it being there designated as the right to use for hydraulic power one-half (less specific reservations) of the flow of the Fox river not required for navigation at the Grand Chute dam, the one here in question, and it is the same that is sought to be condemned by the Traction Company, and which it described in its petition in substantially the same language.

It is this water power right, the possibility of generating hydroelectric energy, that the Canal Company has declared its intention, as set forth in the statement of facts, from now on, or for the coming decade at least, shall be placed in the electric power field.

[3] There are no precise formalities which must be undergone before a corporation becomes a public utility and default in which is an insuperable barrier to its becoming such. As pointed out in Kilbourn City v. S. W. P. Co., 149 Wis. 168, 180, 181, 135 N. W. 499, it is not necessary that service by such corporation shall actually begin before its duties and liabilities as such arise or are imposed, otherwise, as in that case pointed uut, it might contract prior to actual service to evade the lam as to uniformity of rates.

[4] Whether the Canal Company by virtue of its contract with the United States in 1872 and the prior acts of our Legislature is in a better or different position, has a higher or different title to surplus flow of the Fox river than are or have been water power companies on other of the navigable rivers of our state, need not be now considered, for in any event, as is pointed out in Re Crawford County L. & D. Dist., 182 Wis. 404, 409, 196 S. W. 874, the state, under the ordinance of 1787 and our Constitution, is a trustee of the navigable waters within our confines, not merely for the people of this state but of the United States, and that the federal authority is paramount, and citing Economy L. & P. Co. v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. Ed. 847; the latter, an interestiug case holding that though actual navigation on the Desplaines river in Illinois had been

abandoned for 100 years, nevertheless an obstruction there, even though to utilize its water power, but without prior federal consent, **must be removed.**

From the earliest days of our statehood the state has assumed control through the Milldam Act (Rev. St. 1858, c. 56) of the utilization of the water power in its rivers. whether always recognizing the paramount authority of the United States it is immaterial to now inquire, for such was always there, and, as held in Economy L. & P. Co. v. United States. 256 U. S. 113, 41 S. Ct. 409, 65 L. Ed. 847. supra, such paramount control existed before as well as after Congress passed definite laws on the subject.

The state has justified the giving of the **somewhat** drastic power involved in the exercise of eminent domain to those seeking to build dams and to overflow their neighbor's land because of the public interest in the utilization of such latent power. Allaby v. Mauston E. L. S. Co., 135 Wis. 345. 351, 116 N. W. 4, 16 L. R. A. (N. S.) 490: McDonald v. Apple River P. Co.. 164 Wis. 450, 456, 160 N. w. 166.

[5, 6] This power, when vested in a corporation, to control the water power. the so-called white coal of the state. is coupled with an authority and duty separate and quite distinct from ordinary corporate authority as is pointed out in Wis. River Imp. Co. v. Pier, 137 Wis. 325, 337, 118 N. W. 857, 21 L. R. A. (N. S.) 535. When such a company enters the field of furnishing and selling the water power created by dams in our navigable waters, it in effect dedicates such to **a** public use. Pier. Case. supra, p. 336 (118 N. W. 857). **When** by chapter 380 of 1915 the Legislature placed the subject-matter of the Milldam Act under the control of the Railroad Commission it still more emphasized its intention of broadening the scope of public interest in its water power. We think therefore that for these reasons the Canal Company, at the time when the condemnation proceedings here were started, was a public utility within the meaning of section 196.01, Stats.

There is still another and substantial reason why the Canal Company is within the field of public utilities. Its contract with the city of Kaukauna on February 1. 1923. the terms of which hare been set out in the foregoing statement of facts. was of such a nature **that the Canal Company thereby placed** itself in the position of one furnishing **hydroelectric energy to the public. It leased an already erected and evidently then operating** hydroelectric plant to the **city of Kaukauna.** That the city was described in the lease as **a** "public utility" as well as municipality, and the Canal Company was described merely as a corporation and not as a "public utility," could not change the legal effect. The Canal Company reserved plenary power over the employees who were to run the plant, **and** had an absolute veto on their continued employment although not paying their wages. The rental was measured per electrical energy generated. Very significant features are the provisions that in case the city of Kauknuna obtained an increase in rates for electric service from its customers, the public, it must increase the rent to the Canal Company by 50 per cent. of the net profit derived from such increase, and that the lease expressly provided for the contingency of the Canal Company becoming openly and beyond question a public utility. We consider this lease to be an unequivocal act by which the Canal Company undertook to furnish. directly or indirectly, hydroelectric power for lighting and heating purposes to the public, and by so doing the Canal Company, willy-nilly, was **a** public utility. It was as clearly a public utility as was the lessor in **W. E.** P. Co. v. Town of Lake. 186 Wis. 199, 202 N. W. 195, where the builder and owner of the power plant leased all the power therein generated to a street car company, which latter and not the owner actually operated the plant; that case however involving the income tax law rather than the statutes here considered.

Therefore. in view of the record as presented. we reach the conclusion that the Canal Company at the time of the institution of the condemnation proceedings being a public utility within the purview and meaning of the statute, the objection interposed to the condemnation by another public utility of its, the Canal Company's, property, should have been sustained and the proceedings in **the circuit** court dismissed. This determination as to its immunity from these proceedings makes it unnecessary to pass upon the many other questions presented and argued, and we do not decide them.

Orders reversed, and the cause remanded, with directions to dismiss the proceedings.

ploy& to report at the toolhouse in the morning, secure their tools, and proceed therefrom to a point on the flll where they were expected to work during the day. That in thus proceeding the employé was performing services growing out of and incidental to his employment is not debatable.

It is contended here, however, as it was in the Monroe Case, that the employé did not take the route provided for him by the employer, in this case, the cinder roadway. There is no evidence that the employ& were directed to take the cinder roadway, or that they were prohibited from walking on the railroad tracks. As stated, the evidence shows that they took either route with the acquiescence of those in charge of the work. It being necessary for the deceased to go from the toolhouse to his place of work, and having come to his death while so proceeding along a customary route, and one not prohihited, it follows that at the time of the accident he was performing services growing out of and incidental to his employment.

Judgment affirmed.

SCHUMACHER et' al. v. RAILROAD COMMISSION OF WISCONSIN.

(Supreme Court of Wisconsin. Dec. 9, 1924.)

Electricity ⇐ 11-Neighbors constructing private line to secure electricity held not "public utility."

Individuals who undertook to render no public service, but constructed a private line bv which they were enabled to secure electric c&rent, *held-not* a "public utility" within St. 1923. § 196.01. and hence Railroad Commission was without jurisdiction to order them to permit their neighbors to share in benefits of such enterprise except on such terms as might be agreed upon.

[Ed. Note.-For other definitions, see Words and Phrases, Second Series, Public Utility.]

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by G. B. Schumacher and others against the Railroad Commission of Wisconsin. From a judgment setting aside an order of the Commission, defendant appeals. Affirmed.

Jurisdiction of Railroad Commission. The Lincoln Highway Light Company is an unincorporated association composed of twelve members residing along the Shoto Road, a highway running north from the city of Manitowoc. The city of Manitowoc operates a public utility and has a practice of attaching its lines at the city limits to privately constructed lines extending beyond. The consumers on these privately constructed lines receive current from the city and the city bills for the current so furnished and collects therefor from each of the consumers. In 1920, one Schwantes bad erected such a Line to furnish light and power 'to buildings owned by him. Subsequently others connected with the Schwantes line. Thereafter Schwantes built another and stronger line and the plaintiffs under the name of the Lincoln Highway Light Company purchased the new line. Messrs. Ziebell, Christiansen, and Aastad live upon the Shoto Road, respectively, 200, 500, and 600 feet from the city limits. Each of the members of the Lincoln Highway Light Company had paid $100 as his share of the cost of the erection of said lines. After the plaintiffs had made their connection, Aastad, Christiansen, and Ziebell were invited to join the association, but refused to do so. Up to the time of the filirig of their petition with the Railroad Commission, they were not connected with the new line. The company offered then to permlt them to connect upon payment of $50. This offer was refused. The city offered to give them service if they would build the necessary line to the city limits as the other nonresident consumers had done. This they refused to do. Aastad, Christiansen, and Ziebell claimed that the Lincoln Highway Light Company was a public utility and that it was obliged to furnish them with light and power. They petitioned the Railroad Commission. There was a hearing and the Commission ordered that connection be made upon a rental basis of $6 per year, the Commission retaining jurisdiction for such further order as might be necessary should the recommendation not be accepted within a reasonable time. There was a rehearing and an order reaffirming its finding. This action was begun to review the order of the Commission granting Ziebell. Aastad, and Christiansen the right to connect upon payment of the rental of $6 per year each. From the judgment setting aside the order of the Commission, the Railroad Commission of Wisconsin appeals.

Herman L. Ekern, Atty. Gen., C. A. Erikson, Deputy Atty. Gen.. and E. L. Wingert, Law Examiner, of Madison, for appellant.

E. L. Kelley, of Manitowoc, for respondents.

ROSENBERRY. J. (after stating the facts as above). The only issue involved in this ease is whether or not the Railroad Commission had jurisdiction tv make the order reviewed. The trial court was of the opinion that under the case of Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. (N. S.) 510, the plaintiffs here were not a public utility and that the Railroad Commission had no jurisdiction. The court said:

"The plaintiffs are in no sense a public utility. They are only a group of neighbors who have co-operated to build a line to supply themselves with electric current, with no purpose of making a profit or of serving the public

generally or any portion of the public outside of those who voluntarily band themselves together to aid in- this purely neighborhood co operative undertaking. The Legislature never contemplated that such an association would be considered a public utility, subject to the regulation of the Railroad Commission."

In this view we concur. The plaintiffs enjoy no monopoly as the evidence clearly shows. If this neighborhood association is a public utility, then where three or four neighbors band together to share the expense of carrying their milk to a creamery Or cheese factory, they become common carriers. The original petitioners herein obstinately refused to join in the enterprise upon the same basis upon which their neighbors entered and seek to gain the advantage of this neighborhood enterprise without sharing in its burdens and responsibilities. The trial court was right in holding that this case was Clearly ruled by the case of Cawker v. Meyer, supra.

The definition of "public utility" found in section 196.01, St. 1923, must be read in connection with the subject-matter to which it refers. The Pipe Line Cases, 234 U. S. MS, 34 S. Ct. 956, 58 L. Ed. 1459, are cited to our attention as decisive of the question presented here. It was there held in the matter of the Uncle Sam Oil Company that a corporation operating a pipe line for the sole purpose of transporting oil from its own well to its refinery is not a utility.1 The character of the act is not changed because two or three join in it. It is where there is a monopoly or a service is offered to the public that that which was before private property becomes impressed with a public use and is brought within the field of regulation as a public utility. The plaintiffs undertook to render no service but constructed a private line by means of which the city of Manitowoc was enabled to render a service to them. Their neighbors have the same right, but they have no right to share in the benefits of a purely private enterprise except on such terms as may be agreed upon between them and the plaintiffs.

Judgment affirmed.

(185 Wis. 218)

AMERICAN EXCH. BANK v. BORNSTEIN et al.

(Supreme Court of Wisconsin. Dec. 9. 1924.)

I. Compositions with creditors ⊂=20—Credifor's acceptance of dividend, under composition in which he did not join, held not to operate as accord and satisfaction.

Creditor's acceptance of dividend, declared under composition agreement with insolvent partnership, *held* not to operate as accord and satisfaction of claim for money procured by false financial statements where creditor refused to aim agreement and stated it would accept dividend only as a mere distribution of assets of insolvent, and not in satisfaction of claim.

2. Compositions with creditors ⊂=20—Credifor's acceptance of dividend declared under composition held not to estop him from asserting whole claim less dividend.

Creditor's acceptance of dividend, declared under composition agreement with insolvent partnership, *held* not to estop him from asserting whole claim less dividend received, where, on presentation of composition agreement, creditor refused to sign. and clearly stated it would accept payment under the composition only as a mere distribution of assets, and not in satisfaction of claim.

Appeal from Circuit Court, Milwaukee County: Walter Schinz, Judge.

