LEGISLATION

MERCHANDISING BY PUBLIC SERVICE CORPORATIONS—The frequently litigated question of the right of public service corporations to engage in enterprises collateral to their primary business has recently been brought into sharp prominence by a nationwide movement to drive the gas and electric utilities from the lucrative field of appliance merchandising. In the latter part of 1930, and throughout 1931, public service commissions and legislative committees were petitioned to investigate utility activities in this field;[1] the old cry of *ultra vires* was twice raised in the courts;[2] and bills to prohibit or to regulate merchandising by gas and electric companies were introduced into the legislatures of fourteen states.[3] The issue is still pending in several states and apparently will be an important legislative problem during the current year.

In challenging the right of the public service corporations to engage in this enterprise, the electrical contractors, appliance manufacturers and retail merchants who find competition with the utilities difficult, have advanced substantially the same objections that have been raised to the other forms of collateral business in which the various public utilities have sought to engage. To some degree the increasingly evident relaxation of the vigilance of the courts in restricting the collateral activities of purely private corporations,[4] has been reflected in a judicial tendency to construe the charter powers of public utilities with greater liberality. Public service corporations, however, though operated for private gain, are so "affected with the public interest", and are granted such great powers through their franchises that the state must be vitally concerned with the manner in which they perform the duties which they have undertaken.[5] Unquestionably, if they were to be permitted to do so, the public utilities, as this note will suggest, are in a position to jeopardize the freedom of competition in private enterprises by exercising their public powers in the furtherance of any collateral business of a purely private nature in which they are permitted to

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[1] According to "The Legal Status of Utility Merchandising", a report furnished to the writer by the NATIONAL ELECTRIC LIGHT ASS'N BULLETIN, legislative intervention has been proposed in numerous states by associations of retail appliance merchants, manufacturers, retail druggists, and by the Association of Certified Electricians. The manufacturing firm, Merchant & Evans Co., of Philadelphia, petitioned the Federal Trade Commission to investigate these activities in 1929 and 1930. Their objections are contained in a pamphlet, "A Protest Against Merchandising by Utilities" (1929), a copy of which was supplied to the writer by Mr. B. P. Carey, of the legal department of the Phila. Elec. Co., to whom he is also indebted for the use of papers relating to the Merchant & Evans Co. protest, and for many helpful suggestions. The New York Public Service Commission has recently concluded a study of utility merchandising. U. S. Daily, Feb. 11, 1932, at 2803.

[2] Commonwealth v. Phila. Elec. Co., 300 Pa. 577, 151 Atl. 344 (1930). An injunction restraining the sale of gas and electric appliances has recently been granted in the case of Attorney General v. San Antonio Pub. Serv. Co., 53d Travis County Dist. Ct., Tex., decided Jan. 21, 1932. U. S. Daily, Jan. 22, 1932, at 2643. An appeal has been filed by the company. U. S. Daily, Jan. 29, 1932, at 2709.

[3] Alabama, California, Florida, Illinois, Indiana, Kansas, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas and Wisconsin.

[4] See Holm v. Claus Lipsius Brewing Co., 21 App. Div. 204, 47 N. Y. Supp. 518 (1897); Ballantine, *Proposed Revision of the Ultra Vires Doctrine* (1927) 12 CORN. L. Q. 453; Carpenter, *Should the Doctrine of Ultra Vires be Discarded?* (1923) 33 YALE L. J. 49; Stevens, *Doctrine of Ultra Vires* (1927) 36 YALE L. J. 297 (particularly at 311); Note (1919) 32 HARV. L. REV. 279; (1928) 76 U. OF PA. L. REV. 872.

[5] Hannah v. The People, 198 Ill. 77, 64 N. E. 776 (1902); Fifth Ave. Coach Co. v. City of New York, 58 Misc. 401, 111 N. Y. Supp. 759 (1908); Attorney General v. Great Northern Ry., 1 Dr. & Sm. 154 (Eng. 1860).

engage.[6] For this reason the courts have been unwilling to interpret the charters of these companies so liberally as those of corporations which are not engaged in public service.[7]

A public service corporation, obviously, cannot engage in any enterprise which is expressly prohibited by its charter or by the laws of the jurisdiction. It may, however, pursue any collateral business which is incidental to the performance of the primary undertaking for which it was created, or which is impliedly authorized by its articles of incorporation. To deny the company such implied and incidental powers would not only be unduly severe, but would, in many cases, prevent the company from rendering the public service for which its charter was granted.[8] For the good of the public as well as the corporation, it is essential that the courts should regard its charter as being sufficiently flexible to enable it to adapt itself to changing industrial methods and to the mutability of economic conditions.[9] An examination of the cases shows that in this respect the courts have evidenced a marked fairness.

