(Decision No. 6400)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EXHIBIT A

CITY OF FORT COLLINS, COLORADO, a Municipal Corporation, Complainant, vs. PUBLIC SERVICE COMPANY OF COLORADO, a Corporation, Defendant.	CASE NO. 1571

March 30, 1935

Appearances: Fred W. Stover, Esq., and Herbert A. Alpert, Esq., Fort Collins, Colorado, for Complainant.

Lee, Shaw and McCreery, Denver, Colorado, and Wm. A. Bryans, III, Esq., Fort Collins, Colorado, for Defendant.

STATEMENT

By the Commission:

This case was instituted by the City of Fort Collins, hereinafter referred to as the City, by filing a co plaint or petition asking for an order by this Commission requiring Public Service Company of Colorado, hereinafter called Service Company, to furnish electric energy to the City at a fair and reasonable wholesale rate to be fixed by the Commission.

Fort Collins is a city of the second class, and is a charter or home-rule city, having adopted a charter under and by virtue of the Twentieth Amendment to the Constitution of the State.

Service Company is now and for years past has been engaged in generating and distributing electric energy in a large part of the

State, including the City and the territory adjacent thereto. Its wholesale customers who are engaged in the distribution of energy to the public within the area served by such customers include The Home Gas and Electric Company, operating in the Greeley district, The Glenwood Light and Power Company, Park Power Company, Carbondale Light and Power Company, Redlands Water and Power Company, Arvada Electric Company, Colorado Central Power Company, Town of Frederick, and Town of Bonanza. Moreover, Service Company furnished emergency service to the City of Loveland in the fall of 1928, and offered a contract to the said City under which Service Company would supply such energy to the City as the latter's own hydro plant would not be capable of furnishing, for a charge of seven dollars per kilowatt* of transformer capacity per year, plus one cent per kilowatt hour.° Likewise, Service Company offered at one time to sell energy to the City of Longmont for redistribution by it. The Northern Colorado Power Company, the predecessor of Service Company in the territory in which Fort Collins, Longmont and Loveland are situated, did sell energy for a number of years to the City of Longmont.

On September 12, 1932, a special municipal election was held in the City. At said election a majority of the qualified electors voting voted in favor of the adoption of an amendment to the charter of the City, the amendment being as follows:

> "The City Council shall have the right and without other or further preliminaries, it shall be the duty of the City Council forthwith to acquire, by any lawful means, a municipal electric light and power system, consisting of a gneerating plant and distribution system with all necessary appurtenances, and to issue in full payment therefor municipal electric light and power

* Hereinafter referred to as kw.

° Hereinafter referred to as kwh.

interest bearing revenue bonds in an amount not exceeding the principal sum of $745,000.00 which bonds shall be payable solely out of the revenue to be derived from the operation of said system, such bonds in no event to be paid by taxation or out of thegeneral funds of the city, except that the city shall pay reasonable rates for light and power used for municipal purposes. The Council shall have power to maintain and operate said system for the use and benefit of said city and its inhabitants, and shall have all other powers and shall adopt all means necessary or appropriate to carry out the requirements, purpose and intent of this section in accordance with the most liberal construction which may be placed hereon. Any and all parts of the city charter and all laws in conflict herewith are hereby repealed."

Thereafter the City instituted a condemnationcase in the District Court of the Eighth Judicial District in and for the County of Larimer for the condemnation of the distribution system of Service Company located in the City. In the trial of said case the jury returned a verdict making a total award to Service Company of $216,500, plus costs. A motion for a new trial filed by Service Company was denied. Judgment and decree on the verdict was thereupon made and entered.

We understand that the City is taking over, and that the amount of the verdict includes the value of, the distribution system in some fringe territory. When, therefore, we speak of the City system and the area within the City, we refer also to the system in the fringe territory and to such fringe territory.

The Mayor of the City testified that the City is desirous of taking over Service Company's distribution system within the City at once, and to begin immediately the construction of a generating plant which could be completed on or about December one. While the plant is being constructed the City desires to buy energy at wholesale from Service Company, which has refused to sell and furnish the same to the City.