Action by the American Exchange Bank against Solomon Bornstein and another. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

This action was brought by the plaintiff to recover from the defendants $16,875.49 alleged to have been procured from the plaintiff by means of false financial statements. The case was tried to the court and jury. After the plaintiff had offered a considerable amount of evidence with respect to the making of the financial statement8 and their falsity, the court stopped the introduction of further evidence upon that issue and held that the plaintiff was concluded by the fact that it had accepted its pro rata share of the proceeds of the assets of the defendants in a liquidation proceeding. It appears that after the insolvency of the defendants became known and on the 15th day of August, 1922, the defendants entered into an agreement with one L. E. Flchaux as trustee. By the terms of this instrument, the defendants conveyed to Flchaux all of their property under an agreement that Flchaux was to sell and dispose of the same for the benefit of all of their business creditors after paying the expenses of sale and other agreed items of expense. The second clause of said composition agreement is a8 follows :

"It is agreed by all creditors who may join herein to give their consent hereto, that all moneys received, under the within trust, if the same is carried out by final liquidation, by sale of the property, together with any other moneys received hereunder, shall, if less than necessary to pay in full their respective claims or any unpaid balance hereof, nevertheless, be received and accepted by the said creditors in full accord and satisfaction of all their respective claims and demands against said parties of the first part to the same extent, and in the same manner and with the same legal effect as would be accomplished upon a discharge, under the laws of the United States, relating to bankruptcy. This said agreement, however, is executed by the said Sol. Bornstein and Morris

[1] See Michigan Public Utilties Com'n et al. v. Duke, 45 S. Ct. 191, 69 L. Ed. —, decided January 12, 1925.

it is, it must be because it is "a final order affecting a substantial right made in a special proceeding," under subdivision 2, § 3069, Stats. In the instant case no action: is pending, so the proceeding cannot be regarded as a provisional remedy under subdivision 3 of section 3069, for a Provisional remedy must always be in, or connected with, an action. Noonan v. Orton, 28 Wis. 386; Ellinger v. Equitable Life Assurance Society, 125 Wis. 643, 648, 104 N. W. 811; State v. Wisconsin Telephone Co., 134 Wis. 335, 113 N. W. 944; Snavely v. Abbot B. Co., 36 Kan. 106, 12 Pac. 522; 6 Words & Phrases, 5752; 32 Cyc. 742. Clearly, the application under the statute to perpetuate testimony, where no action is pending, is a special proceeding. Section 2596, Stats. That being so, is the order appealed from a final order in such proceeding, and does it affect a substantial right? In our judgment it is neither final nor does it affect a substantial right. It is not final, because section 4133, Stats., provides that before the deposition shall be ordered recorded the court must find that it was taken according to law and the directions contained in the commission. Such finding involves the exercise of a judicial act, an application of rules of law, and the requirements of the commission to the deposition when returned. If it be found not to be taken conformable thereto, it cannot be ordered recorded, and, if not recorded, it cannot be used, since section 4134 provides that only depositions taken and *recorded* under the statute may be used. So, until an order is made by the court directing the deposition to be recorded, judicial action has not terminated. The order allowing the deposition to be taken is merely an intermediate order; the order directing to be recorded is the final one. No appeal lies except from the final order. Jarvis v. Hamilton, 3'7 Wis. 87; In re Schumaker, 90 Wis. 488, 63 N. W. 1050; In re Minnesota & Wisconsin R. Co., 103 Wis. 191, 78 N. W. 753; Maynard v. Town of Greenfield, 103 Wis. 670, 79 N. W. 407; Kingston v. Kingston, 124 Wis. 263, 102 N. W. 577; In re Horicon Drainage Dist., 129 Wis. 42, 108 N. W. 198. In Kingston v. Kingston, supra, the court said: "A final order in a special proceeding. within the meaning of this statute, is one which determines and disposes finally of the proceeding-one which. so long as it stands, precludes any further steps therein." Nor does an order appointing a commissioner to take depositions to perpetuate testimony affect a substantial right. The depositions taken are innocuous till ordered to be, and in fact are, recorded. The judicial act that gives them power to affect a substantial right is the order directing them to be recorded. Until that order is made, the depositions are useless; they can harm no one, for they cannot even be recorded without an order of the court, much less used.

So we conclude t&at the order appealed from is neither a final order in a special proceeding nor one affecting a substantial right, and for that reason the appeal must be dismissed; for if the order is not appealable, this court acquires no jurisdiction to consider the merits. Hyde v. German National Bank of Oshkosh, 96 Wis. 466, 71 N. W. 659; In re Minnesota & Wisconsin R. Co., 103 Wis. 191, 78 N. W. 753.

Appeal dismissed.

CALUMET SERT'ICE CO. v. CITY OF CHILTON.

(Supreme Court of Wisconsin. Feb. 20, 1912. Concurring Opinion, Feb. 23, 1912. Additional Opinion, March 4, 1912.)

(Syllabus by the Judge.)

1. TRIAL (§ 394*)—TRIAL BY COURT-FINDISGS OF FACT—SEPARATE STATEMENT.

Equitable action closed by findings in some 14,000 words. An assignable privilege was granted by a city to do public utility service therein for public and domestic purposes with usual incidental rights. The privilege was exclusive as to city service for a time and preferential thereafter and exclusive for a longer term as to domestic service. The business was established. The entirety was rested in plaintiff before commencement of the action. There were four corporation owners in the chain of title and questions as to some respecting corporate power.-particularly as to the second corporation which. in due form, acquired an indeterminate per&t for the old privilege under chapter 499, Laws of 1907. The exclusive city term had expired but service was continuing. "Thereafter the city sought to enforce conditions of the old privilege; to invade the field claimed to be exclusive, incident to the permit; to establish a business to that end: and incur indebtedness therefor without complying with the public utility law, claiming rights under statutes antedating such law. The impeachment of plaintiff's claimed rights caused it pecuniary loss and prejudiced it in performance of its duties, and made further loss imminent. Except for disturbance thus caused, plaintiff and its predecessors were willing and-competent, substantially all the time. to perform their public utility duties.

The decision involves these points:

Section 2863 of the Code should be reasonably followed below, in the circumstances stated therein, by a decision stating "separately all the facts found."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92-l-926; Dec. Dig. § 394.*]

2. TRIAL (§ 394*) — TRIAL BY COURT — FINDINGS—"FACTS."

"Facts" means pleadable facts.

[Ed. Sate.-For other cases, see Trial, Cent. Dig. §§ 924–926; Dec. Dig. § 394.*

For other definitions. see Words and Phrases, vol. 3, pp. 2638, 2630.1

3. TRIAL (§ 394*) — TRIAL BY COURT — FINDINGS—"SEPARATELY."

"separately" refers to pleadable or pleaded facts. each being required to be covered by a finding confined thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924–926; Dec. Dig. § 394.*

For other definitions, see Words and Phrases, vol. i. pp. 6417, 6418.]

4. TRIAL (§ 395*)—TRIAL BY COURT—FINDINGS—REQUISITES.

A decision under section 2863 of the Code should contain one finding for each actually, or in effect, pleaded fact, upon which the parties depend, phrased in concise, clear, judicial language, avoiding repetition, elaboration, discussion, and evidence or evidentiary facts or circumstances.

[Ed. Note.-For other cases, see Trial, Cent Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

5. FINDINGS OF FACT-COMPLIANCE WITH CODE PROVISION—PURPOSE.

Compliance with the Code, as indicated, ie to be striven for, to minimize unnecessary judicial labor, raise the grade of it, increase judicial efficiency, and promote economy and certainty in the administration of justice.

6. FRANCHISES (§ 3*)—STATUTORY PBOVISIONE—PUBLIC UTILITY LAW.

The sole purpose of chapter 499, Laws of 1907 (sections 1797m1 to section 1797m108, Stats.), was to promote general welfare by affording public utility service directly and indirectly to and for the public, of the highest practicable efficiency, at the lowest practicable rates under the circumstances of each particular case, having regard for existing proprietary interests and reasonable opportunity for municipal ownership on a basis of justice to existing proprietors.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

7. STATUTES (§ 192*)—CONSTRUCTION—GENERAL RULES

Ambiguous parts, if there be any, of the public utility law. should be read in the most reasonably favorable light to effect the manifest purpose, comprehensive definitions of the law being adhered to regardless of technical meaning of terms.

[Ed. Note.-For other cases, see Statutes, Cent. Dig. § 270; Dec. Dig. § 192.*]

8. FRANCHISES (§ 3*)—STATUTORY PROVISIONS—PUBLIC UTILITY LAW.

The basic idea of the public utility law is stated in section 1797m3, thus: "Every public utility is required to furnish reasonably adequate service and facilities," etc. "The charge * * * shall be reasonable and just, and every unjust or unreasonable charge * * * is prohibited and declared unlawful."

[Ed. Note--For other cases, see Franchises, Dec. Dig. § 3.*]

9. FRANCHISES (§ 3*)-STATUTORY REGULATIONS—APPLICATION TO MUNICIPAL CORPORATIONS.

The duty and responsibility indicated in No. 8 applies to municipalities engaged in public utility business.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

10. FRANCHISES (§ 3*)—STATUTORY PROVISIONS---PUBLIC UTILITY LAW.

Those parts of the law, other than the one declaring the purpose, are auxiliary thereto,—a prescription of means for effecting the end aimed at.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

11. FRANCHISES (I 3*) — STATUTORY PROVISIONS—PUBLIC UTILITY LAW.

The dominant means was classification of existing and prospective privileges to do public utility business, making the latter indeterminate and conditionally exclusive and inducing each owner of the former to join the latter as to the scope of the then existing privileges by acquiring an indeterminate permit; thus gathering all into a single class, referable directly to a single source for existence and to a single standard for a measure of right duties? responsibilities; and advantages, i. e. the public utility law, and a single control, the Railroad Commission, subject to the conditions and limitations of such law.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

12. FRANCHISES (§ 3*) — STATUTORY PROVISIONS-"PUBLIC UTILITY."

For detail means, by section 1797m1, the person or persons, natural or artificial. in touch with the public in connection with public utility service, whether as owner, operator, manager, or controller, or private or quasi-public entity, is a public utility. the physical and other things in use, public utility property, and the subject of the service,-a utility,-the term "public utility" being used to characterize the physical situation and condition as to immediate authority over it.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 8, p. 7774.1

13. FRANCHISES (§ 3*) -STATUTORY PROVISIONS-PUBLIC UTILITY LAW.

One, natural or artificial, public or private. municipal or otherwise, answering to the calls of section 1797m1 of the Statutes. viewing the descriptive words in the broadest reasonable sense, and disregarding technical capacity to hold and enjoy in præsenti, was, for regulation and control to effect the end sought, given the status indicated. subject to prescribed duties and responsibilities, with corresponding advantages, all subject to the single control under the single standard.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

14. FRANCHISES (§ 3*)-STATUTORY PROVISIONS—"DIRECTLY OR INDIRECTLY TO OB FOB THE PUBLIC."

"Directly or indirectly to or for the public," includes service whether to a municipality or its inhabitants, or both, or by a municipality for itself or its inhabitants.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

15. FRANCHISES (§ 1*) — STATUTORY PROVISIONS-"FRANCHISE."

A privilege within the scope of No. 14, whether a license, permit, or technically a franchise, is the latter in the statutory sense.

[Ed. Note.-For other cases, see Franchises, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2929–2942; vol. 8, p. 7666.1

16. FRANCHISES (§ 11*) — STATUTORY PROVISIONS—INDETERMINATE PERMIT—"PERPETUAL EXCLUSIVE PRIVILEGE."

An indeterminate permit is a perpetual exclusive privilege within the scope of the grant, subject to the Code of conditions and limitations.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. F, p. 5318.]

17. FRANCHISES (§ 3*) — STATUTORY PROVISIONS—INDETERMINATE PERMIT.

An indeterminate permit duly received for an old privilege is of the same scope as the latter as to the privilege feature, freed from all considerations, limitations, reservations, and control incident prescribed by the municipality as a state agency, including the right of repeal, if any reserved, but subject to the con-

ditions and limitations of the public utility law.

[Ed. Note.—For other cases, see Franchises, Dec. Dig. § 3.*]

18. FRANCHISES (§ 11*) — STATUTORY PROVISIONS—TERMINATION OF FRANCHISE.

The law contemplates all relations created by a municipality between it and the grantee of a franchise and inhering therein as being the mutual creation of the state. through its agent, and the grantee, and subject to termination by the same mutuality.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 11.*]

19. FRANCHISES (§ 11*) - STATUTORY PROVISIONS—INDETERMINATE PERMIT.

The essentials of "public utility" to acquire an indeterminate permit for an old privilege, are referable to section 1797m1 of the Statutes; that of corporate status is satisfied by corporate existence de jure or de facto, referable to Wisconsin written law; that of existing privilege, by ownership of any right from the municipality, whether resting in grant, permit, license, or franchise in the technical sense, either being a statutory franchise; and that of operating under the privilege in præsenti; services offered and affordable, and willingness and ability in that regard, except for reasonable and excusable cessations not involving any purpose to abandon.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 11.*]

20. FRANCHISES (§ 2*) - STATUTORY PROVISIONS—INDETERMINATE PERMIT—CORPORATE POWEB

Want of corporate power referable to defect in organization and-not militating against existence de facto, or referable to limitations of corporate purpose specified in the organic articles, which under ordinary circumstances are only subject to be inquired into by the state, directly, does not affect capacity to acquire an indeterminate permit.

[Ed. Note.-For other cases. see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

21. FRANCHISES (§ 2*) - STATUTORY PROVISIONS—INDETERMINATE PERUIT-CORPORATE POWEB.

The general grant of power under the circumstances specified in section 1797m77 of the Statutes, to acquire an indeterminate permit, by necessary implication was intended to enlarge, if necessary, corporate powers, enabling the organization to legitimately deal with the state in the exchange-of equivalents,-to surrender its rights, whatever they may be, and take and enjoy the one offered in lieu thereof.

[Ed. Note.-For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

22. FRANCHISES (§ 4*) - STATUTORY PROVISIONS—PUBLIC UTILITY LAW.

The privilege, conditional and temporary or otherwise under a grant through municipal agency. to supply a municipality with a particular utilitv. using the public places to that end. in case of-exchange thereof for the indeterminate permit of the statute, retains in the substituted franchise the privilege features, with the added element of perpetuity and the element of exclusiveness, freed from all prior conditions and limitations, but subject to those of the public utility law.

[Ed. Note.-For other eases, see Franchises, Cent. Dig. § 3; Dec. Dig. § 4.*]

23. FRANCHISES (§ 3*) — STATUTORY PROVISIONS—INDETERMINATE PERMIT.

An indeterminate permit as in No. 22, within its scope, as to the municipality for its own service or service by it to its inhabitants, or service to others by any other public utility, is characterized by the elements of perpetuity and exclusiveness. mentioned.