Where a public service corporation, therefore, engages in a collateral enterprise which is reasonably necessary to the performance of its public duty or which materially advances it, or even where the enterprise merely affords the public greater convenience in the use of the corporation's facilities, the participation in such an enterprise is usually held to be incidental to the charter powers of the corporation. Thus railroad companies have been permitted to erect and operate hotels for the accommodation of passengers;[10] to maintain restaurants and dining cars,[11] and to operate connecting steamboat lines for the improvement of their rail service.[12] Street railways have been permitted to lease advertising space in their cars and upon station platforms;[13] to maintain vending machines on the platforms,[14] and, in one instance, to subsidize a baseball park so situated as to increase the passenger "load" of the railway.[15] And ferry com-

[6] See Attorney General v. Great Northern Ry., *supra* note 5. This fear has been most frequently expressed in railroad cases. For a full discussion of the point see 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) §§ 703-710; Wyman, *Limitations Under Which a Public Service Company Must Conduct an Independent Business* (1906) 18 GREEN BAG 290.

[7] See Wyman, *Business Policies Inconsistent with Public Employment* (1907) 20 HARV. L. REV. 511.

[8] Consumers' Gas Trust Co. v. Quinby, 137 Fed. 882 (C. C. A. 7th, 1905), in which a natural gas corporation was denied the right to manufacture artificial gas to continue its service when the natural gas supply was exhausted, is an example of the result of too strict interpretation of charter powers.

[9] Mayor of Norwich v. Norfolk Ry., 4 El. & Bl. 397 (Eng. 1855) (particularly at 433). For a resumé of the transition periods through which the utilities have passed as a result of inventions and commercial applications of scientific discoveries see WHERRY, PUBLIC UTILITIES AND THE LAW (1925) 4 *et seq.*

[10] Jacksonville Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379 (1896); Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412 (1912). But *cf.* Western Maryland R. R. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351 (1905).

[11] Flanagan v. Great Western Ry., L. R. 7 Eq. 116 (1868).

[12] Green Bay R. R. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221 (1882). But *cf.* Plymouth R. R. v. Colwell & Jacoby, 39 Pa. 337 (1861).

[13] Interborough R. T. Co. v. City of New York, 47 Misc. 221, 95 N. Y. Supp. 886 (1905); see Burns v. St. Paul City Ry., 101 Minn 363, 365, 112 N. W. 412, 413 (1907). But *cf.* Pittsburgh & Birm. Tract. Co. v. Seidell, 6 Pa. Dist. Rep. 414 (1896), in which the court suggested that such advertising was aesthetically objectionable, and was otherwise *ultra vires.*

[14] Interborough R. T. Co. v. City of New York, *supra* note 13; City of New York v. Interborough R. T. Co., 53 Misc. 126, 104 N. Y. Supp. 157 (1907).

[15] Temple Street Cable Ry. v. Hellman, 103 Cal. 634, 37 Pac. 530 (1894). Extreme as this case seems, a street railway was permitted, in Vanderveer v. Asbury Park & B. St. Ry., 82 Fed. 355 (C. C. N. J. 1897), to issue bonds jointly with a land improvement company, to obtain a right of way from the latter. The decision turned upon estoppel, but the court said *obiter* that the enterprise was not *ultra vires.* And, in Alabama City, G. & A. Ry. v. Kyle, 202 Ala. 552, 81 So. 54 (1919), a street railway was permitted to subscribe to a manufacturing company in order to induce the latter to bring its plant to the other's lines. Steam railroads, however, have been denied the right to subsidize or even donate funds to amusement enterprises, the success of which would increase the railroad's "passenger load". Tompkinson

panies have been permitted to use their surplus boats for private excursions.[16] Of course, a great many collateral enterprises undertaken by the public utilities have not, as yet, been passed upon by the courts. Among these might be listed the preparation of a business directory by the telephone companies as an advertising venture. This, while a convenience to subscribers to the telephone service, is not necessary to the rendition of that service, since the business enterprisers' numbers also appear in the alphabetical directory. A merchandising enterprise analagous to the sale of appliances by gas and electric utilities is conducted by those railroad companies which sell passenger and baggage insurance to the users of the transportation facilities, and their right to do this has not been questioned.