There was some question as to the possibility of securing the necessary capital for the taking over of the distribution system and for the construction of the generating plant. We believe it is unnecessary to go into some correspondence had by the City with representatives

of the Federal Emergency Administration of Public Works. The Mayor testified that several private parties are desirous of buying bonds which the City has authorized to be issued and sold. He testified also that the City's credit is good and that it has never been in default on any of its bonds or interest thereon.

The testimony of Mr. McCammon, Assistant General Superintendent of Operations of Service Company, was to the effect that the company has six hydro and four steam plants in Colorado, which are inter-connected, and which, with the transmission lines and distribution system used in distributing energy generated at these plants, constitute what is called Service Company's central system; that the maximum demand in the year 1934 upon said system was 66,700 kw, and that the capacity of said system is 100,000 kw. In other words, the maximum demand made upon the generating plants is only about two-thirds of the amount of energy which they are capable of furnishing. There is no evidence to indicate that the demand, including that of the City, during the time when the City will be constructing its generating plant, would approach the capacity. As Mr. McCammon testified, Service Company has ample capacity for the City.

Service Company in its answer and at the hearing contended that this Commission has no power or jurisdiction to require it to furnish electric current at a fair and reasonable wholesale rate or any other rate; that the City is without power or authority to take over and operate the distributing system of the defendant "in advance of the time when the City shall have completed its generating plant"; that the City by its complaint or petition "seeks to make the said City a joint owner and partner of this defendant in the business of operating and conducting agenerating plant and distributing system, contrary to the provisions of Article XX, Section 2, of the Constitution of the State of

Colorado"; that Service Company has never held itself out as engaged in the business of selling electricity to others for the purpose of resale, and that in all instances where electricity has been served at wholesale, it has been done as the result of specific contracts; that the City has failed to comply with the requirements of Chapter 192, S.L. 1927, of the State of Colorado, in that no plan has been adopted by ordinance for the acquirement of a municipal electric light and power system, and that the qualified electors of the City have not approved any such ordinance or plan. The answer alleged also that there is pending in the District Court of Larimer County an action in which is drawn in question the right of the City to proceed to acquire such plant without compliance with the requirements of said Chapter 192. Prior to the hearing said suit had been dismissed. The answer alleged also that divers and sundry errors were committed in the condemnation action, and that by reason thereof defendant is about to sue out a writ of error from the Supreme Court of the State, some of said errors being set forth in the answer.

It was further alleged that there is pending and undisposed of in the District Court of the United States for the District of Colorado a certain action, the object of which is to secure an injunction preventing the consummation of a plan of the City to acquire a municipal plant, and to enjoin the Federal Administrator of Public Works of the United States of America from advancing and loaning the necessary money therefor.

The answer further alleged that "a determination as to the right of complainant to require service and the duty of this defendant to supply it is purely a judicial one, and which can not validly be made by this Commission." With respect to this defense, the brief for Service Company on pages 6 and 7 states:

"This contention is made in view of the fact that, in the condemnation proceedings referred to in the Fifth paragraph of the complaint, there was drawn in question the present right of the City to acquire the distributing system - this because of the provisions of the contract of February 17, 1913 (set forth at page 8 of the Answer), whereunder the predecessor of this defendant was authorized to continue its operations until such time as the City had elected to exercise its option to purchase the distributing system of the defendant, as provided by the specific requirements of said contract.

"That is to say, the Company, in the condemnation proceedings, contended that the City could acquire the distributing system only by proceeding under the purchase clauses of the contract of 1913, and it could not allege and prove inability to agree as to price unless in some manner it should be thwarted in its efforts to proceed under those contract provisions, but as to that, the defendant in the condemnation case alleged entire ability and willingness to proceed under the provisions of that contract.

"Accordingly, if any obligation rests on this defendant, under any circumstances, to supply current to the City for resale, this is dependent upon and conditioned by the judicial determination - the trial court having held that condemnation was permissible without compliance with the contract of 1913."