[Ed. Note.—For other cases, see Franchises, Dec. Dig. § 3.*]

24. FRANCHISES (§ 4*) — STATUTORY PROVISIONS—"MONOPOLY."

The purpose of the law was to give the holder of an indeterminate permit, as in Nos. 22 and 23, as regards the conditions existing at the time of its origin. a aualified monopoly within the scope of the privilege, subject to the conditions and limitations of the public utility law,-the term "monopoly" not being used in its common-law sense, except as to exclusiveness, but being characterized by purpose to promote public welfare, by a return consideration and by not being of common right, instead of being otherwise but for the grant and being for private gain.

[Ed. Note.-For other cases, see Franchises, Cent. Dig. § 3; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 5, pp. 43X-4574.1

25. FRANCHISES (§ 4*) - STATUTORY PROVISIONS-PUBLIC UTILITY LAW.

Given a field, occupied under section 1797m77 of the Statutes, for service to a municipality and its inhabitants, and the city will be incompetent to interfere except upon obtaining from the governing commission a certificate of public convenience and necessity, evidencing that reasonably efficient service at just and reasonable rates is not obtainable under the existing privilege, or by otherwise complying with the public utility law.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 3; Dec. Dig. § 4.*]

26. FRANCHISES (§ 3*) - STATUTORY PROVISIONS-PUBLIC UTILITY LAW.

The statutory conditions which preceded the public utility law, empowering a municipality to construct or own public utility property for municipal or general use, within the municipality and incur indebtedness therefor, was so superseded by such law as to render the latter paramount and the former subsidiary, making such statutory conditions usable only conditioned upon municipal compliance with such law.

[Ed. Note.-For other cases, see Franchises, Dec. Dig. § 3.*]

27. FRANCHISES (§ 4*) - STATUTORY PROVISIOXS-PUBLIC UTILITY LAW.

Given a public utility corporation operating in a municipality under an indeterminate permit, notwithstanding reasonable and excusable interruptions of service, and all proceedings of the city to construct a rival plant and do a rival business without first complying with the conditions of the public utility law, are void.

[Ed. Note.-For other cases, see Franchises, Cent. Dig. § 3; Dec. Dig. § 4.*]

25. FRANCHISES (§ 8*) - STATUTORY PROVISIONS—ASSIGNMENT OF PRIVILEGE.

A public utility property and privilege constitute an entirety, partaking of the character of the privilege, and is of proprietary nature, and assignable the same as property commonly, in the absence of any express prohibition.

[Ed. Note.-For other cases, see Franchises, Cent. Dig. § 5; Dec. Dig. § S.*]

29. INJUNCTION (§ 65*) - PROTECTION OF FRANCHISE - GROUNDS - IRREPARABLE INJURY.

Given a situation of a public utility property operating under an indeterminate permit received in exchange for a prior privilege and the municipalit?, nevertheless, insisting upon conditions and hmitations of the old grant, and proceeding accordingly, assuming to possess

authority to do so, and invading the field reserved to the holder of the indeterminate permit without satisfying the conditions subsequent in that regard, to the irreparable injury of the existing public utility,-and a situation exists for equitable interference and relief adequate to the case.

[Ed. Note.-For other cases, see Injunction, Cent. Dig. § 134; Dec. Dig. § 65.*]

30. INJUNCTION (§ 194*)—NATURE OF REMEDY-IRREPARABLE INJURY.

In the circumstances stated in No. 29. if the illegitimate claim of right extends to that of invading the reserved preferential right to do the municipal lighting, the equitable relief should quiet the right of the existing public utility against such wrong claim, and afford injunctional prevention of its bemg acted upon.

[Ed. Note.-For other cases, see Injunction, Cent. Dig. § 414; Dec. Dig. § 194.*]

(Additional Syllabus by Editorial Staff.)

31. ELECTRICITY (§ 4*)—EXCLUSIVE PRIVILEGE--RESTRAINING INVASION.

Defendant city granted an assignable franchise to an individual to erect and operate in such city an electric lighting and power plant. The privilege was exclusive as to city service for a time, and preferential thereafter, and exclusive for a longer term as to domestic service. There were four corporation owners in plaintiff's chain of title, one of which acquired an indeterminate permit for the old privilege under the public utility law (St. 1898, §§ 1797m1–1797m108, added by Laws 1907, c. 499). The exclusive city term had expired, but service was continuing. Thereafter the city sought to construct a rival plant without first complying with the public utility law. *Held,* such action of the city was void, and an invasion of the exclusive right of plamtiff to do the municipal lighting.

[Ed. Note.-For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.*]

Appeal from Circuit Court, Portage County; Charles M. Webb, Judge.

Action by the Calumet Service Company against the City of Chilton. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for equitable relief. Its nature as disclosed by pleadings and evidence and embodied in the findings is thus summarized:

I. Defendant city, December 7, 1897, granted an assignable franchise, license, or permit to one Bink, who accepted the same, to erect, maintain, and operate in such city an electric lighting plant to supply light, heat, and power for public and private use for 15 years, using the city public places, as usual, to that end, with the sole right to do the public lighting therein for 10 years and preferential consideration in that regard thereafter, and a right to franchise extensions in respect thereto, reserving the privilege to purchase the property in a manner specified, and right of repeal, in case of failure to furnish electricity as provided during 30 consecutive days, of willful violation of any requirement of the franchise or to properly carry on the contemplated business.

II. Bink installed the plant and established the contemplated business, and thereafter, by him and his associates and successors in interest,—first, Wisconsin Storage & Electric Company; second, Wisconsin Electric Service Company; third, Public Service Company: fourth, plaintiff,—it was maintained and all duties incident to said franchise, or the substitute therefor hereafter mentioned, dowq to the time of the trial, were fully performed,-except as prevented by defendant's wrongful conduct,-and the public lighting was paid for, except $396 for the last quarter of the 10-year period, ending December 14, 1967.

III. Each of said companies was, and plaintiff is, a duly organized corporation under the laws of the state of Wisconsin: the first had due capacity to, and did, acquire as owner the said franchise, the second likewise, as owner, acquired it, and the indeterminate permit duly granted by the state in lieu thereof, as hereinafter stated, which permit and all property in use and for use in connection therewith, including the public utility business privileged thereby, in due course, passed to the third corporation and subsequently to the fourth, each being duly authorized thereto, and was possessed by the latter with such indeterminate permit at the time of the commencement of this action.

IV. During the second ownership, the company duly incumbered the franchise and property for $20,000, issuing bonds which are outstanding and were to defendant's knowledge, during the time material to this case.

V. December 21, 1907, during the third ownership the company surrendered the Bink franchise under chapter 499, Laws of 1907, receiving from the state, in lieu thereof, a perpetual and exclusive privilege,—called an indeterminate permit,—to do the things privileged before, subject to the conditions and limitations of such chapter.

VI. During the latter part of the 10-year period of the Bink franchise, the owner became financially weak and did not efficiently maintain the plant and give altogether satisfactory service, though largely, or wholly, because of defendant's fault. The latter, ostensibly because of such poor service, refused to deal with such owner; whereupon the latter offered to comply fully with the franchise, or sell to the city, or meet any competition, but said city refused all advances in that regard and invoked the railroad commission. December 23, 1907, to grant a certificate of public convenience and necessity, authorizing another public utility in the city. The proceedings were dismissed because of the existing public utility and defendant's failure to proceed in reference thereto as contemplated by the public utility law.

VII. Xotwithstanding the refusal to deal with plaintiff's predecessor, under the public utility law or the old franchise, public and private lighting was continued till January 17, 1908, though payment for public service

ceptions being saved raising the questions discussed in the opinion.

L. P. Fox (P. H. Martin and James Kirwan, of counsel), for appellant. Thompsonrs, Pinkerton & Jackson (J. E. McMullen, of counsel), for respondent. Minahan & Minahan, amici curiæ.

MARSHALL, J. (after stating the facts as above). [1-5] In the foregoing summary, covering a few pages, we have stated, it is thought, the essentials from any viewpoint, of the 54-page finding required to be examined in order to discover just what was decided in this case as a basis for the judgment. A recast of the findings seemed necessary. It has been accomplished by elimination of over ninetenths of the words originally used. The vital matters could by more study be covered by still less. It would be a valuable change in administration, one tending to successfully meet some criticism of the law where it is free from fault, the trouble being with its administration, if more attention could be efficiently given to closing an equity case by concise findings of fact, covering singly and concisely the material pleaded, or pleadable, and proved or admitted grounds for redress or defense, avoiding repetition, elaboration, discussion, and all evidentiary matters even to mere evidentiary facts. Such is what the Code calls for. To such its letter and spirit restrict the findings. Why not conform thereto, especially since the labor, and the expense, both public and private, are thereby minimized and the case would be, as a rule, more easily understood, the initial judgment be more liable than otherwise to be securely grounded; in short, since there are many and very valuable advantages, both public and private, in the course suggested and no disadvantages. The court has spoken several times quite emphatically, on this subject, and not without effect, though with less, as the case in hand and others which have come to this court indicate, than we had hoped for. This is said with more of desire to lighten the labor of the overworked trial judge than thought of criticising.

The overcaution which often results in such excessively long findings as n-e have had to deal with here greatly adds to the necessary labor of trial courts and this court without corresponding benefits,-generally the opposite. Elimination of all which is unnecessary, so far as practicable, and concentration of energy upon essentials. will minimize work while raising the grade of it, and greatly add to efficiency of each unit in the field of trial administration. Without saying more we counsel attention to Farmer v. St. Croix P. Co., 117 Wls. 76, 93 N. W. 830, 98 Am. St. Rep. 914; McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33; McDougald v., New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1656, 4 L. R. A. (N. Y.) 666, 110 Am. St. Rep. 946, 5 AM. Cas. 435; Neacy v. Milwaukee County, 144 Wis. 210, 222, 128 N. W. 1063.

The briefs of counsel for appellant cover a wide range of subjects. It includes many which, in the judgment here, are not sufficiently material to warrant special treatment. They are all interesting subjects for study. Each was exhaustively and technically treated by the eminent counsel. If the result of the case, from any viewpoint involving doubt. depended upon a discussion of them in detail the mere labor of it would not cause hesitation to meet the situation.

The case is one of great importance as regards the few vital questions. It is especially so as to the main contention,-the real key of the controversy between the parties. It is so important to the vast public interests involved in the public utility field, which the Legislature evidently intended to encompass by chapter 499, Laws of 1907 (sections 1797m1 to 1797m108),—and, so far, it has been found to have accomplished tke task with such distinguished completeness that the enactment stands as a most consummate effort of legislative wisdom and a model for similar efforts elsewhere,-it is thought that any uncertainty left in the law by the previous judicial tests which have been applied to it, can best be eliminated by confining this opinion and discussion to the particular point, or points, of uncertainty which constitute the real root of this litigation, turning aside all mere technical questions and makeweights. Thus restricted the opinion is liable to be of unusual length.

Are those of the Endings of fact which call into activity the question of law upon which the legitimacy of the judgment complained of depends, sustained by the evidence? That is the first grand division of the subject to be dealt with. If there are other findings not material from the suggested viewpoint they may well, and will, be passed without special mention. Thus brushing aside the inconsequential, we come first to the question of whether respondent's remote grantee, the Wisconsin Electric Company, acquired an indeterminate permit under the public utility law. The court so found as a fact, and the finding was duly excepted to. In a sense, it was a mixed matter of law and fact, but so far partook of the cast of the latter that it was properly pleadable as a fact and thus passed upon.

Subsidiary to the foregoing major proposition, is the question of whether the Electric Company. at the time of the surrender proceedings. December 21. 1907, satisfied the calls of section 1797m1 of the public utility law for a "corporation * * * that * * * may own, operate, manage or control any plant or equipment or any part of a plant or equipment within the state, * * * for the production, transmission, delivery or fur-

nishing of heat, light, • • • or power either directly or indirectly to or for the public," and at the same time satisfied the calls of section 1797m77 of such law for a "public utility, being * • • a corporation duly organized under the laws of the state of Wisconsin, operating under an existing license, permit or franchise."

There is no question but that the Electric Company complied with all the requirements of the surrender feature of the law found in the last mentioned section, or but that if, at the time of the surrender, it had the requisite status to satisfy the calls aforesaid, it received by operation of law, in consideration of that which it surrendered, an indeterminate permit of the character mentioned in the public utility act and offered to any corporation possessing such status in exchange for its existing privileges. So we turn to the question of competency.

It is useless to discuss at any great length, whether the Electric Company satisfied the full scope of section 1797m1, since it is clear beyond room for fair controversy, that it responded thereto sufficiently. The comprehensive language, "own, operate. manage, or control any plant or equipment, or any part of a plant or equipment within the state, * * * for the production, transmission, delivery or furnishing of heat, light, * * * or power either directly or indirectly to or for the public," was plainly designed to cover every conceivable situation of the existence of an industry of the nature mentioned. No room was left for controversies over technical ownership or capacity to own. The purpose was to encompass the physical situation,-to deal with the condition whatever it might be, and the person, natural or artificial, whatever might be the particular relation of the person, or persons, natural or artificial, to the physical situation or condition, whether that of owner, operator, manager or controller, and give thereto the status of a public utility. The Electric Company obviously was located somewhere within this broad field. Therefore, it was a public utility,—one essential to capacity to acquire an indeterminate permit under section 1797m77.