There are, however, certain definite restrictions which the semi-public character of the utility imposes upon its participation in collateral enterprises.

(1) The collateral enterprise must not involve such a conflict between the private and public interests of the company that discrimination in favor of the private enterprise will result,[17] or that the efficiency of the public service will be impaired.[18] The mere fact that the private enterprise would provide an opportunity for discrimination has usually been held sufficient to make it *ultra vires,* though the corporation has not actually yielded to the temptation to do so.[19]

(2) The participation of the public utility in the new undertaking must not result in the infringement of clearly defined public or private interests.[20]

(3) The new enterprise must not be entirely foreign to the purpose for which the corporation was chartered. The charter has often been declared to be a contract between the public and the corporation, as well as between the stockholders and the organizers. The entrance of the public utility into any enterprise which is not contemplated by its charter is, therefore, a breach of these contracts.[21] There are some decisions that seem to suggest that a utility may engage

v. South Eastern Ry., 35 Ch. D. 675 (1887); Davis v. Old Colony R. R., 131 Mass. 258 (1881).

[16] Brown v. Winnisimmet Co., 93 Mass. 326 (1865); Forrest v. Manchester Ry., 30 Beav. 40 (Eng. 1861). See also Attorney General v. Great Eastern Ry., 11 Ch. D. 449 (1879), in which one railroad was permitted to lease excess rolling stock to another.

[17] Attorney General v. Great Northern Ry., *supra* note 5 (railroad carrying its own coal for resale); Hannah v. People, *supra* note 5 (public warehouse storing own grain); State v. Southern Pac. Co., 52 La. Ann. 1822, 28 So. 372 (1900) (railroad storing its own grain); Downing v. Mount Washington Road Co., 40 N. H. 230 (1860) (turnpike company acting as carrier over its own toll road); *Re* Grain Rates of Chi. Great West. Ry., 7 I. C. C. 33 (1897) (carrying its own grain). Under the "commodities clause" of the Hepburn Act, interstate carriers are prohibited from carrying their own goods for resale. The statute appears to achieve substantially the same result as Attorney General v. Great Northern Ry., *supra.* United States v. Delaware & Huds. Co., 213 U. S. 366, 29 Sup. Ct. 527 (1909); Delaware, L. & W. R. R. Co. v. United States, 231 U. S. 363, 34 Sup. Ct. 65 (1913). Nor would discrimination be permitted as a means of inducing the public to patronize a collateral private enterprise. Thus it has been held that the practice of permitting appliances sold by an electric company to be used at lower rates than those purchased from independent retailers is discriminatory and *ultra vires.* Devils Lake Steam Laundry v. Otter Trail Power Co., P. U. R. 1928C 83 (N. D.).

[18] People v. Illinois C. R. R., 233 Ill. 378, 84 N. E. 368 (1908); State v. Southern Pac. Co., *supra* note 17; York Motor Express v. Public Serv. Comm., 96 Pa. Super. 174 (1929).

[19] Hannah v. The People, *supra* note 5, at 87, 64 N. E. at 778. The same opinion was expressed in United States v. Delaware & Huds. Co., and in Delaware, L. & W. R. R. v. United States, both *supra* note 17.

[20] Citizens Elec. Co. v. Lackawanna & W. Va. R. R., 255 Pa. 176, 99 Atl. 465 (1916); Chicago Gen. St. Ry. v. Ellicott, 88 Fed. 941 (N. D. Ill. 1898) (in these two cases the railroads were selling power generated in their own plants in competition with the electric companies which held the exclusive franchises to supply power in those communities). Fifth Ave. Coach Co. v. City of New York, *supra* note 5 (displaying advertising on exterior of buses in violation of municipal ordinance).