As to what rate Service Company should charge the City if it is required to sell energy to the latter, there is considerable testimony. Some of the testimony had to do with what it would cost the City itself to generate its own energy. Other testimony had to do with the cost to the City of Colorado Springs for generating and distributing electric energy, and with the rates charged the consumers served by the system of said city. The evidence showed that the costs and rates in Colorado Springs are quite low. There was evidence also, as we have indicated, of the rate at which Service Company offered to supply energy to the City of Loveland to supplement the energy generated by said city. One exhibit introduced in evidence showed the rates at which energy is sold to each of the wholesale customers herein named which are engaged in retail distribution.

As Mr. McCammon testified, no inventory and appraisal has been made of Service Company's property. Even if we had an inventory and

appraisal, the matter of fixing a particular rate is not as simple as it might first appear.

Mr. McCammon testified with respect to this difficulty:

> "Now as one who has had considerable experience in the designing and application of rate schedules I want to state that in my opinion there is no rate engineer who can take a given schedule and apply it to a given condition of service and find out whether any given company is making a fair return upon its investment or whether it is not. We have ninety thousand or one hundred thousandelectric consumrs, pick out customer No. 69975 and that way determine whether we are making a fir return upon that investment or not is not only a physical impossibility but subject to all kinds of conflicting opinions with respect to the allocation of certain fixed charges, either upon a kilowatt hour basis, upon a demand basis or an investment basis or what not, and there may be honest differences of opinion regarding those allocations."

Mr. McCammon testified also that "if a wholesale rate is to be granted," the rate charged the Home Gas and Electric Company operating in Greeley district "would be substantially the rate which we would propose, plus the cost of making the change-over of the substation." Part of his testimony with respect thereto is as follows:

> "My testimony here with reference to the whole sale rate for the Commission, for the guidance of the Commission, if a wholesale rate is to be granted, is to take the Greeley rate as representing something that was fair and equitable. . . . I am saying after all that's gone through with that that rate as applied to Fort Collins represents conditions which are typical, which are analagous, . . . "

Mr. McCammon testified that the cost of making the necessary changes in setting up the proper equipment at the substation in order to meter service to the City alone would be some $1500. The evidence with respect to this item is not as detailed as it should be. We do not know whether this includes thetotal cost or value of all materials and apparatus used, or whether it is limited to the cost of labor and of materials that would have no salvage value, and the reasonable value of the use of long-life materials which might hereafter be used at some other place. We shall assume it is so limited.

At the hearing there were read into the record excerpts from the testimony given at the trial of the eminent domain proceeding by Mr. Loiseau, Secretary of Service Company. At one point he testified that $52,162.58 "is the cost of power delivered to the distribution system in Fort Collins." This language might indicate that he was talking about the cost to the Service Company of the power delivered at the City's limits in the year 1933, as distinguished from a reasonable wholesale price therefor. However, when asked "how was that computed," he answered, " . . . I took the average price per kilowatt hour that the Greeley Company paid to the Public Service Company during the same year 1933 as being a proper price in the town border of Fort Collins." When asked what the average price paid by Greeley was, he answered " . . . 1.405, that is 1.4 cents per kilowatt hour delivered to the town border." One other question and answer follows: "Q. Now that is just what I am getting at exactly, you have charged this city in your figures $52,163 for power which you admit is sold at a profit? A. That is right."

One of the members of the Commission at the hearing of this case then made the observation "That $52,000 is what he assumed to be the wholesale rate delivered to Fort Collins at the same rate as is charged in Greeley ?"

The State of Colorado has given rather broad powers to this Commission with respect to the rates and service of public utilities. Section 2925, C.L. 1321, vests in the Commission the power and authority and makes it its duty

> "to corect abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utility of this State, and to generally supervise and regulate every public utility in this State and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power. . ."

Section 2929 provides, inter alia:

"No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The commission shall have the power to determine any question of fact arising under this section."

Section 2844 authorizes the making and filing with the Commission of a co plaint on the Commission's own motion

"or by any corporation or person, ... or any body politic or municipal corporation, ... setting forth any act or thing done or omitted to be done by any public utility . . . . in violation , or claimed to be in violation, of any provision or law or of any order or rule of the Commission."

