

CHAPTER 197.

MUNICIPAL ACQUISITION OF UTILITIES.

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197.01 Municipalities, powers under utility law. (1) Any municipality shall have the power, subject to the provisions of chapters 196 and 197, to construct and operate a plant and equipment or any part thereof for the production, transmission, delivery or furnishing of heat, light, water or power, or to acquire, construct and operate a toll bridge.

(2) Any municipality shall have the power, subject to the provisions of chapters 196 and 197, to purchase any public utility or any part thereof; provided, that such purchase and the terms thereof shall be approved by the commission after a hearing as provided in section 197.05.

(3) Any municipality shall have the power, subject to the provisions of chapters 196 and 197, to acquire the property of any public utility, wheresoever situated, actually used and useful for the convenience of the public; provided, that in acquiring any property outside of Wisconsin, such property must have been used exclusively by such public utility for furnishing heat, light, water and power to such municipality.

(4) Any municipality having secured a declaration of convenience and necessity to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, or owning any such plant, may contract with any public utility lawfully engaged as such for a division of any of the foregoing service in said municipality, for a period not exceeding ten years, with mutual covenants restricting and obligating operations by each party to service within the respective fields of division so contracted for, and within such fields the commission shall have the right to regulate the charges for, and quality of, service, notwithstanding anything provided in such contract. Nothing in this section shall prevent the commission from terminating such contract and granting a certificate of convenience and necessity for a third or other utility, if in its judgment the public interest requires it.

Note: The methods prescribed by 66.06 (8), (9) and 197.01 to 197.05 for the municipal acquisition of public utilities are separate, distinct, and mutually exclusive. *Wisconsin P. & L. Co. v. Public Service Commission*, 222 W 25, 267 NW 386.

A majority of the electors of Edgerton voted affirmatively on the following question: "Shall the City of Edgerton purchase the rights and property of the Wisconsin Power and Light Company actually used and useful for transmission, delivery and furnishing of heat, light, and power within the City of Edgerton, and construct and operate a plant and equipment for production and furnishing of electricity?" The two propositions were clearly stated; those in favor of both would vote "Yes," while those in favor of either and opposed to the other as well as those opposed to both, would vote "No." The proceedings were held to be valid and to authorize the acquisition of rights and property even if located outside city if used and useful for furnishing power within city. *Wisconsin P. & L. Co. v. Public Service Commission*, 224 W 286, 272 NW 50.

Chapter 197 provides a complete procedure for the acquisition by a city of a public utility operating under an indeterminate permit and an exclusive procedure for discontinuing proceedings duly initiated and conducted, after the public service commission has determined the just compensation to be paid. Section 10.43 has no application to such situation. *Henderson v. Hoesley*, 225 W 596, 275 NW 413.

In proceedings by a village to acquire a public utility the voters' affirmative answer

to a question whether the "plant and equipment" "located in the village" should be acquired by the village did not authorize the acquisition of utility property located outside the village. *Wisconsin P. & L. Co. v. Public Service Commission*, 226 W 370, 276 NW 623-625.

Sec. 196.39, relating to the regulation of public utilities, providing in part that the public service commission may reopen any case for further evidence following the issuance of an order therein, does not apply to acquisition proceedings brought before the commission by a municipality under ch. 197, and vests no power in the commission to reopen such a proceeding for further evidence following its issuance of an order fixing just compensation for the municipal acquisition of the property of the utility in question. *Superior W., L. & P. Co. v. Public Service Comm.*, 232 W 616, 288 NW 243.

The proceeding was held to be one under 197.01 (3), for an "adversary acquisition" of the used and useful property, as against the contention that the proceeding was one under 66.06 (8) and 197.01 (2), for a "negotiated purchase" of the utility's distribution system. In a proceeding under 197.01 (3), whether certain property owned by the utility is used and useful for the convenience of the public, so as to be required to be included in the property to be taken by the municipality, is a question of fact and a finding of the public service commission as to the property used and useful can be set aside only when of such a character that the court can clearly say

that the finding is unreasonable. A determination of the public service commission excluding, from the property used and useful required to be taken by the city, the local operator's house, the local manager's home,

an interest in the power line serving the city, and certain substation property, was neither unlawful nor unreasonable. *Lake Superior Dist. P. Co. v. Public Service Comm.*, 235 W 667, 294 NW 45.