[21] Waldo v. Chicago, St. P. & F. du L. R. R., 14 Wis. 575 (1861) (railroad speculating in land); Calumet & Chi. Canal & Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982 (1916) (money lending); Pittsburgh & Birm. Tract. Co. v. Seidell, *supra* note 13 (advertising in and on street cars); Attorney General v. Great Northern Ry., *supra* note 5 (railroad selling coal).

in any enterprise to which its facilities profitably adapt themselves, so long as no stockholder objects and no injury results to a public or private interest.[22] The majority view, however, recognizes the fundamental distinction between the purely private and the semi-public corporation, arising from the latter's peculiarly favored position, and is not hesitant to restrict the activities of the public service company to the public calling which it has undertaken.[23]

Reviewing these restrictions upon the right of utilities to conduct collateral enterprises, the Pennsylvania court said, in *Malone v. Lancaster Gas Co.*,[24] which was cited with approval in *Commonwealth v. Philadelphia Elec. Co.*,[25]

> "It would be no use to manufacture gas if there were not consumers to buy, and hence the company may fairly supply not only the gas itself, but incidentally such appliances and conveniences as will induce new customers to use gas, or old ones to use more. This is a legitimate mode of extending the company's business in direct furtherance of its charter object." [26]

Although these two decisions, which, with the recent Texas decree,[27] are the only decisions directly in point, assert the right of the gas and electric utilities to engage in the merchandising of appliances, they do not answer the charges of the merchants and manufacturers that this right is being abused by the utilities, and they do not solve the problems of unfair competition against which the recent movement has been directed. The utilities themselves have recognized that such problems do exist, and some of them have announced reforms in merchandising policy that promise to eliminate many objectionable practices.[28]

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[22] The sale of chewing gum is hardly ancillary to the conduct of transportation, nor, in a large city where the commodity is readily obtainable, particularly necessary for the accommodation of passengers. Advertising displays in the cars are not public conveniences nor a means of furthering the service. These two enterprises were permitted in City of New York v. Interborough R. T. Co., *supra* note 14, because the plaintiff failed to show that either "has in any way interfered with the public's full enjoyment of all their rights." In Attorney General v. Great Eastern Ry., *supra* note 16, the court declared that, even if the enterprise objected to were *ultra vires*, this alone would not justify a *quo warranto* action by the attorney general if no actual injury to a protected interest could be shown.

[23] Cases cited *supra* note 21; KEEN, PUBLIC SERVICE UNDERTAKING (1925) 14 *et seq.*; 1 MORAWETZ, CORPORATIONS (2d ed. 1886) §§ 363, 393. It must be noted that the decision often turns upon the status of the party bringing the action. The great majority of courts hold that the corporation itself is estopped from pleading *ultra vires* as a defense to an action on a contract made in furtherance of a collateral enterprise. Arkansas & La. Ry. v. Stroude, 77 Ark. 109, 91 S. W. 27 (1905); Dorsett v. Black Hills Tract. Co., 30 S. D. 420, 138 N. W. 808 (1913). *Contra:* Vanderveer v. Asbury Park & B. St. Ry., *supra* note 15. Nor can a private party who can show no liquidated damages therefrom, restrain a corporation from engaging in an *ultra vires* enterprise. Burns v. St. Paul City Ry., *supra* note 13. Cases of this sort, obviously, are not decisive of the power of the corporation to engage in such activities. 3 COOK, CORPORATIONS (8th ed. 1928) 681.

[24] 182 Pa. 309, 37 Atl. 932 (1897).

[25] *Supra* note 2.

[26] At 321, 37 Atl. at 933.

[27] Prior to the recent decision in Attorney General v. San Antonio Pub. Serv. Co., *supra* note 2, which denies the right of a utility company to engage in merchandising, the Pennsylvania case of Malone v. Lancaster Gas Co., *supra* note 24, has been unchallenged. Chairman Maltbie, of the New York Pub. Serv. Commission, in his recent report on merchandising, *supra* note 1, said: ". . . it must, under the decisions, be held that . . . gas and electric corporations are authorized to deal in both gas and electric equipment when such a business is reasonably carried on for the purpose of promoting the use of gas or electricity."

[28] In the N. E. L. A. BULLETIN for Feb., 1929, at 34, M. S. Sloan, president of the New York Edison Co., said, "We shall not cut prices or do anything else, directly or indirectly to place any contractor or dealer under unfair competition. . . ." The Phila. Elec. Co. adopted a policy on Jan. 2, 1932, committing itself to abstain from price-slashing; to give no premiums, trade-in allowances, or credit terms that do not permit of fair competition; to

Therefore, even though the sale of appliances be considered incidental to the sale of gas and electricity, it may be conducted in such a manner that it involves the misuse of franchise powers, or an infringement of the private rights of the appliance merchants and manufacturers by a species of unfair competition. It is largely upon these grounds that those who oppose the merchandising activities of the public utilities have invoked legislative relief.