Section 2855 provides that "After the conclusion of the hearing, the Commission shall make and file its order, containing its decision."

Section 2826 requires every public utility to file with the Commission a schedule showing all rates and charges, a portion of the section being as follows:

"Under such rules and regulations as the commission may prescribe, every public utility shall file with the commission within such time and in such form as the commission may designate, and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges and classifications collected or enforced, or to be collected and enforced, together with all rules, regulations, contracts, privileges and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service."

Two of the main functions of this Commission are to pass upon the reasonableness of rates and determine the obligation to serve, the extent and quality of service, etc. We could cite many cases in which the privileges and duties of public utilities under the Public Utilities Act are determined by this Commission, and not, at least in the first instance, by the courts. For instance, several years ago the City of Loveland was building its distribution system into territory contiguous to the City. Service Company, defendant herein, instead of seeking an

injunction, filed its petition with this Commission, alleging that it was engaged in serving the public in the area in question, and that Loveland could not lawfully extend service thereto without first securing a certificate of convenience and necessity from this Commission. We heard the case, found the contentions of Service Company well founded, and ordered Loveland to cease and desist from serving customers in the territory. 7 Colo. P.U.C. 900, 918. Our order was sustained by the Supreme Court. Public Utilities Commission, et al. v. Loveland, 87 Colo. 556.

So here, the contention might conceivably be made that in any case jurisdiction to order a public utility to furnish service to another is confined to the district courts. If it were made, we would have to decide otherwise, for we are of the opinion, and so find, that regulation of public utilities is a legislative function, and that the Legislature in the Public Utilities Act has prescribed generally a policy and set up standards and has given to this Commission jurisdiction to determine facts and make findings "within the framework of the policy which the Legislature has sufficiently defined." Panama Refining Co. v. Ryan, 53 S. Ct. 241. As Chief Justice Marshall expressed it, we are authorized to "fill up the details" by ascertaining existence of facts to which legislation is directed. Wyman v. Southard, 10 Wheat. 1, 43, and Panama Refining Co. v. Ryan, supra.

But, as we have indicated, we understand that such a borad contention is not made. The point as to jurisdiction is that it is lacking in this case for the reason or "in view of the fact that" Service Company had contended in the condemnation case that because of a contract made with the City by Service Company's predecessor an eminent domain proceeding was not available to the City as a means of determining the value of and taking over the distribution system in the City.

It is elementary that, since a utility commission is an administrative body and at most is only quasi judicial, it can not attempt to pass upon the correctness of a decision by a court of the State in which the commission is functioning. Here the decision by the District Court in and for the County of Larimer to the effect that in spite of the contract with Service Company's predecessor the City was entitled to follow the statutory course of an eminent domain proceeding, is binding upon this commission, and leaves it in the same position it would be in if the contention of Service Company with respect thereto had never been made.

We must likewise assume that the District Court for Larimer County properly dismissed the action described on page 6 of Service Company's answer.

We doubt whether the Federal District Court will interfere if the City secures its capital from private sources. At any rate, we are ofthe opinion that the pendency of one or more actions brought to enjoin or stop further steps bythe City does not operate to suspend the performance of our statutory duties. In other words, in a case of this kind an administrative body must assume the City has a right to proceed until it is held otherwise by a court of competent jurisdiction. If there is any serious question about the City's right the State District Court can, if it sees fit, grant a stay.

In respect of elections this commission decided in Western Light and Power Company v. Loveland, P.U.R. 1918B 644, that it has no power to adjudicate the question of the validity of a municipal election authorizing the construction of a power plant, and that until the matter has been passed upon by the courts, the election will be presumed to be valid.