Now regardless of the exact scope of the corporate powers of the Electric Company it clearly was a duly organized corporation under the laws of this state and so had the second essential to acquire the permit. While there seems to be no efficient ground for impeaching the original scope of the organization, a point perhaps not essential to this case, there is no ground which can be urged collaterally, and none that could be by defendant in any event, since there is no question but that it was at least a corporation de facto. Moreover, the city, both in its own behalf and as a state agency, recognized and dealt with it as a corporation for much over a year after the. company took over the property from its predecessor. In proceedings before the railroad commission the city Insisted by sworn petition that the company was a duly organized domestic corporation: that it became owner of the Bink franchise; that it had duly surrendered the same; and that the city had refused to deal with it under the public utility law for reasons suggested. 2 Railroad Comm. Rep. 326.

[21] Notwithstanding the foregoing, which we only refer to as an additional ground for the essential of efficient corporate status, the case might well be rested in respect to the matter upon what seems from the record quite plain; i. e. that there was no infirmity in the corporate organization or capacity in any event. But if it were otherwise as to the original scope of the corporate authority the company possessed ample power because, by force of the public utility law, the corporate authority was automatically expanded, if necessary, to enable the company to receive the thing given to it for the one surrendered,-the one which it was operating under, regardless of any technical question as to its previous capacity at the suit of the state to so operate. No opportunity was left at this point for cavil or complication. If the corporation was operating, within the meaning of the law, under the privilege surrendered, and had a right, as against any other claimant to make the surrender, that gave it corporate capacity to do so. The law, in holding out the consideration for the surrender and inviting acceptance thereof, by necessary implication afforded the company capacity to deal with the state in such invited exchange of equivalents. The paramount essential was that the company making the surrender should be a domestic corporation,—one referable to Wisconsin law for its existence and powers, thus possessing a status enabling the state to shape such powers, if necessary, so as to meet the necessities of the contemplated traffic in privileges,—a corporation amenable to Wisconsin jurisdiction to the fullest extent essential to enable the administrative commission to readily prevent the abuse of the privilege granted and compel full performance of the dnties incident to the grant.

[15] Whether the Electric Company had a franchise, in the strict technical sense. granted by the city of Chilton to do public utility business therein, though we perceive no good reason why not, independently of any statutory definition. is of little moment. The Legislature anticipated room for controversies over such matters and, es industria, guarded against it. In that respect the most consummate care was used in framing the Law. The Legislature did not rest the matter, as it might have done, by mere use of the term "franchise." The broad term was used instead, "license, permit, or franchise," -in short, any public privilege of any sort to do any kind of the 'service mentioned

within the scope of the public Utility law followed by the term "franchise" as a synonym for the entirety.' The company had the privilege granted to Bink. That is clear. The appellant Confessed it in the proceedings before the commission, as we have seen. It was a Privilege of some sort to do public utility business in the city of Chilton, covered by the broad phrasing repeatedly there. in used, "license, permit or franchise," and in the more concise phrasing in section 1797m77, referring to the broader one as an entirety for an antecedent "franchise." Here again note the legislative care to guard against prejudicial controversies over the subject dealt with. Observe that it was a situation and a condition in the entirety which the lawmaking power had in view. Plainly the purpose was not to leave any room for claiming that any part thereof was omitted by grounding the claim on technicality as to the meaning of the words. In the popular, if not legal conception, and why not the latter is not perceived, a privilege to do anything, not a matter of common right but referable either directly or indirectly to sovereignty as the grantee, is a franchise. The Legislature evidently had this conception in mind, yet thought it was synonymous with the legal meaning, but to remove *all* doubt used the words, as indicated, "license, permit or franchise,'! and "franchise," interchangeably. So the Electric Company had the third essential to competency to acquire an indeterminate permit.

Was the company, operating under its existing "license, permit or franchise" within the meaning of section 1797m77? There seems to be no question about that. At the date of the surrender proceedings, December 21, 1907, the company was furnishing electric current, both to and for the public for all purposes. It continued to thus furnish till January 17, 1908, and till the defendant refused to deal with it under any circumstances, or to recognize it as having any rights under the public utility law, thus creating a condition rendering temporary suspension necessary to prevent loss, and excusable as the trial court decided. We will say, in passing, that the words "operating under," etc. in section 1797m77, were doubtless used in the same sense as the words "in operation Under" in section 1797m74 which we shall speak of later. Enough has been said, at this point, to show that the Electric Company had the particular feature here discussed of capacity to surrender its existing permit and obtain a new one in lieu thereof.

[19] So the findings are amply sustained that the Electric Company December 21, 1907, acquired an indeterminate permit. The surrender proceedings in form and substance were without infirmity; the company had all the essentials of capacity to make the exchange,-(a) it was a public utility; (b) it was a duly organized corporation under the laws of this state;. (c) it had a "license, permit or franchise" to do public utility business in the city of Chilton; and (d) it was operating under such "license, permit or franchise."

The next subsidiary question is: What was the scope of the privilege? That is plainly ruled by the letter of the public utility law as analyzed in State ex rel. Benosha G. & E. Co. v. Kenosha E. R. Co., 145 Wls. 337, 129 N. W. 600, and La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 130 N. W. 530. It was a privilege emanating directly from the state to do the things theretofore privileged by it through the city as a state agency, freed from all conditions or limitations except those of the public utility law. This field was explored so fully in the La Crosse Case that the better way now, as it seems, is to refer thereto respecting matters therein settled instead of indulging in any lengthy rediscussion thereof

So question is raised but that the Bink franchise privileged the grantee to generate and convey electric current and distribute in it the city of Chilton to supply the city and its inhabitants with light, heat, and power, and to use the public places of the city and do the things usual to that end. By the terms of the privilege, it contemplated a means of supplying electric current directly to the public by dealing with its inhabitants in their individual capacities. all possessing the common right to be served, and to the city,-the inhabitants thereof in their corporate capacity. That contemplated not only supplying, as indicated. but having a supply or capacity to supply from, to satisfy all needs within the corporate limits of the municipality. The privilege, as to the corporation, was no less significant than as to the inhabitants, except as regards the IO-year limitation of exclusiveness. As to the mere preferential element in serving the city in the public utility field, there was no difference.

The Wisconsin Electric Company then was clothed with an indeterminate permit of the full scope mentioned. It manifestly included the privilege to do all things contemplated by the terms "supply to the city or its inhabitants" found in the original grant. That it included supply to the city by the grantee utilizing the current to do the municipal lighting is evident, because such particular use was specified and, as we have seen, made exclusive for a term of years and preferential thereafter, in the Bink franchise.

[20] Thus the principal proposition stated at the outset must be answered in the affirmative. The Wisconsin Electric Service Company, as found. on the 21st day of December, 1907, became the owner of a "license, permit or franchise," call it what we may, from the state, characterized in the public utility law as an indeterminate permit, of the scope, as regards the privilege feature, of the Bink franchise, as herein

determined. The physical things in use and for use in connection therewith, and the existing business to which the privilege was referable, all became, by operation of law, merged in the single thing, the public utility property. The franchise, in such circumstances, is the principal thing and, in general is inseparable from the rest. The latter really partakes of the nature of the former. Washburn v. Washburn W. Co., 120 Wis. 575, 98 N. W. 539; Chicago & N. W. R. Co. v. State, 128 Wis. 553, 619, 108 N. W. 557. The entire thing is to be considered apart from the franchise to be a corporation which is inherently unassignable, and apart from such property franchises as are unnssignable by their terms. The entire privilege element here was susceptible of ownership as property subject to the conditions and limitations of the public utility law, and so assignable to any purchaser competent to take thereunder,—a corporation duly organized under the laws of this state, section 1797m75, Stats. (Laws of 1907, c. 499).

[20] The corporation which took title from the Wisconsin Electric Service Company seems to have satisfied all the requisites mentioned. If as a purchaser from the grantee of the state the public utility law cannot be referred to as expanding its corporate capacity if necessary to fit the situation, as in case of the original grantee, and so its capacity must be found in its articles, they seem to be sufficient. They specify the "manufacture, sale and distribution of * * * electric currents" for all purposes. That would seem to leave no indrmity in corporate power, since incidental to the broad general purpose there must exist the ordinary and reasonable means of effecting it. But in any event, the mere want of power could not be challenged collaterally. John V. Farwell Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921; Security Nat. Bank v. St. Croix P. Co., 117 Wis. 211, 94 N. W. 74.

Further, the third corporation was not much more than a mere conduit through which the property, by due conveyance, passed to and was vested in the fourth corporation, the respondent, which was organized for the particular purpose of acquiring it and performing the public duties incident to its ownership. It expressly purposed, among others, this: To "manufacture, distribute and sell electricity * * * for any and all purposes * * * to acquire the franchise rights, privileges, contracts, real estate and electric lighting plant at Chilton, Wisconsin, for the purpose of reorganization, improvement and operation and to enjoy all the powers conferred by law upon domestic public service corporations."

So, still laying aside for the present the effect of the attempted repeal of the Bink franchise, the findings that plaintiff was competent to acquire and own the indeterminate permit aforesaid, and did so August 15, 1908, and continued to be such owner and to actually operate the property and perform its public utility duties from that time down to the time of trial, barring some interferences mentioned in the findings, which need not be more than incidentally referred to, seem to be supported beyond room for successful challenge. That the corporation was organized in good faith by those whose money was invested in the property, as found, does not appear to be assailable.

The next basic question is this: What were the conditions and limitations of the rights incident to the indeterminate permit? We have heretofore dealt mainly, with the privilege feature, finding that it includes supplying the city of Chilton as well as its inhabitants with electric current for heat, light, or power, in short, all purposes, and maintaining and operating a plant with all essential or convenient accessories to that end. But the mere privilege feature is one thing, while the conditions and limitations is another.

The trial court covered the subject of conditions and limitations of the indeterminate permit as matter of fact, and permissibly so. It is of mixed law and fact, partaking more of the latter than the former.

The findings are to the effect that only the privilege feature of the old franchise survived the surrender for its equivalent emanating directly from the state; that all the conditions and limitations of the old one and all contract features between the city and the owners of the privilege inherent in the grant, were extinguished by the surrender and superseded by the "conditions and limitations" of the public utility law. Is that finding correct?

The stated proposition is ruled in the affirmative by the letter and spirit of the public utility law and by the previous decisions of this court. State ex rel. Kenosha G. & E. Co. v. Kenosha E Co., 145 Wis. 337, 129 N. W. 600; Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056; La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 130 N. W. 530. After the full discussion of the subject in the last case cited, it does not seem best to go over the matter again, at least, more than briefly or incidentally.

The court there called attention to the significant language of section 1797m77, "shall * * * receive by operation of law in lieu thereof, an indeterminate permit * * * and such public utility shall hold such permit under all the terms, conditions and limitations of this act." That negatives, as was said, "any idea that the Legislature contemplated the so-called indeterminate permit would be subject to any conditions or limitations of the surrendered grant; that any limitation or condition was in legislative con-

templation, except those 'of this act' independently of the scope of the mere privilege feature and appropriate police regulations. The idea was the exchange of a privilege held upon specified conditions and limitations mentioned therein or attached thereto for a new one of equal dignity," as to the privilege feature, "subject only to the conditions and limitations of this act." The court, further, after quoting section 1797m77, said:

"Does not that language tell, without judicial aid, its own plain story, contemplating as to old franchises, in their entireties, a complete severance of all relations between sovereign authority,-whether exercised directly or through municipal agencies,-and the owners of the franchises, by an optional exchange of old ones for new ones, equivalent as to the privilege element, denominated indeterminate permits. There is no suggestion in the statutes of coercion, no hint of a purpose to take away from franchise owners anything other than by their consent; exchanging in each case a privilege with new incidents for an old one with its incidents; a complete change from an existing to a new condition. * * *

"Ex industria the Legislature said, 'the filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon fulfillment of any contract theretofore entered into relating to any charge or service regulated by this act.' All such matters were henceforth to be referable to the public utility law under the supervision of the state commission. Such statute was made unmistakably exclusive as to everything affecting the service, its character, and charges therefor to consumers, whether public or private. The extinguishment of the obligatory features of the old franchise as to one side by necessary inference operated to extinguish such features as to the other. Such must have been the legislative purpose. * * * The thing existing after consummation of an exchange upon which respondent's business was dependable, was the new privilege, emanating directly from the state, denominated an 'indeterminate permit'; a permit to do the 'things theretofore licensed by the state through the municipality as a state agency, but now unconditionally, except as specified in the public utility law."

So it follows that the 15-year limitation of the Bink franchise, the condition in respect to the repeal of the privilege, and all other conditions and limitations mentioned therein, ceased to exist on the 21st dny of December, 1907. The most significant thing at this point is the extinguishment of the repeal feature.

What are the conditions and limitations of the new privilege found in the public utility Iaw? Everything of that nature, inherent in the old grant, or which, as between the state, acting through the city, and the grantee of the old privilege, formed any part of the consideration for the grant, were by the same mutuality which originated them extinguished, in consideration of the incidents of the substituted privilege,-the conditions and limitations of the public utility law.