197.02 Action by municipalities to acquire utility. If the municipality shall have determined to acquire a plant operated under an indeterminate permit provided in section 196.55, by a vote of a majority of the electors, such municipality shall bring an action in the circuit court against the public utility for an adjudication as to the necessity of such taking by the municipality. Unless the parties waive a jury, the question as to the necessity of the taking of such property by the municipality shall be submitted to a jury.

Note: For court procedure under this section, see note to section 274.33, citing *Ban-* gor v. Hussa C. & P. Co., 208 W 191, 242 NW 565.

197.03 Indeterminate permit; notice. If the municipality shall have determined to acquire an existing plant in the manner provided in section 197.02, and the public utility owning such plant shall have consented to the taking over of such plant by the municipality by acceptance of an indeterminate permit as provided herein, or, in case such public utility shall not have waived or consented to such taking, if the jury shall have found that a necessity exists for the taking of such plant, then the municipality shall give speedy notice of such determination and of such consent or such finding to the public utility and to the commission.

197.04 Discontinuance of condemnation. (1) Any municipality having determined to acquire an existing plant or any part of the equipment of a public utility may discontinue all proceedings to that end at any time within ninety days after the final determination of compensation by the commission, by a resolution to that effect by its municipal council, provided that such resolution shall not be of force and effect until ninety days after its passage and publication. If within said ninety days a petition shall be filed with the clerk of such municipality in a city of the first class signed by five per cent and in all other municipalities by ten per cent of the electors thereof requesting that the question of discontinuing said proceeding to acquire such plant or equipment be submitted to the electors, such question shall be submitted to the said electors at any general or regular municipal election that may be held not less than thirty, and not more than thirty-five, days from the date of the filing of the petition; and if no general election or regular municipal election is to be held within the stated periods, then the governing body of the municipality shall order the holding of a special election for the purpose of submitting to the electors the question whether the aforesaid resolution shall remain in effect and its adoption be ratified, and such resolution shall not have force or effect unless a majority of the electors voting on such question shall be in favor thereof.

(2) The municipal council may provide for the notice, the manner of holding such election and the method of voting thereon and of making returns thereof and the canvassing and determining of the result thereof; provided, that notice of the submission of the question contemplated herein to the electors shall be given by a brief notice of that fact once a week for three weeks in some newspaper of general circulation published in the municipality, and if there be no such newspaper then publication may be made in any newspaper of general circulation in the county seat of the county wherein the municipality is located. The notice of holding any special election shall be incorporated as a part of the aforesaid notice.

(3) Upon the discontinuance of proceedings by the municipality no subsequent proceedings shall be instituted within two years thereafter.

Note: When the commission makes an award which may be the subject of discontinuance proceedings the making of that award is the time of taking and the time as of which just compensation should be fixed. *Wisconsin Power & Light Co. v. Public Service Commission*, 231 W 390, 286 NW 392.

197.05 Compensation determined by commission; notice; title. (1) The commission shall thereupon set a time and place for a public hearing upon the matters of the just compensation to be paid for the property of such public utility, wheresoever situated, actually used and useful for the convenience of the public, and of all other terms and conditions of the purchase, and shall give to the municipality and the public utility interested, not less than thirty days' notice of the time and place when and where such hearing will be held, and such matters considered and determined, and the municipality shall publish such notice once a week for not less than three successive weeks in at least one newspaper of general circulation printed in the English language and published in the county in which such public utility is located.

(2) The commission shall, by order, fix and determine and certify to the municipal council, to the public utility and to any bondholder, mortgagee, lienor or any other person having or claiming to have any interest in such public utility appearing upon such hearing, just compensation to be paid for the taking of the property of such public utility

actually used and useful for the convenience of the public and all other terms and all conditions of purchase which it shall ascertain to be reasonable.

(3) The compensation and other terms and the conditions of purchase thus certified by the commission shall constitute the compensation and terms and conditions to be paid, followed and observed in the purchase of such plant from such public utility. Upon the filing of such certificate with the clerk of such municipality the absolute title of the property taken shall vest in such municipality, and, as to any such property located outside of Wisconsin, the circuit court is vested with power to require such public utility company to convey the same to the municipality. Municipalities in adjoining states which have determined to acquire a public utility, part of which is located in Wisconsin, are authorized to acquire and to hold and operate any part of such public utility located in Wisconsin, provided, such state gives a similar power to Wisconsin municipalities.

