

PUBLIC SERVICE COMMISSION: Rural Electric Membership Corporation, extension of service into rural membership territory.

May 17, 1937.

Hon. Samuel L. Trabue, Commissioner,
Public Service Commission,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your letter of April 25, 1937, submitting certain questions which require an interpretation of the Indiana Rural Electric Membership Corporation Act of 1935, as amended in 1937.

Your questions are as follows:

“Question 1. Does the Act prohibit the construction, by any person, copartnership or corporation not formed under the Act, of an *electric transmission line* within territory included in that described in the articles of incorporation of both the Indiana Statewide REMC and a ‘local district’ corporation without first having filed with the Public Service Commission a petition therefor and obtaining from such commission a declaration that public convenience and necessity require the construction and operation of such electric transmission line?

“Question 2. Does the Act prohibit the construction, by any person, copartnership or corporation not formed under the Act, of an *electric transmission line* within territory included in that described in the articles of incorporation of the Indiana Statewide REMC, but which is not within territory included in that described in the articles of incorporation of any ‘local district’ corporation, without first having filed with the Public Service Commission a petition therefor and obtaining from such commission a declaration that public convenience and necessity require the construction and operation of such electric transmission line?

“Question 3. Does the Act prohibit the construction, by any person, copartnership or corporation not formed under the Act, of *electric distribution lines or extensions of existing distribution lines* to serve pa-

trons within territory included in that described in the articles of incorporation of the Indiana Statewide REMC, but which is not within territory included in that described in the articles of incorporation of any 'local district' corporation, without first having filed with the Public Service Commission a petition therefor and obtaining from such commission a declaration that public convenience and necessity require the construction and operation of such electric distribution lines or extensions?"

In connection with these questions you submit copies of the articles of incorporation of the "Wayne County Local Electric Membership Corporation" and also copies of the articles of incorporation of the "Indiana Statewide Rural Electric Membership Corporation."

You say that the Wayne County Corporation is typical of other local organizations, and that such local corporations are affiliated with the statewide organization. The local corporations propose to render electric service directly to their individual members. The Statewide Corporation does not propose to render electric service directly to its individual members, but its object, in the main, is to promote the organization of local organizations and to assist them by technical and other advice, so that the local organizations may avail themselves of the full benefits of the Rural Electric Membership Corporation Act. However, it should not be understood that the promotion and giving of advice to local organizations is the full extent of its powers.

There are a number of provisions in the Rural Electric Membership Corporation Act which indicate a purpose on the part of the legislature to give the corporations organized under the Act somewhat of a monopoly in furnishing electricity to their members within the territory they were organized to serve. The title of the Act indicates such a purpose. After stating various objects, one of the purposes named in the title is that of "preventing others than such corporations from extending electric energy producing or transmitting systems, or ownership, management or control thereof, in the territory of such corporations without declaration by Public Service Commission that public convenience and necessity require the same."

The Act requires that a description of the territory to be served by a corporation be set out in its articles of association, and, if the articles of association are amended, there can be no change of territory in the amended articles unless it is approved by the Public Service Commission (Sec. 20 (4)).

In considering the questions submitted by you, attention must be given chapter 293 of the Acts of 1935, which provides for the extension of municipally owned electric utilities. Section 1 of such chapter provides that a municipality within a state shall have power to acquire and operate any utility within six miles of the limits of the municipality and any place within the county.

Burns Annotated Statutes, 1933, section 54-507.

The question arises whether or not the amendment to the Rural Electric Membership Corporation Act, as amended in 1937, repeals the provision of the 1935 Act above referred to. I am of the opinion that the 1937 provision supersedes the earlier law giving municipalities authority to extend anywhere in the county without the consent of the Public Service Commission. While there is no direct repeal, the 1937 Act contains the following provision:

“(b) No person, copartnership, or corporation not formed under this Act, shall construct, own, manage or control any system within any territory included in that described in the articles of incorporation of, and to be served by, any corporation formed under this Act, to any extent greater than such construction, ownership, operation, management, control or system actually exists on the effective date of this Act or on the date when such territory is first included in that to be served by such corporation formed under this Act, whichever date is later, unless or until the following condition shall have been met, to-wit: the one seeking such construction, ownership, operation, management or control shall first file, or cause to be filed, with the Public Service Commission a petition therefor and obtain from such Commission, after a public hearing advertised and conducted as provided for the hearing mentioned in section 5 of this Act, a declaration that public convenience and necessity require the respective construction, ownership, operation, management or control.” (Sec. 18 (b) 1937 Act.)