We can not agree with the contention made by Service Company that since the City Council has been directed to acquire "a municipal electric light and power system consisting of a generating plant and distribution system with all necessary appurtenances" the City is without right to engage in the distribution of electric energy during the peiod while it is constructing its generating facilities. The Service Company quotes the maxim "Expressio unina est exclusio alterina," saying that "there is no authority granted to do what is now contemplated." Its argument then is that where two things are required to be done, instead of one, as in the maxim, one of them only may not be done. If this argument were carried to its logical conclusion, it might later be argued that the City would have no power to construct thegenerating plant until it had acquired the distributing system. In other words, the city could do nothing because it could not take over the distribution system until the plant had been built, and could not build the plant until the distribution system had been taken over. We see nothing in the cases cited which would prevent the City from proceeding in good faith to acquire the distribution system and proceeding as expeditiously as possible, as the evidence shows it intends to do, in constructing the generating plant.

Neither can we agree with the argument that the mere fact that the City buys energy from Service Company constitutes the City a joint owner or a partner with Service Company. The City in our opinion would no more be a joint owner or partner with Service Company than it would be a joint owner or partner with some coal company from which it would buy its coal for heating its city hall.

A leading case dealing with the question when an electric company is a public utility is Salisbury and Spencer Ry. Co. et al. vs. Southern Power Co., 17 N.C.18, 101 S.E. 593, 12 A.L.R. 304.

Southern Power Company had authority to distribute energy at retail and at wholesale, but had confined itself to the sale of power at wholesale. It was supplying energy to various towns and municipalities, to cotton mills, and to three public utilities engaged in distributing energy at retail. One of these utilities was a subsidiary of Southern Power Company. Another was the Salisbury Company, plaintiff, the third being North Carolina Public Service Company, "the other plaintiff." The contract with the Salisbury Company expired without a new contract being made. Southern Power Company "refused to contract for a period of less than five years, and persisted in demanding an increase in rates" demanding a rate from Salisbury Company greatly in excess of rates charged "to other companies for like service under the same or substantially similar conditions." Southern Power Company had filed with the Corporation Commission of North Caroline a partial schedule of its rates, but did so with the statement that "The filing of these rates by this company is in deference to the request of the commission and must not be treated or considered as done because any legal obligation is imposed upon it to file the same." The State Corporation Commission apparently agreed with the position taken by Southern Power Company, as we find the following statement in the report of the case:

> "The corporation commission expressed the opinion to the plaintiff that it had no authority, under the act of the legislature conferring upon it jurisdiction with respect to the regulation of public utilities, to pass upon a question involving a contract between one public utility company and another public utility company as here presented."

The Salisbury Company thereupon brought mandamus to compel Southern Power Company "to furnish it energy at a reasonable rate."

Concerning the position of the Southern Power Company the Court said:

> "Exercising the power thus boldly declared that it possesses free from any control by the public, it declines to sell power and current to any consumer for a less period than

five years, and then only under the terms which it sees fit to offer under its assertion of absolute sovereignty and freedom from control by law."

The Court held that when Southern Power Company elected to exercise its charter power to sell electricity for the purpose of resale, and did the other acts which we have briefly described,

"it dedicated its property to this particular class of public use, and can not discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc."

The court continuing said:

"This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor. This question is very fully discussed in Postal Cable Teleg. Co. vs. Cumberland Teleph. & Teleg. Co., (C.C.) 177 Fed. 726 et seq."

The Court stated that the defendant asserted "that it has a right to select customers to whom it will sell current and power, and to discriminate at will as to its prices." In answering this contention the court said, inter alia:

"It has epxressly devoted its property to the public use over a period of ten years by connecting its lines with and furnishing electric current and power to other public service corporations, as well as to the plaintiff, and to municipalities, with a knowledge that the current so purchased was being resold for the benefit of the inhabitants of the various cities, and its property had therefore become affected with a public use."

We take the following from the concurring opinion of Mr. Justice Walker:

"In my opinion the defendant had the right originally to confine its sale and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or coporation which does not desire it for consumption, but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation, desiring current from it for distribution purposes, prima facie, has precisely the same right to obtain it as another. A public service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must jutify its refusal by good reasons.

"If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such smaller corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate. That does not mean it must sell them all at the same price. The circumstances surrounding each distributing corporation, cost, etc., must be taken into consideration.

"Having undertaken this public service, the defendant is bound to serve impartially all who have the right to demand its service."