Note: Municipality purchasing local electric utility was required to pay as compensation therefor value of physical property taken and going value of local utility, but was not required to pay overhead costs or severance damages for diminution in value of electric company's property as a whole by reason of the taking of a portion thereof. Cost of removing high-tension lines and facilities for transforming high-tension current and transferring it to distribution lines, and value of substation comprising these facilities, as compensation for local electric utility purchased by municipality, may be determined when removal takes place. Public service commission's order for joint use by electric company and municipality, purchasing local electric utility, of poles carrying electric company's high-tension transmission lines held proper under statute requiring utility to permit another utility to use its poles and other equipment, and statute giving public service commission power to fix terms and conditions of purchase. *Wisconsin P. & L. Co. v. Public Service Commission*, 219 W 104, 261 NW 711, 262 NW 257.

Where a resolution and notice of election for the municipal acquisition of the plant and equipment of an electric utility specified that payment was to be made by the issuance of mortgage bonds under 66.06 (9) (b), which would not be a village debt, and

did not limit the proposed acquisitions to only such property as was actually used and useful for the convenience of the public, the proceedings are considered as being under 66.06 (8), (9), relating to acquisition by agreement, rather than under 197.01 to 197.05, providing for acquisition by action against the utility and subsequent proceedings before the public service commission, and limiting the subject of the acquisition to property used and useful for the convenience of the public; especially since the method of financing specified in the instant proceedings is applicable to an acquisition by voluntary agreement only; and, therefore, the commission was without jurisdiction in the premises to fix the compensation of the utility. *Wisconsin P. & L. Co. v. Public Service Commission*, 222 W 25, 267 NW 386.

The statute required just compensation to be fixed as of the time when the commission makes its award. *Wisconsin Power & Light Co. v. Public Service Commission*, 231 W 390, 286 NW 392.

The power exercised by the public service commission in fixing just compensation in acquisition proceedings under ch. 197 is a quasi-judicial rather than a legislative power. (Contrary statement in *Wisconsin P. & L. Co. v. Public Service Comm.* 231 W 390, corrected.) *Superior W., L. & P. Co. v. Public Service Comm.*, 232 W 616, 288 NW 243.

197.06 Court review of order of commission. Any public utility or the municipality or any bondholder, mortgagee, lienor or other creditor of the public utility, being dissatisfied with such order, may prosecute an action to alter or amend such order or any part thereof, as provided in sections 196.41 to 196.48. [1931 c. 79 s. 23]

Note: Sec. 196.405, relating to rehearing before the public service commission, although not mentioned in 197.06, authorizing an action for the judicial review "as provided by sections 196.41 to 196.48" of an order of the commission issued in a proceeding by a municipality under ch. 197, to acquire the property of a utility, is nevertheless to some extent incorporated in ch.

197 by reason of the fact that 196.42, which is mentioned in 197.06, provides that an action for judicial review shall be commenced within sixty days after the commission's denial of a rehearing or entry of a final order on a rehearing granted. *Superior W., L. & P. Co. v. Public Service Comm.*, 232 W 616, 288 NW 243.

197.07 Burden of proof; judgment. If the plaintiff shall not establish to the full satisfaction of the court that the compensation fixed and determined in such order is unlawful, or that some of the terms or conditions fixed and determined therein are in some particulars unreasonable, judgment shall be entered affirming said order.

197.08 Decision for utility. If the plaintiff shall establish to the full satisfaction of the court and the court shall adjudge that such compensation is unlawful or that some of such terms or conditions are unreasonable, the court shall remand the same to the commission with such findings of fact and conclusions of law as shall set forth in detail the reasons for such judgment and the specific particulars in which such order of the commission is adjudged to be unreasonable or unlawful.

197.09 Reconsideration of compensation. (1) If the compensation fixed by the order of the commission be adjudged to be unlawful, the commission shall forthwith proceed to set a rehearing for the redetermination of such compensation as in the first instance.

(2) The commission shall forthwith otherwise alter and amend such order with or without a rehearing as it may deem necessary so that the same shall be reasonable and lawful in every particular.

197.10 Cities of first class; contracts; utilities. (1) Any city of the first class, however incorporated, may enter into contract, upon any terms not repugnant to the constitution of this state, with the owner or owners of any street railway, interurban rail-

way or public utility, as defined in section 196.01, except utilities for the operation of telephone or telegraph lines, operated in whole or in part within the corporate limits of said city, for any or all of the following purposes:

(a) To provide for the leasing, public operation or joint operation of any part or all of the properties of such public utility, street railway or interurban railway, by said city.