In some states the operating expenses of the merchandising enterprises are included in the general operating costs of the utility, and so enter into the computation of the rate.[29] Here, when the utility indulges in price-slashing to undersell its merchandising competitors, and retails its appliances at less than cost, the opponents of utility merchandising contend that the losses incurred in the private enterprise will be unfairly absorbed by an increase in the rates for service. The retailer has no allied enterprise with which to share his costs, and in such cases he naturally objects that the public is being forced to shoulder the expenses of a purely private undertaking. The utilities, on the other hand, contend that the public ultimately benefits by these practices. The merchandise, they say, is made cheaper and available, therefore, to greater numbers of consumers, and this in turn results in a larger and more even consumption of electricity and gas. By the large increase in consumption, the public service corporation is not only enabled to absorb any merchandising losses which it may incur through drastic price-cutting, the distribution of premiums, large trade-in allowances on old appliances, unusually long credit terms—financed by "advancements" from the general capital of the public enterprise—and extensive repair services, but also to give the public more efficient service and many voluntary rate reductions. It is quite willing, therefore, to keep its merchandising accounts in red ink and to reap the profits in its public capacity. The local merchant cannot compete successfully against such a dual opponent, for he is obliged to take his profit solely from the sale of his merchandise.

Even if it be conceded that the general public has benefited from utility merchandising in decreased rates and the development of cheaper and better devices for the extension of the usefulness of gas and electricity, it cannot be denied that many manufacturers and retailers of these appliances have suffered a restraint upon competition. And while it is true that the recent period of "large scale" production has lessened our antipathy to the centralization of capital in large corporate enterprises, which was so evident in the "anti-trust" period, freedom of competition is still a national tenet, protected by many statutes and by the regard of the common law for private rights.[30]

In invoking the protection of federal statutes and the common law against unfair utility competition, however, the merchants and manufacturers of appliances have encountered many difficulties. A large number of the public utilities are engaged in purely intra-state business, and are not, therefore, subject to investigation by the Federal Trade Commission. It is true that many of them are subsidiaries of holding companies whose activities are interstate, and upon this basis the Trade Commission has been petitioned to investigate their mer-

refuse the exclusive sales agency of any appliance; and to segregate the merchandising accounts from the operating expenses. The writer is indebted to Mr. A. M. Boyd and Mr. S. W. Griselle of that company for a copy of this policy, and for a courteous explanation of practical phases of the sales problem.

[29] *Re* Consumers Co., P. U. R. 1923A 418 (Idaho); in a California rate case, cited in "The Legal Status of Utility Merchandising", *supra* note 1, as 35 Rate Research No. 21, p. 323, the court said, "It is neither practicable nor reasonable to set this activity of the utility off by itself." According to the same report, New York and Massachusetts have state laws including the incidental business in the operating expenses of the utility. However, Chairman Maltbie, in his report to the New York Commission, *supra* note 1, has recommended separate accounting.

[30] See HENDERSON, FEDERAL TRADE COMMISSION (1924) c. 1.

chandising activities.[31] It is obvious, however, that a less circuitous approach is necessary.

If, under the state laws, or the company's charter, the costs of merchandising are included in the operating expenses of the utility, there is little doubt that the public service commission of the state has the power to regulate, superficially at least, the conduct of the merchandising enterprise.[32] However, where the merchandising accounts are wholly or partially segregated from the company's operating expenses,[33] the right of the commission to regulate the merchandising is less clear, since it has no authority over purely private enterprises.[34] Even if it be said that the state commissions have jurisdiction wherever the private enterprise uses the facilities of the public enterprise, the extent of that jurisdiction is doubtful and there is difficulty in determining to what extent these facilities are being so employed. Where the property of the utility, or the public service personnel is used in merchandising appliances, the commission might conceivably effect a *pro rata* valuation thereof to be credited to the utility revenues.[35] But the utility possesses, *in its public capacity,* the right of access to the homes of consumers of gas and electricity, and when this privilege, which no private competitor can enjoy, is used to promote the appliance business of the company, there is a definite use of a public service facility in the private undertaking upon which it would be impossible to place a valuation. The prestige, or "good will" which the utility enjoys in its community by virtue of its franchise, is, in itself, sufficient to place a private competitor at a disadvantage. If it were permitted to accept the exclusive sales agency of any particular "make" of appliance, its semi-public status would operate to place undue emphasis on the merits of this appliance to the detriment of the makers and retailers of others.[36] This "good will" would be a factor in the sale of appliances by the utility, and might well be considered a public service asset, but it would be impossible to determine the extent of its operation, or to estimate its actual value to the private merchandising enterprise.