It is held by courts generally that a corporation becomes a public utility, and therefore subject to regulation as such, only when and to the extent that its business is devoted to a public use. Its obligation is largely dependent upon its profession of service. The test is stated by the Supreme Court of California in Van Hoosear vs. Railroad Commission, 184 Cal. 553, as follows:

"The test to apply is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any portion of it, such portion, for example, as could be served by his system..."

A public utility becomes such by what it does in serving or holding itself out to serve the public, in spite of what it says about itself. RE Exhibitors Film Delivery and Service Co., 7 Colo.P.U.C. 1035, 1040. In other words, a utility's profession of service by its general conduct may be such as to make it a public utility even though at all times it has been careful to say orally that it is not such a utility.

Whether an electric company is a public utility as to a certain class of customers cannot be determined by whether or not it has separate written contracts with each of them. As we stated in the Exhibitors Film Case

"An examination of all the authorities, however, leads one irresistibly to the conclusion that in determining whetheror not a given operator is a common carrier the test is not whether he has seperate written or other kind of formal contract with each and every one of his customers."

In the Exhibiters File Case we referred to the case of Smitherman and McDonald, Inc., et al., vs. Nansfield Hardwood-Lumbr Company, 6 Fed. (2d) 29. There it appeared that the Lumber Company extended its private railroad line from three miles to carry aoil for one person who for a while was the only shipper Later it made contracts with four other shippers of oil, and held itself willing and ready to haul oil and oil supplies for any other under private contract, although it professed not to be a common carrier. However, the court held it was a common carrier of oil and oil equipment.

Moreover, a utility cannot, by signing up separate contracts with customers, prevent the State from stepping in, in the exercise of its admitted power, and upon proper evidence ordering different rates in lieu of the contract rates, Our Supreme Court has spoken clearly on this point. In Welverton v. Telephone Co., 38 Colo. 58, 65, it said:

"And it in now held that even in case of such contracts with public utilities for specific rates and for definite periods of time, these are subject to legislative acts of regulation. Louisville and Nashville Ky. v. Mettley, 219 U. S. 467, 58 L. Ed. 297, 34 L. R.A. 'N.S.' 671; Souther Wire Co. v. St. Louis etc. Co., 38 Mo. App. 111."

Again, the court quoted with approval in Denver Coo v. Eaglewood, 62 Colo. 239, 239-240. the following from the opinion of theSupremen Court of the United States in Chicago, B& Q. R. Co. V. Iowa, 94 U. S. 155:

"It is most earnestly insisted on behalf of the city that the contract inviolable, and that to uphold the powers of the Public Service Commission to the extent of allowing the Commission to change the rates would in effect abrogate the contract, contrary to constitutional inhibition against the enactment of any law impairing the obligation of a contract. In the light of whatwe have said, this position cannot be sustained.

> Nothing that was binding in the contract will be impaired. By it the state was not bound. The contract related to a subject-matter belonging to the state. The state had not given the city the power or agency to contract away the right thereto for a given time. The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract bh the act of the state in claiming the own, when it is not bound by the contract. The supervision and regulation of the rates by the state, through the Public Servict Commission, do not take from either of the parties to the contract may right which they had thereunder. Such supervision and regulation do not therefore impair the obligation of a contract."

It is true that there is a line of cases holdingthat a public electric utitlity be required to sell energy to one who would retail it to customers when the utility has authority to serve. Forida Light & Power Co. v. State, 144 So. 667, Munn v. Board of Public Utilities Commissioners, 147 Atl. 735 and Frankel Bros. v. New York Edison Co., 4 P/ S. C. R. (1st Dist. N.Y.) 272.

For instance, as long as the defendant in this caqe is Authorised or permitted by a city to distribute energy at retail in the city, it could not be required to sell energy to the owner of a large apartment building therein, if such owner were going to retail the energy to his tenants. Florida Light & Power Co. v. State, supra, andMunn v. Board of Public Utilities Commissioners, Supra.