What are the substituted conditions and limitations mentioned? They are various. The determination of this case does not require reference to all of them. There are several features designed to give to the municipality adequate protection. One of primary importance is the right of the municipality to take over the property by purchase upon "terms and conditions determined by the commission." Section 1797m78. The public utility charges are required to be "reasonable and just." Section 1797m3. The municipality as a consumer, as well as representative of its inhabitants, is made competent to challenge before the commission the reasonableness or justness of any of the rates, tolls, charges, or schedules, or anything affecting efficient performance of the public utility duties. Full power in this Eeld is given the commission for efficient regulation, in harmony with the requirement that the service shall be efficient and charges reasonable. Section 1797m43 and associate sections. Ample power as regards police regulations is reserved to the municipality. Section 1797m87. Subject to the special right reserved to the city, not having to do with rules and charges for service, the whole field is placed under the supervision of the commission with power to enforce the dominant purpose of the grant to render it as certain as practicable that all public utility service rendered "either directly or indirectly to or for the public" shall be reasonable as to character, and reasonable and just as to charges.

[11] In consideration of submitting to full control by the commission and the right of the municipality, at its option, to take over the property as indicated, certain conditions and limitations in favor of the grantee are attached to the new privilege. The dominant feature thereof is that the franchise shall not only be perpetual, subject to the conditions and limitations of the law,—indeterminate as it is said,-but shall be subject to such conditions exclusively. In other words, the icleu is that the grantee, under state control, and subject to prescribed limitations and supervision, shall have a "monopoly," as it has been several times called by the Railroad Commission, in its administrative work, and by this court, within the field covered by the privilege, as to rendering the particular public utility service, whether directly or indirectly, to or for the public.

[24] We should say, in passing, that the term "monopoly" as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee,-the mere element of exclusiveness. A privilege

of that sort, where there is a consideration equivalent to the public, though often. spoken of as a "monopoly" is essentially different from one of the character regarded as odious at common law and prohibited in many state constitutions ; a privilege from the sovereign to the individual as a mere favor to the latter for his aggrandizement, or as such and the personal advantage of the individual sovereign grantor, the thing granted being by way of limitation, of what would otherwise be of common right, to the particular grantee. The term "monopoly" as it has been used to characterize the privilege in question, has been sanctioned in many jurisdictions, they sometimes differentiating it from "monopoly," in the offensive sense, and sometimes not, it being assumed, from the very nature of the case, that the word would be taken in its popular and common, rather than in its technical sense. In this line to justify, or rather explain the use of the term by the commission and the court, reference may be had to the following illustrations: State v. Milwaukee G. L. Co., 29 Wis. 454, 9 Am. Rep. 598; Davenport G. & E. Co. v. Davenport, 124 Iowa, 22, 98 N. W. 892; Ludington W. S. Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Bartholomew v. City of Austin, 85 Fed. 359, 29 C. C. A. 568; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; New Orleans G. Co. v. Louisiana L. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; International T. C. Co. v. Hanks D. Assoc. (C. C.) 111 Fed. 916.

In the latter case it is said that the word "monopoly" as now commonly used, and used in the patent law, is not a monopoly at all in the ancient sense. According to the logic of Judge Story in the Charles River Bridge Case, to be such the privilege must not only be made exclusive by sovereign authority but be something theretofore of common right.

So while, in common parlance, it is proper to characterize the exclusive privilege in question, a monopoly, it is one purchased by giving an equivalent to the public, as in case of a patent allowed by the federal government. It is a grant for *a* public not for a private purpose, and not a grant of that which without it would be of common right. It has none of the essentials of the monopoly so offensive, anciently, in the eye of the law.

While perhaps the term "exclusive privilege" is the better term to apply to the right in question, the word "monopoly" has been used in the books with reference to such franchises. The use of it seemed proper and in the particular matter it has bebn a handy word. It was doubtless more suggestive than the term "exclusive privilege" as regards the general conception by the administrative commission of the real purpose of the law, and that here, in regard to a matter supposed to be pretty clear though not yet specifically passed upon, and now before us for the first time for that purpose-

A few general observations at this point, in regard to the ground gone over, and Passing remarks respecting matters which were immaterial at the start, or have been rendered so by the conclusions already reached, and we will return to the subject of whether the exclusive privilege in question excludes the city of Chilton from going into the electric lighting business, even to the extent of doing its own lighting, except under the conditions and limitations of the public utility law; that is either by taking over the existing plant owned by the respondent, or demonstrating to the commission, in due proceedings to that end, that public convenience and necessity require it, notwithstanding the existing public utility. To establish the negative of that proposition is doubtless the main purpose of this litigation.

Notwithstanding the care,--the comprehensiveness at all points of the public utility law, and the manifest purpose of it to remedy all the mischiefs of the old situation, prominent among them being the contests between owners of existing public utilities and others, including the municipality, striving to acquire the field, or some part of it, often to the great prejudice of all concerned, and manifest injustice to innocent investors, and notwithstanding the general trend of administration of the law by the commission, stopping just short of a definite stand on the particular point, and notwithstanding the plain logic of the decisions of this court, stopping short, it is true, of an adjudication of the particular matter,-it has remained, as we have suggested, so far, a mooted question as to whether the exclusive privilege of the public utility law acts prohibitorily upon the municipality as well as others desiring to invade the field of exclusiveness, as regards serving the public in the aggregate,-that is doing the municipal lighting, as well as serving patrons in general in their individual capacities.

[27] To recur to the suggested general remarks before closing upon the final point, -as we have seen, respondent possessed an indeterminate permit at the time this action was commenced. As to electric service, it covered the whole field intended by the public utility law to be reserved to the hoider of such a permit. We shall not spend time discussing the circumstances of the temporary suspension of service under the privilege. The privilege still existed. It could only be superseded or annulled by some proceeding under the law, directly to that end, so long as there was no abandonment. None was taken. The city, instead of submitting to the statute and proceeding thereunder, proceeded in defiance of it. In good faith we may well conclude, through misconception of its rights, but in defiance, nevertheless. After acquitting it of any bad intent, the fact still remains that its action was utterly void in attempting to repeal the franchise which had, in legal effect, been

merged into the new franchise and so passed beyond municipal authority to disturb it. It follows, necessarily,: that defendant had no power to build a municipal plant for encroachment upon respondent's exclusive field, which, manifestly, from the findings well supported, was the purpose, even laying aside for the moment the subject of municipal lighting. Having no such authority, clearly, it had no authority to issue bonds to pay for Carrying out its ultra vires purpose.

[29] So regardless of whether defendant complied with the forms of law in respect to building a municipal lighting plant and issuing bonds therefor, or either, the statutes to which its actions are referable, from any viewpoint, were rendered' inoperative by the public utility law, except upon compliance by the city with the conditions and limitations therein, including the specified conditions precedent to capacity to build a municipal lighting plant such as it proposed to build. That it did not do, and did not propose to do, rendering respondent helpless as regards protecting its privilege, investment, business, and field therefor, guaranteed by the public utility law, other than by commencing this action. That the attitude of appellant and its acts committed and threatened, cast a serious cloud on respondent's property rights and privileges and was destructive thereof, rendering irreparable loss imminent, as found, and that it was remediless to successfully and adequately meet the mischief except by an appeal to the jurisdiction of equity, in the judgment of this court, is well supported in the record. That gave respondent ample capacity to sue as it did.

Thus the findings which are material to some substantial relief embodied in the judgment, covering as they do some mixed matters of law and fact, are approved. As there are no further questions of fact, or of that nature, which may well be referred to, we turn to the scope of relief granted, as the second major division of the subject presented.

It is insisted that the judgment went too far by, in terms or effect, enjoining appellant from proceeding to build and operate a plant of its own for the purpose of municipal lighting, except conditioned upon a successful appeal under the public utility law for permission to invade the field claimed by respondent to be reserved to it subject to the conditions and limit&ions of such law.

The particular phase of the judgment counsel insist is legitimate, because it amounts, as said, to no more than a judicial declaration of the law, not dependable upon the form of the decree. That is the final, and we repeat; probably the dominant matter of controversy in the litigation.

[25] Stating the proposition concisely: Does the public utility law, in the circumstances of this case, afford to the operator, under an indeterminate permit, preferential right to do the municipal as well as the private lighting, so that the municipality can no more invade. the fleld itself than it can by a rival company, or the latter independently, all being in that respect subject to the judgment of the Commission as to whether public: convenience and necessity require the disturbance, because efficient, adequate service at reasonable and just rates therefor is not obtainable under the existing franchise..

[6, 7] As before suggested, in terms or effect during discussion of the findings of fact complained of, it would seem that the affirmative of this last question, basic and dominant as it is, follows inevitably from the logic, if not the letter, of City of La Crosse v. La Crosse Gas & Electric Company, supra. It was there held, that, the evident intention of the Legislature, expressed in unambiguous language, when read in the light of the situation dealt with, was that by treaty with the owner of existing franchises, to displace the old situation, in its entirety, with all its complications, the growth of years, and we may add, with all its bitter controversies, the like of which is pictured in this case, and to substitute a new situation, all looking to unity, in practical effect, of a multitude of diverse units corresponding to the many outstanding franchises, and others in prospect, harmonizing them by making them referable to a single standard, to wit, the public utility law, and to an ultimate single control to wit, control by the trained impartial State Commission, so as to effect the one supreme purpose, i. e., "the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit,-a condition as near the ideal probably as could be attained. Certainly, that great object might well have aroused legislative ambition to a high plane, and inspired legislative wisdom accordingly, as it did in fact. Completeness of the law, so far as tested, and its success under the efficient conservative administration of it by the commission, bear witness to that. As, in effect, suggested in the La Crosse Case, the evident purpose of the law to produce the ideal condition indicated, and the means designed to that end, are so plain, and we may add so legitimate from all constitutional viewpoints heretofore suggested, or reasonably apprehended, and from all viewpoints of public and private economy and sound public policy, that, if to leave the door open where there is an existing privilege covering the field, as in this case, to municipal invasions to any extent, would greatly disturb the harmony of the system the Legislature purposed constructing, and prevent the full accomplishment of the end sought to be attained, judicial construction, if that were necessary to determine the meaning of the law, should rather lean toward preventing such result.

In the further treatment, appreciating the

somewhat repetitious character of it, but deeming that Justifiable to bring out the final result with as much clearness as practicable, we will refer to some significant features of the statute.

[18] We must keep in mind, as suggested in the La Crosse Case, that the state was competent to take to itself all authority as regards the scope of the privilege,-regardless of anything inhering in or connected with the old one,-by consent of the owners of the latter, cannot be doubted. The municipalities acted wholly as state agencies. As principal, it was competent for the state to make new arrangements with its grantees in place of the old ones.

We must further keep prominent the supreme purpose before stated; service as efficient as practicable at as low rates as just and practicable under the circumstances of each particular situation. That is shown in the premise portion of the act. The first section deals with the definition of terms, giving to each such comprehensiveness as not to *leave* any fair ground for claiming that any part of the situation to be dealt with was overlooked, either in the details of the plan, or the means of effecting it.

[14] Treating of the new privilege, it was given a name so comprehensive as to include, without room for doubt. as before indicated, every sort of an existing privilege in the public utility field to serve the public. Note the significance of the term "either directly or indirectly to or for the public." In this, we repeat, nothing is left out, service to the public in the aggregate as well as in individual capacities, was unmistakably included.

The next section deals with administration giving the Commission the broadest of legitimate powers in that regard so as to enable it to supply all details of administrative work. Note the language: "The Railroad Commission of Wisconsin is vested with power and jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient in the exercise of such power and jurisdiction." There is administrative authority to the limit, including quasi legislative as well as -quasi judicial power.

[8,9] The next section deals with the great object of the act. "Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility * • • shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." Around the objective feature, all the balance of the provisions of -the act are grouped, existing utilities being necessarily placed in one group, and prospective public utilities in another, each for the necessary special treatment, to bring all under the single system and single control to effect the single purpose of promoting the public good without injustice to any one.

That one of the principal mischiefs sought to be remedied by the new system, was elimination of the conditions promotive of 'hostilities between municipalities and public utility companies, after making large investments by permission and invitation to serve the public directly as well as indirectly,-bitter controversies, sometimes for good reasons and sometimes not, but in any event at the expense of consumers of the product,-seems quite certain.

It likewise seems certain that one of the major means for attaining the desired end was elimination of excessive investments, and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments, or threatened encroachments, upon an occupied field of public service without any public necessity therefor. Doubtless an unvarying and invariable economic law was squarely faced and appreciated, that all such subjects for elimination represent waste, which if not avoided, would, in the main, fall on the product, increasing the cost of service per unit and be paid by the consumers. It was the interests of consumers which was the prime subject of legislative solicitude ; such object to be conserved without injustice to others.

In the situation pictured it could not have escaped legislative consideration, and, necessarily, would not have been considerately left unguarded against that in the cities and villages of the state, in general, public utility service at the lowest practicable rates with the highest practicable efficiency, is impossible without combining the municipal service with that to others.

Further, it could not well have escaped appreciation and been left unguarded against, that one of the fruitful sources of waste to ultimately fall, largely, if not wholly, on consumers, and fruitful sources of wasteful controversies and injustice to owners of existing investments, 'many of whom were bondholders as in this case, was opportunity for municipalities to unreasonably menace existing investments by threatening to, or actually displacing in whole or in part, existing public utilities in cases where proper regulation would secure efficient operation; ample efficient service in the whole field, thus creating waste in many ways and to a large amount in the aggregate, to the impairment of efficiency, in general, and enhancement in cost, per unit of service to the customer, contrary to the purpose of the act.