Because of these difficulties in defining the exact nature of the overlapping of the private and public enterprises, and in achieving a complete separation of the two, it has been suggested that public service corporations should be denied the right to engage in *any* collateral business.[37] This was the object of the great majority of bills proposed in the various state legislatures during 1931,[38]—to

[31] Merchant & Evans Co. asked the Commission to investigate merchandising by the subsidiaries of the United Gas Improvement Co. "A Protest Against Merchandising by Utilities", *supra* note 1. In United States v. Lehigh Val. R. R., 220 U. S. 257, 31 Sup. Ct. 387 (1911), the Supreme Court held that an interstate railroad which held all the stock of a company engaged in intrastate mining was, in effect, engaged in mining.

[32] United Fuel Gas Co. v. Railroad Comm. of Ky., 278 U. S. 300, 49 Sup. Ct. 150 (1929).

[33] In Wisconsin, *e. g.,* the merchandising accounts are segregated by statute. *Re* Wisconsin Pub. Utility Co., P. U. R. 1930A 119 (Wis.). Missouri, Montana, North Dakota, Pennsylvania and Utah also exclude these accounts from the computation of the rate. Due to individual differences in charters, and incorporating laws, it is difficult to determine whether, in one state, these accounts are to be excluded or included. "The Legal Status of Utility Merchandising", *supra* note 1.

[34] Public Utilities Comm. v. Henderson County Pub. Serv. Co., P. U. R. 1920C 381 (Ill.); Claggett v. Eastern Shore Gas & Elec. Co., *ibid.* 501 (Md.); Just v. Consolidated Gas Co., P. U. R. 1918C 390.

[35] United Fuel Gas Co v. Railroad Comm. of Ky., *supra* note 32.

[36] Merchant & Evans Co. alleged that the Philadelphia utilities were selling only those appliances manufactured by subsidiaries of the holding company, or by closely allied interests. "A Protest Against Merchandising by Utilities," *supra* note 1.

[37] Wyman, *loc. cit. supra* note 7.

[38] *Alabama:* H. 815, and H. 830, denying the utilities the right to merchandise any appliances other than fuses, or to hold stock in any merchandising company. *California:* H. 1662 was adopted. See *infra* note 49. *Illinois:* H. 546, denying the utility or its subsidiaries the right to retail appliances. *Indiana:* S. 173, to prohibit wholesale and retail utility merchandising. *Kansas:* H. 144 was adopted. See *infra* notes 39, 41. H. 189, prohibiting

prohibit, rather than to regulate, merchandising. These measures were adopted only in Kansas,[39] and Oklahoma.[40] The Kansas statute provides, briefly, that it shall be a misdemeanor for any public utility or its agents to manufacture, sell, or lease any articles not required to supply the utility service, or created as by-products of the manufacture of the primary commodity.[41] The Oklahoma statute makes similar provisions, but adds a short term of imprisonment to the fine imposed for each violation by officers and agents of the company.[42]

It has been contended that, since the merchandising of appliances is incidental to the conduct of the gas and electric business only because it increases consumption and enables a more efficient adjustment of the "load curve", the utilities could achieve the same object by the promotion of appliances through advertising alone. The utilities feel, however, that if they did not participate in this business, new devices for the use of gas and electricity would not be developed and popularized because the local merchants would be unable to provide the necessary capital and unwilling to risk the investment. The utilities pioneered in the development of the majority of these appliances, and there is force to their contention that their opponents are now seeking to kill the "goose that laid [and is still laying] the golden eggs." [43] Furthermore, it is not so much against the right of the utilities to engage in merchandising as against the manner in which they exercise that right, that the protest of their opponents is directed. If it be possible to correct the more outstanding abuses in utility merchandising by regulation, the statutes of Kansas and Oklahoma would appear to be too