But if the City of Fort Collins takes from Service Company the distribution system within the City's limits under the judgment in the eminent domain proceeding, Service Company is effectively barred from retail service or any other service within the Cuty. It would then have no right to serve the retail customers therein. The City in serving them would not be competing with defendant. A public utility cannot be or have a competitor in an area where it has no right to serve. We must assume, unti a court decides differently, that the City has the

power to terminate Service Company's right to distribute energy within the city. The City asks for energy when such termination is made.

We need not deal with the question of the right of a public utility to discontinue service to a municipality after a franchise has expired without renewal. We discussed the question at some length in Re Abandement of Service of Highland Utilities Company, Case No. 1168, decided June 28, 1933. Here, if and when the City takes over the city distribution system and operates it, the service which Service Company has been rendering has been terminated, not by the utility but by the City. Service Company could not, therefore, if it so desired, continue to serve within the area bounded by the City's limits.

The question remains, however, whether Service Company owes a duty to sell energy at wholesale at the city limits to the City. The evidence shows that Service Company is selling energy at wholesale for distribution at retail to seven privately owned public utilities and to two municipal corporations, and that it served Loveland at one time and offered to make a contract for long-time service with said City, and that it offered to make such a contract with Longmont, which Service Company's predecessor did serve at wholesale for many years. Service Company never has refused to sell to others for the same purpose.

The evicence indicates clearly and we find that during the period when theCity is building its generating plant, Service Company will have from existing facilities ample energy to supply the City all the current it will require for distribution. We need not therefore consider a case where Service Company would be required to spend a large amount of money in enlarging its facitlitie for a short-time consumer.

If Service Company owes a duty generally to serve

wholesale customers, and has ample energy for this customer--the City--we know of no principle upon which it may refuse to sell energy, merely because the city will take service for a few months instead of for many years.. If we had a large mining company desiring service only during a period in which it would be building its own generating system, and the defendant had ample energy for sale, it clearly could not say that it would refuse the service. It would be required to furnish it as long as the customer might want it.

We are dealing then in this case with a company whose main business is not operating a coal mine or a saw mill or some other line of business for which it generates its own power, with a surplus left over. We are dweling with a corporation whose main business is, as its name indicates, serving the public as a public utility or public service company. We believe the burden is on it to show as to any class of its electric business that it is other than what it is in the ordinary case.

We are of the opinion that it can make no difference that the wholesale customer desiring energy in this case is a municipality instead of a privately-owned utility. A public utility serving energy at wholesale certainly cannot deny service to a man merely because he is a Socialist or a Communist, or something else. Neither can the defendant deny service to a municipality for redistrubition any more than it could to a privately owned utility that wanted the energy for the same purpose.

In view of all the evidence, including the fact that Service Company is a public utility generally and that it is selling energy at wholesale to a substantial number of public utilities, including two municipal corporations, for distribution by them, and the fact that the evidence shows that the defendant has never refused to sell energy for redistribution, we are of the opinion,

and so find, that as to those having the exclusive right to sell and distribute energy in local areas included in the general territory in which the defendant has the lines and is serving the public generally, the defendant is a public utility and should sell and deliver energy to the City.

It is quite difficult fairly and accurately to compare rates charged by one company with those charged by others, unless the conditions in each case with which comparison is made are identical, because of the difficulty of properly appraising the differences in conditions. We are, therefore, of the opinion that we can give little weight on the brief record made herein to the very low rates which Mr. Moseley testified that the municipal plant in Colorado Springs charges.

We are of the opinion that the fact that the use by the City of Fort Collins is to be for a rather short period does not argue as strongly for a high rate as Service Company urges. We believe the fact that the use by Fort Collins is to be brief has advantages as well as disadvantages. At this particular time Service Company can take on considerably business without being required to spend any money in employing its facitlities. If the City's bu siness is to be held for only a brief time, then it is obvious that there is no danger incurred of having to make such expenditures. On the other hand, with the lang-term customer, before his use has terminated, it may be necessary to spend a substantial amount of money for extensions of generating plant facilities.