(b) To provide for the control, operation, service or management of such properties by either party or by both parties acting jointly.

(c) To determine and fix by the terms of such contract the value of the properties of such utility, street railway, or interurban railway to be used as a basis for the computation and distribution of earnings, rates, and rate of return to the owner or owners of such public utility, street railway, or interurban railway.

(d) To provide for the stabilization of the rate of return to the owner or owners of such properties.

(e) To provide for the extension and improvement of existing properties by the municipality or otherwise.

(f) To provide for the purchase of all or any part of such properties by the city, to fix the purchase price or the basis or method for computing the same and to provide for the payment thereof and the method of such payment out of funds provided by the city whether derived out of the earnings of such properties or otherwise, or derived in part from such earnings and in part from other sources.

(g) To provide for the purchase by the city of mortgage bonds issued by such public utility, street railway or interurban railway.

(h) To provide for the submission of matters of difference arising between the parties to the public service commission or to a board of arbitrators as the parties may agree.

(i) To provide for such further or additional matters as will enable the parties to accomplish any object agreed upon between them relating to the use, operation, service, management, control, sale, lease, purchase, extension, improvement, rates, value or earnings of such properties.

(2) Such contract when adopted by the common council of said city and accepted by the owner or owners of such public utility, street railway, or interurban railway shall be submitted to the public service commission for its approval and upon such approval the same shall be submitted in such manner as the common council shall determine to a vote of the electors of such city at the next regular municipal election or at a special election called for that purpose, and such contract shall not become binding upon such city until approved by a majority vote of the qualified electors of such city voting thereon. No bonds shall in any case be issued by said city under the contract or contracts mentioned in subsection (1) of this section, until the proposition of their issue shall have been submitted to the people of such city and adopted by a majority of the electors voting thereon.

(3) It shall be the duty of the public service commission upon request joined in by both parties to any such contract to advise and co-operate with them in the making of audits, estimates, and other determinations of fact which will aid the parties in reaching an agreement or in the operation of the property under such agreement.

(4) Insofar as the use, operation, service, management, control, sale, lease, purchase, extension, improvement, rates, value or earnings of the properties of the public utility, street railway or interurban railway or provisions looking toward the ultimate acquisition of the same are made subject to the terms of any contract provided for in subsection (1) of this section, and so long as said contract remains in force, the following sections and parts of sections of the statutes shall be inapplicable to the same, to wit: Sections 104.13 subsection (2), 193.37, 193.38, 193.39, 193.40, 193.41, 193.42, 193.43, 193.44, 195.05, 195.08 subsection (6), 195.10, 196.02 subsections (1), (2), 196.05, 196.09, 196.10, 196.11, 196.15, 196.16, 196.20, 196.21, 196.22, 196.23, 196.26, 196.27, 196.28, 196.29, 196.30, 196.37, 196.38, 196.39, 196.40, 196.58, 196.70, 196.77, 197.01 subsections (2) to (4), 197.02, 197.03, 197.04, 197.05, 197.06, 197.07, 197.08, 197.09; provided, that nothing in any contract made hereunder shall operate to prevent an appeal to the commission by any person, firm or corporation other than a party to said contract upon any complaint alleging that any rate, fare, charge or classification, or any joint rate, or any regulation, act or practice whatsoever affecting the transportation of persons or property, or relating to the production, transmission, delivery or furnishing of gas, heat, light or power, or any service in connection therewith, are unjustly discriminatory, or that any such service is inadequate or cannot be obtained. Upon said appeal the commission shall, as provided by law, determine and by order fix a rate, fare, charge, classification, joint rate or regulation, act or practice or service to be imposed, observed or followed in the future in lieu of that found to be unjustly discriminatory or inadequate.

(5) Nothing in this section shall operate to deprive the public service commission of its jurisdiction over service, rates and other matters as provided in chapters 195, 196 and 197, outside of the limits of said city of the first class. If any complaint or investigation be-

fore the public service commission as to service, rates or other matters arising outside of any such city necessarily shall involve any contract authorized in subsection (1) of this section, or any specifications, rules, regulations or acts in its conduct or administration such city shall be made a party to such proceeding and to the extent that such contract or its administration shall be determined by the commission to be unreasonable or unjustly discriminatory as regards any person or municipality outside of such city, the same shall be changed to conform to the rates, service or regulations provided by said commission outside of such city. [1931 c. 79 s. 24]