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merchandising by any corporation where 10 per cent. of its capital stock was held by any other corporation, did not receive favorable action. *Missouri:* H. 82 denying the utility the right to merchandise any products other than those necessary to the utility service, or created as by-products of the utility commodity. *Nebraska:* H. 347 contained the same provisions as the Missouri bill. *Nevada:* H. 178 prohibited merchandising by utilities in large cities, but permitted it at the discretion of the public service commission in towns not exceeding 1500 population, and rural districts where the population totaled not more than 5000. *Oklahoma:* H. 201 was adopted. See *infra* notes 40, 42. *Pennsylvania:* H. 760, introduced by Rep. Talbot in Feb., 1931, sought to prevent utility merchandising, and to prohibit any utility from holding the stock of any corporation authorized to do a mercantile business. *Tennessee:* S. 606, prohibited retail and wholesale merchandising. *Texas:* H. 626, was similar to Oklahoma bill H. 201. *Wisconsin:* the Wisconsin bill also sought to prohibit retail and wholesale merchandising, and the holding of stock by utilities in merchandising corporations.

The California, Kansas, and Oklahoma measures were adopted. In Illinois, Nebraska and Texas the bills were defeated in the house into which they were introduced. In Missouri, Nevada and Pennsylvania the bills were passed by one house, but did not receive favorable action in the other. In the remaining states, the bills died by the adjournment of the legislature prior to action upon them.

[39] Kans. Laws 1931, c. 238, §§ 1-3.

[40] Okla. Laws 1931, c. 46, § 2.

[41] Section 1. ". . . it shall be unlawful for any individual, firm or corporation engaged in the manufacture, transporting, distributing or selling of heat, gas, water, electricity or electrical current to engage in the manufacture, wholesale or retail, by sale or lease, of any chattel, article, commodity or manufactured product, except those articles which have been owned by such utility in manufacturing, distributing or selling its utility service, or those articles which are the direct product of the business of manufacturing or distributing said utility service."

Section 2. Provides for investigation of violations by the public service commission.

Section 3. Imposes a fine for each separate offense, and, in addition that "any such individual, firm or corporation may be enjoined . . . by and through the public service commission or by the state of Kansas, by and through the attorney-general or the county attorney, or by any interested person, from violating further the terms of this act."

[42] Section 3. "Any officer, director, manager, agent or employee of any public service corporation in this state who shall knowingly and wilfully violate . . . or permit the violating of this act shall be fined in the sum of not less than One Hundred Dollars, nor more than One Thousand Dollars, and be imprisoned in the county jail not less than one day nor more than twelve months, for each and every separate violation."

[43] For a discussion of the part played by the utilities in the development of appliances see DORAU, MATERIALS FOR THE STUDY OF PUBLIC UTILITY ECONOMICS (1930).

drastic to merit favor in other states.[44] Prohibition is never a practical substitute for thoughtful correction.

In considering a program of regulation, however, the dual nature of the utilities must be borne in mind. Insofar as their service to the public is concerned, they are semi-public, and the state, having given them public powers for the performance of public duties may validly supervise the giving of the service and the use of the special powers; but it has been pointed out that ". . . the state has no right to restrict the earnings of a utility on its non-utility business," [45] so long as this non-utility business does not involve the public service. It is not concerned with the purely private income of the company so long as the public receives an adequate service at a fair rate, and so long as the great powers granted the company for this particular purpose are not used for another, non-public, enterprise.

A program of legislative regulation should attempt to go no further. It might provide:

First, for a separation of the operating expenses of the merchandising enterprise from the operating expenses of the public service, so that the costs of merchandising could, in no way, enter into the formation of the rate.[46] This would answer the objection of the local merchants that the public is being made to share in the support of the private enterprise.

Second, for a prohibition of the use of public service property and personnel in the merchandising business.[47] This would be a corollary to the first provision. It would answer the objection of the local merchants that the public service is bearing the bill-collecting and advertising expenses of the private enterprise as part of its own operating expenses, by combining the bills and advertising of the two undertakings. It would solve the confusion that has resulted in several states from attempts to place a proper valuation on these facilities in order to deduct them from the operating expenses of the public service upon which, and only upon which, the rate is based.

Third, for a ban upon the use of powers, granted solely for public service, in the private enterprise.[48] This would prevent the utilities from obtaining ad-

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[44] No cases have as yet arisen under either of these statutes.

[45] Welch, *When a Public Utility Merchandises,* in PUBLIC UTILITIES FORTNIGHTLY, January 22, 1931, at 73. A second and third installment of this article, by Neil M. Clark, appear in the same periodical for February 5, 1931, at 140; and for February 19, 1931 at 213.