This provision of the 1937 Act deals with the same subject as section 1 of the 1935 Act referred to. While repeal or amendment by implication is not favored, yet where it appears that a legislature intended to change an existing law, an implied repeal must be recognized. In a situation such as this, the rule is that the latest Act should be taken as expressing the intention of the Legislature.

In my opinion, therefore, your third question should be answered in the affirmative, that is, the service of an existing utility, whether owned by a city or a private corporation or individual, can be extended into rural electric corporation territory only by authority of the Public Service Commission, as provided in section 18 quoted above. In this connection it must be kept in mind that a city or town in furnishing electric service, especially to persons outside of the municipality, is not in that service exercising a governmental function—it is exercising a permissive power and acting in a proprietary capacity, the same as a privately owned utility.

Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663;
 Oaks Mfg. Co. v. New York, 206 N. Y. 221, 99 N. E. 540;
 City of Logansport v. Public Service Comm., 202 Ind. 523.

With respect to questions number one and two, the problem arises whether or not an electric transmission line, which is used to carry electric current but which is not used to extend service into rural electric territory, may build across or into the territory appropriated and served or to be served by a rural electric corporation.

In section 3 of the 1937 Act, the word "system" is defined to mean "any plant, works, system, facilities, or properties, together with all parts thereof and appurtenances thereto, used or useful in the generation, production, transmission or distribution of energy." This definition considered alone would seem to cover transmission lines.

However, the 1933 Act, as amended, is to be liberally construed (Sec. 23). I believe that when the entire Act is read and the object to be brought about by the law is considered, the Legislature did not intend to prevent the construction or extension of transmission lines, except where they invaded

and undertook to serve the territory appropriated by a local rural electric membership corporation. For example, it might be necessary, in the interest of economy or better service, to build a transmission line across the corner of the territory of the local organization in order to serve a community not included in the territory of the local organization. That ought to be permissible. The object of the law was to bring the use of electric current into rural communities where no such service was available. It was not intended to change the law with respect to the extension of transmission lines, whether owned by municipal or private utilities now serving cities, or towns of over fifteen hundred in population, or rural communities.

I do not believe the building of such a transmission line involves the question of public necessity and convenience as that term is commonly understood. I do not think the Rural Electric Membership Corporation Act of 1937 was intended to change existing laws as to electric transmission lines as I have defined them above, and your questions number one and two are answered in the negative.

This opinion so far deals with existing laws, but chapter 115 of the Acts of 1937, which amends section 10 of the 1933 Public Service Commission Act, and which goes into effect when the 1937 Acts of the General Assembly become operative, must be considered. This Act was approved March 9, 1937, and gives wide powers to municipalities in the way of establishing, acquiring and operating utilities within the boundary of the county or within six miles of the municipality. This may all be done under the Act without any authority whatever from the Public Service Commission. The Act is not limited to electric service, but clearly includes that, and cannot be reconciled with section 18 of the Rural Electric Membership Corporation Act, as amended in 1937, a part of which section is set out above in this opinion.

The Rural Electrification Corporation Act (Chapter 175 of 1937 Acts) was approved and became effective two days after chapter 115 of the 1937 Acts, which was expected to give authority to municipalities to extend their utility operation anywhere in the county and within six miles of any municipality.

It is a settled rule of construction, adverted to above, that where two statutes are enacted at the same Legislature and are found to be inconsistent, the one enacted the latest in time will prevail.

Swinney v. Fort Wayne, etc., R. Co., 59 Ind. 205, 217;

See also: People v. Wabash Ry., 276 Ill. 92, 114 N. E. 552;

Also: State v. Marion County, 170 Ind. 595.

It is a rule also that of two conflicting statutes passed at the same session of the Legislature, the one with an emergency clause will prevail over one which does not contain such a clause.

59 C. J. p. 1056;

Spokane County v. Certain Lots, etc., 279 Pac. 724.

Moreover, a statute dealing with an especial subject will take precedence over one more general in its terms.

New Albany v. Lemon, 198 Ind. 127.

It is my opinion, therefore, that the provisions of chapter 115, amending section 10 of the Public Service Commission Law, must give way so far as it is inconsistent with the provisions of the Rural Electric Membership Corporation Act of 1935, as amended in 1937.

This does not require any different answer to your questions than the answers I have indicated above.

CITIES AND TOWNS: Municipally owned utilities. Right to borrow money for improvements on plant.

May 18, 1937.

Hon. Charles A. Lowe,
Attorney-at-Law,
Lawrenceburg, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of May 13, in which you submit the following questions:

“(1) Can the City of Lawrenceburg legally pledge the revenues of the municipal light and water plants as security for a loan from the Disaster Loan Corporation?”

“(2) Would it be necessary to secure the consent of the Public Service Commission of Indiana for the