In the light of the foregoing, strongly indicating that the Legislature must have intended that the new privilege—where the old one occupied the whole field, in that it was granted to provide for service to the public directly as well as indirectly, and there was no other public utility at the time of the

surrender of the old franchise, should be exclusive, let us turn further to the letter of the law.

Section 1797m79, provides four distinct methods by which a municipality may become the owner of a public utility plant and conduct public utility business: First, by constructing a plant; second, by purchasing an existing Plant by agreement; third, by condemnation of an existing plant whether operating under a public privilege or not; fourth, by purchase of an existing plant through the Commission as provided in the act. In each case the power is granted "subject to the provisions of this act." Such provisions, in all cases of the existence of a privately owned plant, operated as in this case, require a permit from the Commission upon a showing of public necessity and convenience. In that there is an unmistakable prohibition by implication. But plainer still is section 1797-m74:

"No municipality shall hereafter construct any such plant or equipment where there is in operation under an indeterminate permit as provided in this act, in such municipality a public utility engaged in similar service, without first securing from the commission, a declaration, after a public hearing of all parties interested, that public convenience and necessity require such municipal public utility."

The words "similar service" plainly relate to the words in preceding sections, "either directly or indirectly to or for the public"; the words "public utility" relate as distinctly to a municipality performing the service, whether "directly or indirectly to or for the public," as to a private corporation, and the words "operating under an existing permit" do not suggest, necessarily, in continuous operation, absence of momentary or reasonable cessation. Excusable, temporary suspensions, involving no purpose to abandon, the owner being willing and seasonably, under the circumstances, able to resume and doing so, as in this case, satisfies the calls for a "public utility operating under," etc. The law must be given a reasonable,—sensible,—construction, at all points; to the end that the legislative intent shall not fail, instead of looking with favor upon technical assaults upon it.

In this connection it should be remembered that in the proceedings before the Railroad Commission to displace respondent defendant grounded its claim on ownership by the Electric Company, a domestic corporation, of the indeterminate permit, but that the company was not operating thereunder and the petition was denied upon substantially the same grounds upon which respondent prevailed in this case,-particularly that it possessed an indeterminate permit and was excusable for the delinquencies claimed to have occurred. Thus there was an adjudication, to all intents and purposes, of the precise point, as it seems; which we now have in band, so far as the Commission had jurisdiction.

The conclusion which must result from the foregoing is that the relief granted respondent is not excessive. The field of exclusiveness of the privilege, in the circumstances of this case, includes municipalities, whether desiring to invade the forbidden territory for municipal lighting only, or for other or all purposes.

Thus the care with which the public utility law was framed as regards harmony of parts, and completeness and efficiency of details to accomplish the single purpose of Promoting the highest attainable good of customers without injustice to existing vested interests, or prejudicial interference with competency for municipal ownership on a fair basis, is again vindicated. With the wisdom of the law we have nothing to do except as that may aid in understanding it. However, we may well say, that, insofar as the matter has come before this court, that has been vindicated by the wise, efficient administration of it by the Commission.

In closing, we again confess that much discussed by counsel has not been mentioned at least specifically. There was no need of it. No question, however, has been passed over without testing it carefully for materiality. With much care to eliminate all inconsequentials, the discussion has been so extended as to make the opinion quite long, and necessarily so, because of the endeavor to respond fully to the effort of counsel to secure treatment of the vital points in all reasonable aspects. The facts being determined, and we must say, in passing, as to pure matters of fact, there was little or no room in the evidence for serious controversy, the result turned wholly on the terms of the statute in which we find little or no ambiguity. So, necessarily, the great range of treatment by counsel, supported by numerous authorities, was largely outside the real case in hand. No part of that, it is thought, has escaped attention.

The judgment is affirmed.

TIMLIN, J. I concur in the decision of the court, and in much that is said in the opinion of Mr. Justice MARSHALL. In so doing I understand the court does not attempt to decide that by the surrender of the pre-existing franchise and the acceptance of an indeterminate permit an irrepealable contract is created between the municipality and the public service company. It is said in the opinion: "The dominant feature thereof is that the franchise shall not only be perpetual, subject to the conditions and limitations of the law,-indeterminate as it is said,-but shall be subject to such conditions exclusively." If this is meant to say or suggest that "indeterminate" means "perpetual." subject only to the conditions presently existing in the statute, I do not agree with it. Indeterminate does not mean perpetual; it

means "not determinate ; indefinite ; not distinct or precise as to limits, character, or meaning ; vague, as indeterminate symptoms ; and indeterminate series; indeterminate feelings or ideas: not fixed or known beforehand ; not predetermined as to date. place, or the like, as an indeterminate appointment; not leading to a definite end or result, as an indeterminate debate. In criminal law a sentence which fises the period or amount of punishment only within certain limits leaving the exact term or amount of punishment to be determined by the executive authorities, usually a board of managers." This is the definition given in Webster's New International Dictionary. See, also, section 4971, Stats. 1898. I consider the public utility law subject to repeal or amend. ment like other statutes, and I feel sure the Legislature had no intention of making it otherwise. This case does not call for the decision of any such question, but I fear the opinion may be misunderstood.

Additional Opinion.

MARSHALL, J. Since this case was concluded, I have discovered a mistake in the opinion I wrote for the court in La Crosse v. La Crosse Gas & Electric Co., 145 Wis. 408. 130 N. W. 530. I take the whole responsibility for it and confess there is little, if any, excuse for the inadvertence. I take this occasion for correcting the error so far as I can.

On page 417 of 145 Wis., page 533 of 130 N. W., in the opinion, speaking of a privilege, such as was grantable to an individual as well as to a corporation, this language was used : "The entirety was a state grant and so under legislative control like any other *corporate state franchise.*" The idea the language might naturally convey was not in mind. Of course such a privilege might be the franchise or property of a corporation, but not a corporate franchise. The two things are radically different. It is incomprehensible, that I could have thus confused the two in view of the former confusion which found place in the books after the correct doctrine was declared in Atty. Gen. v. Railroad Company, 35 Wis. 425, 560, which difficulty was removed in State, etc., v. Portage City W. Co., 107 Wis. 441, 83 N. W. 697, followed by Linden Land Company v. Milwaukee E. R. & L. Co., 107 Wis. 493. 83 N. W. 851, and In re Southern Wisconsin Power Company, 140 Wis. 245, 122 N. W. 801; the initial corrective case having been written by me. As said, in terms or effect, in all, it is only a franchise by act of incorporation, or a corporate charter, or a privilege inhering therein as a part of the organic act which is a corporate franchise, and so within section 31, art. 4, of the Constitution, prohibiting the granting of corporate powers or privileges by special act and within section 1, art. 11, as to legislative power to grant corporate charters, but reserving the right to repeal, alter or amend. To be within such, the franchise must be "essentially corporate," using the language of the Chief Justice in the Linden Land Company Case quoted from, that of Chief Justice Ryan in Attorney Gen. v. Railroad Co., "That is as we understand it, franchise by act of incorporation." The mere governmental privilege, not corporate, is a thing of proprietary nature, which, as indicated in Southern Wisconsin Power Company, supra. may be granted to a corporation as well as to an individual, or to the latter and be sold to the former, or, in general, pass from owner to owner like any other property.

The logic of the foregoing is most distinctly stated as matter of elementary law in Water Power Cases, 134 N. W. 330. where the court declared grants of such franchises. without reservation, not subject to recall.

It would be most unfortunate if after all the labor in La Crosse v. La Crosse Electric Company, supra, and here, to make the meaning of the public utility law unmistakable and give significance to the condition of stability the Legislature purposed creating thereby, the old confusion were revived through my passing remark in the former case, or if the clarity hoped for from the two cases were disturbed by the thought that a mere legislative privilege of proprietary nature to do one thing is different from such a privilege to do a different thing, as regards whether a corporate franchise or not. What power of change exists as to a privilege granted under the public utility law, because of its being subject to the conditions and limitations thereof, is another thing as has been iterated and reiterated over and over again.

DUNN et al. v. CITY OF SUPERIOR.

(Supreme Court of Wisconsin. March 12, 1912. Dissenting Opinion March 13. 1912.)

1. MUNICIPAL CORPORATIONS (§ 511*)—ASSESSMENT FOR IMPROVEMENTS—APPEAL FROM ASSESSMENT—APPEARANCE AS CONDITION PRECEDENT.

Under St. 1398, § 959—30g, as added by Laws 1909, c. 539, which provides that the owner of land aggrieved by the determination of a city council as to the amount of assessments may, within 20 days from public notice of final determination, appeal therefrom to the circuit court, and section 959—30f, subd. 8, which provides that the council may determine the amount to be paid by real estate on account of a street improvement, it is not necessary to entitle a property owner to appeal in proceedings to grade a street under St. 1898, §§ 959—30a to 959—30j, as added by Laws 1909, c. 539, that he appear and object before the board of public works or the council.

[Ed. Note.-For other cases, see Municipal Corporations, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

SOON

E-NOTE

1999 - 2000 LEGISLATURE

LRB-3264/2
MDK:wlj:mrc

3

1999 BILL,

FRIDAY 4:00

Regen

AN ACT ~~*to renumber*~~ 196.50 (4); ***to amend*** 198.12 (6) and 198.22 (6); and ***to create*** 196.50 (4) (b) of the statutes; **relating to:** telecommunications services provided by cities, villages, towns ~~and~~ counties, and school districts

3

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

INSERT A

local government unit

Under this bill, a city, village, town ~~or~~ county may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a ~~city, village, town or county~~ from owning, operating, managing or controlling any plant or equipment used to furnish telecommunications services within this state ~~directly or indirectly to the public~~.

INSERT B

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.50 (4) of the statutes is renumbered 196.50 (4) (a).

9-b

INSERT 2-1

SECTION 2. 196.50 (4) (~~b~~) of the statutes is created to read:

196.50 **(4)** (~~b~~) Notwithstanding par. (~~a~~), no city, village, town or county may construct, own, operate, manage or control any plant or equipment used to furnish telecommunications services within this state (~~directly or indirectly~~) to the public.

INSERT 2-4

SECTION 3. 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (~~a~~), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own, acquire and construct any water power and hydroelectric power plant, within or without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

SECTION 4. 198.22 (6) of the statutes is amended to read:

198.22 (6) **ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) ~~(a)~~ b, to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject, however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

(END)

INSERT A:

local government unit, which the bill defines as a

INSERT B:

unless all of the following are satisfied: 1) construction of the plant or equipment began before the effective date of the bill; and 2) the plant or equipment is used solely to provide services to or between local government units or units or agencies of local government units.

INSERT 2-l:

SECTION 1. 196.50 (4) (a) of the statutes is created to read:

196.50 (4) (a) In this subsection, "local government unit" means a city, village, county or school district.

INSERT 2-4:

, unless all of the following are satisfied:

1. The local government unit began construction of the plant or equipment before the effective date of this subdivision . . . . [revisor inserts date].

2. The plant or equipment is used solely to provide services to or between local government units or units or agencies of local government units.

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/3dn
MDK:.....
WLJ

Representative Freese:

Please review this version carefully to make sure that it achieves your intent. In particular, note that this version extends the prohibition to school districts. What about other types of educational agencies, such as technical college districts and the University of Wisconsin? Should this version be revised to add such agencies to the prohibition?

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/3dn
MDK:wlj:mrc

September 17, 1999

Representative Freese:

Please review this version carefully to make sure that it achieves your intent. In particular, note that this version extends the prohibition to school districts. What about other types of educational agencies, such as technical college districts and the University of Wisconsin? Should this version be revised to add such agencies to the prohibition?

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
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LRB–3264/3
MDK:wlj:mrc

1999 BILL

AN ACT *to renumber* 196.50 (4); *to amend* 198.12 (6) and 198.22 (6); and *to create* 196.50 (4) (a) and 196.50 (4) (c) of the statutes; **relating to:** telecommunications services provided by cities, villages, towns, counties and school districts.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then **the city, village or town may not construct another public utility that provides similar** service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a **city, village or town.**

Under this bill, a ~~local government unit~~, which the bill defines as a city, village, town, county ~~or~~, school district, may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a ~~local government unit~~ from constructing, owning, operating, managing or controlling any plant or equipment used to furnish telecommunications services within this state unless ~~all of the following are satisfied: 1)~~ construction of the plant or equipment began before the effective date of the bill ~~and 2)~~ the plant or equipment is used solely to provide services to ~~or between local government units or~~ units or agencies of ~~local government units~~.

INSERT 2-1

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.50 (4) of the statutes is renumbered 196.50 (4) (b).

SECTION 2. 196.50 (4) (a) of the statutes is created to read:

196.50 (4) (a) In this subsection, "local government unit" means a city, village, county or school district.

SECTION 3. 196.50 (4) (c) of the statutes is created to read:

196.50 (4) (c) Notwithstanding par. (b), no local government unit may construct, own, operate, manage or control any plant or equipment used to furnish telecommunications services within this state, unless all of the following are satisfied:

1. The local government unit began construction of the plant or equipment before the effective date of this subdivision .... [revisor inserts date].

2. The plant or equipment is used solely to provide services to or between local government units, units or agencies of local government units.

