
November 22, 1933.

Hon. Pete H. Dawson,
Secretary, Public Service Commission,
State House,
Indianapolis, Indiana.

Dear Mr. Dawson:

I have your letter of the 17th, requesting an opinion on the transfer of the property of the Frankfort Water Works Company to the City of Frankfort, Indiana, your specific question being as follows:

"Will you kindly give us your opinion concerning this matter, that is, whether or not the commission can legally approve an order permitting the Frankfort Water Works Company to sell to the City of Frankfort without including in the order the transfer of the depreciation funds?"

Your question and the entire letter, indicate that the commission is unable to determine what effect shall be given to section 12696, Burns Revised Statutes of Indiana, 1926, and especially the following language of that section:

"Upon the sale of any public utility property, to continue in operation as such, the balance in the depreciation fund, unexpended for depreciation expenses, shall be transferred to the purchaser and by the purchaser shall be held, administered and used as herein authorized and required. (As amended, Acts 1925, p. 210.)"


Prior to the 1925 session of the legislature, in at least two decisions of the commission, viz.: the Lebanon telephone case, decided September 22, 1924, and the East Chicago case, decided December 20, 1924, the commission took the position that the depreciation fund accumulated by any utility was a fund
simply held in trust for consumers and never became the actual property of the utility. A quotation from the Lebanon telephone case aptly states the position of the commission at that time as follows:

"* * * The depreciation fund is not the property of the utility. It is the property of the utility patrons, paid by them to the utility as a trustee, to be used by it to maintain its property in 100 per cent condition. The utility may, by authority of the statute, invest any balance in this fund, but it must carry the income therefrom into the fund. It is also authorized to expend such balance for new construction, extensions, or additions on condition that it shall not be considered a part of its capital account.

"These restrictions are imposed because the fund is the property of the patrons and is held by the utility as a trustee only.* * *"

Following out the same line of thought, the legislature of 1925, enacted section 12696, set out above.

I cannot agree with the reasoning or statement of the commission in the cases cited. The depreciation fund, in my opinion, is not for the benefit of patrons, but for stockholders, in maintaining the value of the property used and useful in its business, and the very purpose of the fund is to renew the property from time to time, or to keep the investment of the stockholders intact.

This position is sustained by the language of the U. S. Supreme Court in the case of Board of Public Utility Commissioners et al. v. New York Telephone Company, 271 U. S. 23, at 31 and 32, in the following language:

"The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. Cf. Fall River Gas Works v. Gas & Electric Light Com’rs., 214 Mass. 529, 538. The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company’s compensation for the use of its property."

* * * * *
"Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belong to the company, just as does that purchased out of proceeds of its bonds and stock." (My italics.)

We now come to a consideration of the present problem with regard to the purchase by a municipality in the State of Indiana of the property of a public utility. The language of section 12696, supra, carries a certain provision now significant, viz.: "upon the sale of any public utility property, to continue in operation as such."

Section 1 of chapter 190, Acts of 1933, revises section 1 of the Shively-Spencer Act and the definition of "public utility" as used in section 25 of the same act, is changed by this amendment, expressly excluding from the definition of "public utility" property owned or operated by a municipality in the following language:

"* * * but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities."

Inasmuch as section 1, as modified is the latest enactment, the words "public utility" as used in section 25 of the act (Section 12696, Burns Revised Statutes of 1926, supra) are controlled by the definition as now set out in section 1, and in my opinion, section 12696 does not now apply to the situation set out in your letter.

A study of the entire chapter 190, Acts 1933, above referred to, also indicate other facts which should have some bearing on your question and probably will control your action in a great many cases. The whole matter of the acquisition of utility property by municipalities seems to be based upon the present value of the property, said value to be determined by contract or condemnation proceedings. The old statute must have been predicated on a sale at the value of the property when new. Under those circumstances, if the price
is at the latter value, the depreciation fund would rightly be included in the order of sale. But, where, as in the present case, the value and sale price has been determined at the present value, taking into consideration all depreciation up to the present time, an order making the transfer of the cash in the depreciation fund mandatory, would amount to confiscation.

It is, therefore, my opinion that you may properly approve an order permitting the Frankfort Water Works Company to sell to the City of Frankfort, without including in the order the transfer of the depreciation fund, if such sale is made at the present value of the property used and useful in the service.

PROBATION, DIRECTOR OF: Whether present probation officers are required to take examinations to qualify for reappointment.

November 23, 1933.

Hon. Francis D. McCabe,
Director of Probation,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion as to the necessity of requiring an examination of present probation officers before they can be reappointed.

Section 4 of chapter 260, of the Acts of 1933, provides in part as follows:

"The state probation department shall from time to time conduct competitive examinations to establish lists of persons eligible for appointment as probation officers; shall prescribe the qualifications for entrance to such examinations and shall establish rules for the conduct of such examinations and for the eligibility of candidates for appointment."


The section further provides, that

"No person shall hereafter be appointed as a probation officer in any court in this state who has not been certified by the department in pursuance of such rules and examinations."