We have quoted the testimony of Mr. McCasson given in this case and that of Mr. Loiseau given in the eminent demain case with respect to the fairness of using the Fort Collins rate on the Home Gas and Electric or Greeley rate. Mr. McCasmon's

testimony was to the effect that if a wholesale rate is to be prescribed, we ought "to take the Greeley rate as representing that was fair and equitable." Mr. Loisesu's testimony, as we understand it, was to the effect that it would be fair to charge as a wholesale rate to the City of Fort Collins the same average rate per kwh which is paid atGreeley.

The Greeley rate as set forth in Exhibit 18 is as follows:

Demand Charge	
1st 1500 kw or less or less demand, per month...	$4500
All additional of kw of demand, per mo.....	2.50
Energy Charges	
1st 500,000 kwh used per month, per kwh;;;;.	.006
All additional kwh used per month, per kwh...	.005

Nobody knows just exactly what the maximum demand per month made by the City would be, as there has been passing through the meter at the substation the energy for the town of Timnath and, as Mr. McCammon testifies, probably the energy for the Agricultural College. The evidence was not clear as to whether the City or Service Company would serve the College in the future. We wonder also if the energy fpr whatever rural customers are served does not also pass through said meter. His testimony was to the effect that in November, 1933, the maximun demand was 1472 kw, before making any deductions. He estimated that probably the demand was fifty to one hundred kw more in 1934. It seemed to be thought by the witnesses, and we find, that the masimun demand for the dity proper will not exceed 1500, and probably will not reach that amount. 4,200,000 kwh seems to be the maximun enrgy which th witnesses belive the City would consume in a year.

If, therefore, the maximun demand in 1500 kwh, the average monthly consumption bases on a total consumption of

4,200,000 per year, would be 350,00 kwh. The charge per kwh, if the Greely rate as a whole is followed, would therefore be some 1.28 cents.

Mr. Loiseau's testimony was to the effect that the wholesale rate to the City of Fort Collins should be one based, not on theGreeley rate structure, but on the kwh charge of 1.4 cents at Greeley. (Of course, the reason why the rate schedule quoted for Greeley gives a lower average kwh cost at Greeley than at Fort Collins is due to the difference in load factor, amount of energy sold, etc,)

It is therefore appears that one of Service Company 's witness takes the position that the rate charged at Fort Collins should approximate some 1.88 cents, without including any cost for the expense of altering the substation for the purpose of serving Fort Collins alone for some nine months, while the other testifiedthatthe rate should be some 1.4.

Of course, the Greeley rate was made with resoect to theparticular situation that exists in that territory. While we appreciate that there are certain fixed charges, etc., which in any eventmust be given consideration, on the other hand it would not be fair to apply the Greeley rate to a very small utility, if the total demand of its customers would not now approach 1500 kw. It is difficult to take a special rate and made for a particular case and apply it rigidlyto all cases.

After careful consideration of the evidence, the Commission is of the opinion, and so finds, that a reasonable rate to be charged by Service Company to the City, including the net cost of Service Company of substation expense, is the Greeley or the Home Gas and Electric rate, which we quoted supra, but with the provise and condition that the cost per kwh in any month shall not exceed 1.75 cents. We have made this finding with the belief th[illegible] in each and every month application of the Greeley

rate structure as written would result in a charge of more than 1.75 cents per kwh at Fort Collins. We can only say that under the fact and circumstances in evidence in this particular case, we believe 1.75 cents is reasonable.

O R D E R

IT IS THEREFORE ORDERED that the Public Service Company of Colorado shall, upon demand by the City of Fort Collins, deliver to said City at a sub-station at or near the City limits of said City electricity, the cost of which to the City shall be based upon the following demand and energy charge, with the provise and condition that the cost per month in any month shall not exceed 1.75 cents:

Demand Charges:
1st 1500 kw or less of demand, permonth.....$4500.
All additional of kw of demand, per mo..... 2.50
Energy Charges:
1st 500,000 kwh used per month, per kwh..... .006
All additional kwh used per month, per kwh.... .005

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

(SEAL)

EDWARD E. WHEELER

WORTH ALLEN

MALCOM ERICKSON

Commissioners

Attests A true copy

Dated at Denver, Colorado,
this 30th day of March, 1935.

John W. Flinthan

Secretary,