SECTION 4. 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own, acquire and construct any water power and hydroelectric power plant, within or

INSERT 2-13

without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

SECTION 5. 198.22 (6) of the statutes is amended to read:

198.22 (6) ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS. The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject, however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

(END)

INSERT l-4:

, technical college districts and cooperative educational service agencies

INSERT A:

technical college district or cooperative educational service agency,

INSERT B:

. The bill defines "begin construction" to include enacting an ordinance or adopting a resolution that authorizes the construction. In addition, for a city, village, town or county,

INSERT C:

the city, village, town or county. For a school district or technical college district, the plant or equipment must be used solely to provide services to schools or technical colleges in the school district or technical college district.

INSERT 2-l:

SECTION 1. 196.977 of the statutes is created to read:

196.977 Telecommunications and internet service prohibitions on governmental subdivisions. (1) In this section:

(a) "Begin construction" includes enacting an ordinance or adopting a resolution that authorizes the construction.

(b) "Governmental subdivision" means a city, village, town, county, cooperative educational service agency or technical college district.

(c) "Internet service" means the offering for sale of the conveyance ofvoice, data or other information over any part of the Internet, including the sale of service for

collection, storage, forwarding, switching and delivery incidental to such conveyance.

INSERT 2-12:

If the governmental subdivision is a city, village, town or county,

INSERT 2-13:

(c) If the governmental subdivision is a school district, the plant or equipment is used solely to provide services to schools in the school district.

(8) (d) If the governmental subdivision is a technical college district, the plant or equipment is used solely to provide services to technical colleges in the technical college district,

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/4dn
MDK:
3

Representative Freese:

Under this version, the prohibition is placed in proposed s. 196.977, rather than in proposed s. 196.50 (4) (b), because the prohibition has been expanded to include CESAs, school districts and technical college districts, in addition to municipalities. Also note that under this version, a CESA is completely prohibited from constructing the specified plant or equipment, unless construction the began prior to the effective date of the bill.

Mark D. Kunkel
Legislative Attorney
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/4dn
MDK:wlj:jf

September 28, 1999

Representative Freese:

Under this version, the prohibition is placed in proposed s. 196.977, rather than in proposed s. 196.50 (4) (b), because the prohibition has been expanded to include CESAs, school districts and technical college districts, in addition to municipalities. Also note that under this version, a CESA is completely prohibited from constructing the specified plant or equipment, unless construction began prior to the effective date of the bill.

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LRB-3264/4
MDK:wlj:jf

1999 BILL

AN ACT *to create* 196.977 of the statutes; **relating to:** telecommunications and Internet services provided by cities, villages, towns, counties, school districts, technical college districts and cooperative educational service agencies.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

Under this bill, a governmental subdivision, which the bill defines as a city, village,. town, county, school district, technical college district or cooperative educational service agency, may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a governmental subdivision from constructing, owning, operating, managing or controlling any plant or equipment used to furnish telecommunications or Internet services within this state unless construction of the plant or equipment began before the effective date of the bill. ~~The bill defines "begin construction" to include enacting an ordinance or adopting a resolution that authorizes the construction.~~ In addition, for a city, village, town or county, the plant or equipment must be used solely to provide services to units or agencies of the city, village, town or county. For a school district or technical college district, the plant or equipment must be used solely to provide services to schools or technical colleges in the school district or technical college district.

BILL

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.977 of the statutes is created to read:

196.977 Telecommunications and Internet service prohibitions on governmental subdivisions. (1) In this section:

(a) "Begin construction" includes enacting an ordinance or adopting a resolution that authorizes the construction.

(b) "Governmental subdivision" means a city, village, town, county, cooperative educational service agency or technical college district.

(c) "Internet service" means the offering for sale of the conveyance of voice, data or other information over any part of the Internet, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such conveyance.

(2) Notwithstanding s. 196.50 (4), no governmental subdivision may, directly or indirectly, construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within this state, unless all of the following are satisfied:

(a) The governmental subdivision began construction of the plant or equipment before the effective date of this paragraph .... [revisor inserts date].

(b) If the governmental subdivision is a city, village, town or county, the plant or equipment is used solely to provide services to units or agencies of the city, village, town or county.

(c) If the governmental subdivision is a school district, the plant or equipment is used solely to provide services to schools in the school district.

(d) If the governmental subdivision is a technical college district, the plant or equipment is used solely to provide services to technical colleges in the technical college district.

(END)

1999 – 2000 LEGISLATURE

LRB-32641
MDK:wlj:kjf

1999 BILL

AN ACT *to create* 196.977 of the statutes; **relating to:** telecommunications and Internet services provided by cities, villages, towns, counties, school districts, technical college districts and cooperative educational service agencies.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

Under this bill, a governmental subdivision, which the bill defines as a city, village, town, county, school district, technical college district or cooperative educational service agency, may not, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a governmental subdivision from constructing, owning, operating, managing or controlling any plant or equipment used to furnish telecommunications or Internet services within this state unless construction of the plant or equipment was completed before the effective date of the bill. Also, for a city, village, town or county, the plant or equipment must be used solely to provide services to units or agencies of the city, village, town or county. For a school district or technical college district, the plant or equipment must be used solely to provide services to schools or technical colleges in the school district or technical college district.

For further information see the ***state and*** local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.977 of the statutes is created to read:

196.977 Telecommunications and Internet service prohibitions on governmental subdivisions. (1) In this section:

(a) "Governmental subdivision" means a city, village, town, county, cooperative educational service agency or technical college district.

(b) "Internet service" means the offering for sale of the conveyance ofvoice, data or other information over any part of the Internet, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such conveyance.

(2) Notwithstanding s. 196.50 (4), no governmental subdivision may, directly or indirectly, construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within this state, unless all of the following are satisfied:

(a) The governmental subdivision completed construction of the plant or equipment before October 15, 1999.

(b) If the governmental subdivision is a city, village, town or county, the plant or equipment is used solely to provide services to units or agencies of the city, village, town or county.

(c) If the governmental subdivision is a school district, the plant or equipment is used solely to provide services to schools in the school district.

(d) If the governmental subdivision is a technical college district, the plant or equipment is used solely to provide services to technical colleges in the technical college district.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/6dn
MDK:...:...

This version is identical to the prior version, except that the definition of "governmental subdivision" has been corrected to include a school district.

Mark D. Kunkel
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/6dn
MDK:cmh:kjf

October 20, 1999

This version is identical to the prior version, except that the definition of "governmental subdivision" has been corrected to include a school district.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
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LRB-3264/6
MDK:wlj:cmh:kjf

1999 ASSEMBLY BILL

AN ACT *to create* 196.977 of the statutes; **relating to:** telecommunications and Internet services provided by cities, villages, towns, counties, school districts, technical college districts and cooperative educational service agencies.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

Under this bill, a governmental subdivision, which the bill defines as a city, village, town, county, school district, technical college district or cooperative educational service agency, may not ~~, under any circumstances, construct a telecommunications utility. In addition, the bill prohibits a governmental subdivision from~~ construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within this state unless construction of the plant or equipment was completed before ~~the effective date of the bill.~~ Also, for a city, village, town or county, the plant or equipment must be used solely to provide services to units or agencies of the city, village, town or county. For a school district or technical college district, the plant or equipment must be used solely to provide services to schools or technical colleges in the school district or technical college district.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.977 of the statutes is created to read:

196.977 Telecommunications and Internet service prohibitions on governmental subdivisions. (1) In this section:

(a) "Governmental subdivision" means a city, village, town, county, school district, cooperative educational service agency or technical college district.

(b) "Internet service" means the offering for sale of the conveyance ofvoice, data or other information over any part of the Internet, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such conveyance.

(2) Notwithstanding s. 196.50 (4), no governmental subdivision may, directly or indirectly, construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within this state, unless all of the following are satisfied:

(a) The governmental subdivision completed construction of the plant or equipment before October 15, 1999.

(b) If the governmental subdivision is a city, village, town or county, the plant or equipment is used solely to provide services to units or agencies of the city, village, town or county.

(c) If the governmental subdivision is a school district, the plant or equipment is used solely to provide services to schools in the school district.

(d) If the governmental subdivision is a technical college district, the plant or equipment is used solely to provide services to technical colleges in the technical college district.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/7dn
MDK:...:...

cmH

DATE

This version is identical to the previous version of the bill, except that the analysis has been corrected.

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DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/7dn
MDK:cmh:jf

October 25, 1999

This version is identical to the previous version of the bill, except that the analysis has been corrected.

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

Kunkel. Mark

From: Stolzenberg, John
Sent: Wednesday, January 05, 2000 2:54 PM
To: Kunkel, Mark
Subject: Redraft of LRB-3264/7

Mark,

Here are the main points to cover in the redraft of LRB-3264/7:

(1) Prohibit a governmental subdivision, as defined in LRB-3264/7, from becoming a telecommunications utility, alternative telecommunications utility or telecommunications carrier. [This could be done either through a direct prohibition or through a directive to the PSC to not certify a governmental subdivision as one of these entities. In addition, as appropriate given the wording of this prohibition, amend s. 196.50 (4) to be consistent with the prohibition.]

(2) Prohibit a governmental subdivision from offering to sell or lease or selling or leasing a telecommunications transmission facility in the state to another person if the facility is used to furnish a telecommunications service directly or indirectly to the public. [I interpret "selling" broadly to include an exchange for any consideration or form of compensation. Do you?]

(3) Prohibit a governmental subdivision from offering to sell or selling an Internet access service directly or indirectly to the public. Base the definition of "Internet access service" on the definition of "Internet service provider" in 1999 Pennsylvania House Bill 1516, i.e., "Internet access service" is a "service that enables a user to access content, information, electronic mail or other services offered over the Internet."

Tom Engels was comfortable with my suggestion is that you proceed with a preliminary draft that focuses on these core prohibitions. The other provisions that will likely need to be addressed in the redraft are enforcement and PSC funding. With respect to enforcement, Tom Engels wants the PSC to have investigatory powers and the authority to issue an order to stop a governmental subdivision from engaging in one of the prohibited activities described above. I can show the preliminary draft to PSC staff to determine what enforcement and funding provisions they feel it needs.

Questions? Give me a call.

John

John Stolzenberg, Staff Scientist
Wisconsin Legislative Council Staff
P.O. Box 2536
Madison, WI 53701-2536
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LRB–3264/7
MDK:wlj&cmh:jf

8

RM NOT RUN

1999 ASSEMBLY BILL

AN ACT *to create* 196.977 of the statutes; **relating to:** ~~telecommunications and Internet services provided by~~ cities, villages, towns, counties, school districts, technical college districts and cooperative educational service agencies.

Analysis by the Legislative Reference Bureau

Under current law, if a public utility is operating in a city, village or town, then the city, village or town may not construct another public utility that provides similar service without the approval of the public service commission (PSC). This prohibition does not apply to the construction of a telecommunications utility by a city, village or town.

Under this bill, a governmental subdivision, which the bill defines as a city, village, town, county, school district, technical college district or cooperative educational service agency may not ~~construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within~~ this state unless construction of the plant or equipment was completed before October 15, 1999. Also, for a city, village, town or county, the plant or equipment must be used solely to provide services to units or agencies of the city, village, town or county. For a school district or technical college district, the plant or equipment must be used solely to provide services to schools or technical colleges in the school district or technical college district.

For further information see the state ***and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.977 of the statutes is created to read:

196.977 Telecommunications and Internet service prohibitions on governmental subdivisions. (1) In this section:

(a) "Governmental subdivision" means a city, village, town, county, school district, cooperative educational service agency or technical college district.

(b) "Internet service" means the offering for sale of the conveyance of voice, data or other information over any part of the Internet, including the sale of service for collection, storage, forwarding, switching and delivery incidental to such conveyance.

(2) Notwithstanding s. 196.50 (4), no governmental subdivision may, directly or indirectly, construct, own, operate, manage or control any plant or equipment used to furnish telecommunications or Internet services within this state, unless all of the following are satisfied:

(a) The governmental subdivision completed construction of the plant or equipment before October 15, 1999.

(b) If the governmental subdivision is a city, village, town or county, the plant or equipment is used solely to provide services to units or agencies of the city, village, town or county.

(c) If the governmental subdivision is a school district, the plant or equipment is used solely to provide services to schools in the school district.

(d) If the governmental subdivision is a technical college district, the plant or equipment is used solely to provide services to technical colleges in the technical college district.

(END)

INSERT 3-3 √

INSERT l-3:

from providing certain telecommunications services and Internet access services and from making certain transfers of telecommunications transmission facilities

INSERT A:

provide a telecommunications service in this state as a telecommunications utility, alternative telecommunications utility or telecommunications carrier. A "telecommunications utility" is defined under current law as a person that manages or controls any plant or equipment used to furnish telecommunications services within the state directly or indirectly to the public. A "telecommunications carrier" is similar to a telecommunications utility, except that a carrier does not provide basic local exchange service, except on a resale basis. An "alternative telecommunications utility" is defined to include cable television telecommunications service providers, pay telephone service providers and telecommunications resellers.

The bill also prohibits a governmental subdivision from providing an Internet access service directly or indirectly to the public. "Internet access service" is defined as a service that enables a user to obtain access to content, information, electronic mail or any other service offered over the Internet. Finally, the bill prohibits a governmental subdivision from transferring a telecommunications transmission facility in this state to another person if the facility is used to furnish a telecommunications service directly or indirectly to the public.

INSERT 3-3:

SECTION 1. 196.203 (2) of the statutes is renumbered 196.203 (2) (a).