[46] This has been done in Idaho, Illinois, Michigan, Montana, Nebraska, New Hampshire, North Dakota, Pennsylvania, Utah, Washington, West Virginia and Wisconsin. See Welch, *loc. cit. supra* note 45. See also Polson v. Public Utility Consolidated Corp., P. U. R. 1929E 557 (Mont.).

[47] The report of the New York Commission, *supra* note 1, advocates the discontinuance of the practice of including the merchandising item upon the monthly bill for utility service.

It might be contended that the general wealth of the company was part of its public service facilities, and that, therefore, no part of the company's capital should be used in the private enterprise. The contention is not tenable because the wealth of the company in no way enters into the computation of the rate, and is not a facility of the public service. So much of it as is used in providing the public service is, of course, such a facility, but the private income of the company on its securities and investments is not subject to inclusion in the determination of the rate. The use of company's name in conducting the merchandising enterprise might be considered, also, a use of a public service facility to give prestige to the private enterprise. The company is, however, restricted to the use of that name in carrying on business, and its value is purely speculative. If the stationery of the merchandising enterprise is clearly marked "Merchandising Department", there seems to be no reason why its advertising letters should receive more consideration in the homes of its consumers than the advertising letters of any large and well-known corporation. There is a possibility also that the corporation's "prestige" as a utility would hamper, rather than promote its merchandising activities.

[48] An example of such misuse of purely public powers is the practice of applying the cash deposit for gas and electric service—which the utility may lawfully require of every consumer—toward the payment of arrears on merchandise subsequently purchased from the

mission to the homes of their customers as public servants, to promote their private merchandising business. It would deny the utilities the right to coerce the public into buying their appliances, or into paying for the appliances which it had purchased from them by discontinuing the public service for failure to do so.

Such a program would obviously leave many of the independent merchants' objections unanswered. It will be found, however, if these remaining objections are analyzed, that they are the usual objections of small enterprisers to the competitive methods of rich and powerful rivals. It is not the public nature of the utilities that enables them to undersell the local merchants, or to grant long installment terms; it is, rather, the wealth of the public utilities, that enables them to obtain wholesale rates on large purchases of merchandise, and to finance the giving of unusually liberal credit terms to purchasers. It would be no less ridiculous to insist that the Ford Motor Company market its cars at a price that would enable a small rival successfully to compete with it, than it would be to insist that the utilities sell their appliances at the average price charged by local jobbers and retailers. So long as it be conceded that the utilities have a right to engage in merchandising at all, it must be conceded that they have the right to adopt any methods in so doing that are considered lawful in the conduct of a private business, provided they do not thereby employ powers granted to them for purely public purposes, or impair their service to the public in their primary enterprise.[49] Legislation which shields the local merchant from competition by the utility companies, merely because his competitors are public utilities, is class legislation,[50] and is of no benefit to the public at large.

G. M. N.

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company. This practice has been condemned by the Wisconsin Public Service Commission, and a deposit so diverted has been ordered reinstated. U. S. Daily, March 2, 1932, at 2947. The Commission ruled that ". . . when a utility engages in activities involving merchandising and jobbing, it is a well recognized legal and economic principle that such activities should be completely divorced in so far as it is possible from the regular utility activities."

[49] Welch, *The Right of a Utility to Merchandise,* PUBLIC UTILITIES FORTNIGHTLY, September 5, 1929, at 282, ". . . if it is a problem at all it concerns general commercial conduct." State legislation, therefore, to correct such general trade practices should not only concern itself with the activities of utility companies, but with private corporations also. A statute adopted by California in 1931 suggests such a solution. It provides that no corporation shall engage in the sale of any commodity ". . . with the intent to destroy the competition of any regular established dealer in such commodity . . . or to prevent the competition of" any person or firm ". . . who or which intends . . . to become such a dealer . . ." It adds, however, that nothing in the act shall be construed to prevent a company from meeting a competitive rate in good faith. Cal. Laws 1931, c. 617.

[50] In a request to the attorney general for an opinion, counsel for the Kansas public service commission declared that he believed the recently adopted merchandising act to be unconstitutional in that it deprives the utilities of implied charter powers; is legislation for the benefit of a particular class (the manufacturers and retailers), and accomplishes nothing for the general public. U. S. Daily, July 25, 1931, at 1207.