SECTION 2. 196.203 (2) (b) of the statutes is created to read:

196.203 (2) (b) The commission may not issue a determination under par. (a) to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 3. 196.499 (15) of the statutes is renumbered 196.499 (15) (a) and amended to read:

196.499 (15) (a) A telecommunications carrier that is not authorized to provide intrastate telecommunications service on January 1, 1994, may not commence the construction of any plant, extension or facility, or provide intrastate telecommunications service directly or indirectly to the public, unless the

telecommunications carrier obtains a certificate from the commission authorizing the telecommunications carrier to provide intrastate telecommunications. ~~The~~ Except as provided in par. (b), the commission may issue a certificate if the telecommunications carrier demonstrates that it possesses sufficient technical, financial and managerial resources to provide intrastate telecommunications services. A telecommunications carrier that is authorized to provide intrastate telecommunications service on January 1, 1994, is not required to be recertified under this ~~subsection~~ paragraph.

History: 1993 a. 496; 1997 a. 27,218.

SECTION 4. 196.499 (15) (b) of the statutes is created to read:

196.499 (15) (b) The commission may not issue a certificate under par. (a) to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 5. 196.50 (2) (c) of the statutes is renumbered 196.50 (2) (c) 1..

SECTION 6. 196.50 (2) (c) 2. of the statutes is created to read:

196.50 (2) (c) 2. The commission may not issue a certificate of authority under this subsection to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 7. 196.50 (4) (title) of the statutes is amended to read:

196.50 (4) (title) ~~MUNICIPALITY~~ MUNICIPALITIES AND GOVERNMENTAL SUBDIVISIONS **RESTRAINED.**

History: 1977 c. 418; 1983 a. 53; 1985 a. 297 ss. 52 to 57; 1993 a. 496; 1995 a. 409.

SECTION 8. 196.50 (4) 7. of the statutes is renumbered 196.50 (4) (b) and amended to read:

196.50 (4) (b) No municipality may construct any public utility that is not a telecommunications utility or alternative telecommunications utility if there is in operation under an indeterminate permit in the municipality a public utility engaged in similar service ~~other than a telecommunications service~~, unless it secures

from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require the municipal public utility

History: 1977 c. 418; 1983 a. 53; 1985 a. 297 ss. 52 to 54.76; 1991 a. 496; 1995 a. 409.

SECTION 9. 196.50 (4) (a) of the statutes is created to read:

196.50 (4) (a) In this subsection:

1. "Governmental subdivision" means a city, village, **town, county,** school district, cooperative educational service agency or technical college district.

2. "Internet access service" means a service that enables a user to obtain access to content, information, electronic mail or any other service offered over the Internet.

3. "Transfer" means to sell, lease or transfer for consideration of any interest in ownership, title or right to use.

SECTION 10. 196.50 (4) (c) of the statutes is created to read:

196.50 (4) (c) No governmental subdivision may do any of the following:

1. Provide a telecommunications service in this state as a telecommunications utility, alternative telecommunications utility or telecommunications carrier.

2. Transfer a transmission facility in this state to another person if the facility is used to furnish a telecommunications service directly or indirectly to the public.

3. Provide an Internet access service directly or indirectly to the public.

SECTION 11. 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own,

acquire and construct any water power and hydroelectric power plant, within or without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

History: 1975 c. 147 s. 54; 1979 c. 89,323; 1981 c 390; 1993 a. 84; 1995 a 158; 1997 a. 27.

SECTION 12. 198.22 (6) of the statutes is amended to read:

198.22 (6) **ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject,

however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

History: 1971 c. 108 ss. 5, 6; 1971 c. 125 s. 523; 1971 c. 164.1979 c. 323; 1985 a. 29; 1991 a. 316; 1993 a. 184; 1997 a. 254.

SECTION 13. Initial applicability.

(1) The treatment of section 196.50 (4) (c) of the statutes first applies to services provided or facilities transferred under contracts entered into, extended, modified or renewed on the effective date of this subsection.

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–3264/8dn
MDK:...:...
WLJ

Representative Freese:

Please review this version very carefully to make sure that it achieves your intent. In particular, please note the following:

1. I decided to both prohibit governmental subdivisions from providing services as telecommunications utilities, etc., *and* to prohibit the commission from issuing certificates of authority to them to provide such services. I'm not sure if this overkill, is but it makes it clear that they can't provide the services. What do you think?

2. This version refers to "providing" an Internet access service, rather than selling such a service, for the sake of consistency with other provisions referring to "providing" a telecommunications service. Is this okay?

Mark D. Kunkel
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3264Bdn
MDK:wlj:km

January 13, 2000

NOTE: This version was not sent to Freese.

Representative Freese:

Please review this version very carefully to make sure that it achieves your intent. In particular, please note the following:

1. I decided to both prohibit governmental subdivisions from providing services as telecommunications utilities, etc., ***and*** to prohibit the commission from issuing certificates of authority to them to provide such services. I'm not sure if this is overkill, but it makes it clear that they can't provide the services. What do you think?

2. This version refers to "providing" an Internet access service, rather than selling such a service, for the sake of consistency with other provisions referring to "providing" a telecommunications service. Is this okay?

Mark D. Kunkel
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LRB-~~3864/8~~
MDK:wlj&cmh:km

19QQASSEMBLY BILL

AN ACT ***to renumber*** 196.203 (2) and 196.50 (2) (c); ***to renumber and amend*** 196.499 (15) and 196.50 (4); ***to amend*** 196.50 (4) (title), 198.12 (6) and 198.22 (6); and to ***create*** 196.203 (2) (b), 196.499 (15) (b), 196.50 (2) (c) 2., 196.50 (4) (a) and 196.50 (4) (c) of the statutes; **relating to:** prohibiting cities, villages, towns, counties, school districts, technical college districts and cooperative educational service agencies from providing certain telecommunications services and Internet access services and from making certain transfers of telecommunications transmission facilities.

Analysis by the Legislative Reference Bureau

Under this bill, a governmental subdivision, which the bill defines as a city, village, town, county, school district, technical college district or cooperative educational service agency may not provide a telecommunications service in this state as a telecommunications utility, alternative telecommunications utility or telecommunications carrier. A "telecommunications utility" is defined under current law as a person that manages or controls any plant or equipment used to furnish telecommunications services within the state directly or indirectly to the public. A "telecommunications carrier" is similar to a telecommunications utility, except that a carrier does not provide basic local exchange service, except on a resale basis. An

"alternative telecommunications utility" is defined to include cable television telecommunications service providers, pay telephone service providers and telecommunications resellers.

The bill also prohibits a governmental subdivision from providing an Internet access service directly or indirectly to the public. "Internet access service" is defined as a service that enables a user to obtain access to content, information, electronic mail or any other service offered over the Internet. Finally, the bill prohibits a governmental subdivision from transferring a telecommunications transmission facility in this state to another person if the facility is used to furnish a telecommunications service directly or indirectly to the public.

For further information see the ***state and*** local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.203 (2) of the statutes is renumbered 196.203 (2) (a).

SECTION 2. 196.203 (2) (b) of the statutes is created to read:

196.203 (2) (b) The commission may not issue a determination under par. (a) to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 3. 196.499 (15) of the statutes is renumbered 196.499 (15) (a) and amended to read:

196.499 (15) (a) A telecommunications carrier that is not authorized to provide intrastate telecommunications service on January 1, 1994, may not commence the construction of any plant, extension or facility, or provide intrastate telecommunications service directly or indirectly to the public, unless the telecommunications carrier obtains a certificate from the commission authorizing the telecommunications carrier to provide intrastate telecommunications. ~~The~~ Except as provided in par. (b), the commission may issue a certificate if the telecommunications carrier demonstrates that it possesses sufficient technical, financial and managerial resources to provide intrastate telecommunications

services. A telecommunications carrier that is authorized to provide intrastate telecommunications service on January 1, 1994, is not required to be recertified under this ~~subsection~~ paragraph.

SECTION 4. 196.499 (15) (b) of the statutes is created to read:

196.499 (15) (b) The commission may not issue a certificate under par. (a) to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 5. 196.50 (2) (c) of the statutes is renumbered 196.50 (2) (c) 1.

SECTION 6. 196.50 (2) (c) 2. of the statutes is created to read:

196.50 (2) (c) 2. The commission may not issue a certificate of authority under this subsection to a governmental subdivision, as defined in s. 196.50 (4) (a) 1.

SECTION 7. 196.50 (4) (title) of the statutes is amended to read:

196.50 (4) (title) ~~MUNICIPALITY~~ MUNICIPALITIES AND GOVERNMENTAL SUBDIVISIONS **RESTRAINED.**

SECTION 8. 196.50 (4) of the statutes is renumbered 196.50 (4) (b) and amended to read:

196.50 (4) (b) No municipality may construct any public utility that is not a telecommunications utility or alternative telecommunications utility if there is in operation under an indeterminate permit in the municipality a public utility engaged in similar service ~~other than a telecommunications service~~, unless it secures from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require the municipal public utility.

SECTION 9. 196.50 (4) (a) of the statutes is created to read:

196.50 (4) (a) In this subsection:

1. "Governmental subdivision" means a city, village, town, county, school district, cooperative educational service agency or technical college district.

2. "Internet access service" means a service that enables a user to obtain access to content, information, electronic mail or any other service offered over the Internet.

3. "Transfer" means to sell, lease or transfer for consideration of any interest in ownership, title or right to use.

SECTION 10. 196.50 (4) (c) of the statutes is created to read:

196.50 (4) (c) No governmental subdivision may do any of the following:

1. Provide a telecommunications service in this state as a telecommunications utility, alternative telecommunications utility or telecommunications carrier.

2. Transfer a transmission facility in this state to another person if the facility is used to furnish a telecommunications service directly or indirectly to the public.

3. Provide an Internet access service directly or indirectly to the public.

SECTION 11.' 198.12 (6) of the statutes is amended to read:

198.12 (6) **UTILITIES, ACQUIRE, CONSTRUCT, OPERATE; WATER POWER; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any utility or portion thereof to operate, in whole or in part, in the district, and to own, acquire and, subject to ss. 196.01 to 196.53 and 196.59 to 196.76 where applicable, to construct any addition to or extension of any such utility, and to own, acquire and construct any water power and hydroelectric power plant, within or without the district, to be operated in connection with any such utility, and to operate, maintain and conduct such utility and water power and hydroelectric power plant and system both within and without the district, and to furnish, deliver and sell to the public and to any municipality and to the state and any state institution heat, light and power service and any other service, commodity or facility which may be produced or furnished thereby, and to charge and collect rates, tolls and charges

for the same. For said purposes the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the maintenance and operation of such utility or any part thereof, subject, however, to such local police regulations as may be imposed by any ordinance adopted by the governing body of the municipality in which such highway, street, way or place is located.

SECTION 12. 198.22 (6) of the statutes is amended to read:

198.22 (6) **ACQUISITION; CONSTRUCTION; OPERATION; SALE OF SERVICE; USE OF STREETS.** The district shall have power and authority to own, acquire, and, subject to the restrictions applying to a municipality under s. 196.50 (4) (b), to construct any water utility or portion thereof, to operate, in whole or in part, in the district and to construct any addition or extension to any such utility. For such purpose the district is granted and shall have and exercise the right freely to use and occupy any public highway, street, way or place reasonably necessary to be used or occupied for the construction, operation or maintenance of such utility or any part thereof, subject, however, to the obligation of the district to replace said grounds in the same condition as they previously were in.

SECTION 13. Initial applicability.

(1) The treatment ofsection 196.50 (4) (c) of the statutes first applies to services provided or facilities transferred under contracts entered into, extended, modified or renewed on the effective date of this subsection.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–4210/1dn
MDK:...:...

Representative Huebsch:

This bill is identical to LRB–3264/8 and the legislative file for LRB–3264/8 is now included under this bill's LRB number. Please note the following about the bill:

1. I decided to both prohibit governmental subdivisions from providing services as telecommunications utilities, etc., and to prohibit the commission from issuing certificates of authority to them to provide such services. I'm not sure if this is overkill, but it makes it clear that they can't provide the services. What do you think?

2. This version refers to "providing" an Internet access service, rather than selling such a service, for the sake of consistency with other provisions referring to "providing" a telecommunications service. Is this okay?

Mark D. Kunkel
Legislative Attorney
Phone: (608) 266-0131
E-mail: Mark.Kunkel@legis.state.wi.us

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–4210/1dn
MDK:wlj&cmh:jf

January 13, 2000

Representative Huebsch:

This bill is identical to LRB-326418 and the legislative file for LRB–3264/8 is now included under this bill's LRB number. Please note the following about the bill:

1. I decided to both prohibit governmental subdivisions from providing services as telecommunications utilities, etc., and to prohibit the commission from issuing certificates of authority to them to provide such services. I'm not sure if this is overkill, but it makes it clear that they can't provide the services. What do you think?

2. This version refers to "providing" an Internet access service, rather than selling such a service, for the sake of consistency with other provisions referring to "providing" a telecommunications service. Is this okay?

Mark D. Kunkel
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SUBMITTAL -- FORM

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 0 1/1 312000

To: Representative Huebsch

Relating to LRB drafting number: LRB-4210

Topic
Prohibiting governmental subdivisions from providing certain Internet and telecommunications services

Subject(s)
Public Util. - telco and cable

1. **JACKET** the draft for introduction _____

in the **Senate** or the **Assembly** X (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies,

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW,** prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Mark D. Kunkel, Legislative Attorney
Telephone: (608) 266-013 1