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UTILITY FRANCHISES AND MUNICIPAL RATE REGULATION IN NORTH DAKOTA: SOME STATUTORY AND CONSTITUTIONAL CONSIDERATIONS

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The North Dakota Constitution provides for a public service commission.[1] It does not, however, give any powers and duties to the PSC, that being left to the legislature.[2] While the legislature has acted over the years to carry out its constitutional mandate to prescribe the powers and duties of the PSC, it has, nevertheless, placed upon the courts the duty of reminding the PSC of its origins, and of the limits of its delegated powers. Thus, it has been said that the PSC "possesses only the authority conferred upon it by the constitution and the statutes of the state, and that all orders made by it must conform with the statutes to be valid."[3] In other words the PSC "is a constitutional body having only such powers and duties as are prescribed by law."[4] It follows that orders issued by the PSC which are outside its powers are necessarily void as falling beyond the purview of the statutes.[5]

Besides granting powers to the PSC, the statutes also prescribe the manner of exercising those powers. The PSC can act only in the mode prescribed. In addition, it cannot "rightfully dispense with any of the essential forms of procedure which the legislature has prescribed for the purpose of investing it with the power to act."[6]

To say that the North Dakota PSC is the state agency clothed with the power and expertise to regulate the various public utilities

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1. N.D. CONST. art. 3, § 82. The Public Service Commission will be hereinafter referred to as the PSC.
2. N.D. CONST. art. 3, § 83.
3. Lyons v. Otter Tail Power Co., 68 N.D. 403, 280 N.W. 192, 194 (1938).
4. Public Serv. Comm'n. v. Montana-Dakota Util. Co., 100 N.W.2d 140, 143 (N.D. 1959).
5. *Id.* at 143-44.
6. Petition of Village Board of Wheatland, 77 N.D. 194, 42 N.W.2d 321, 335 (1950); *accord,* State v. Northern Pacific Ry. Co., 75 N.W.2d 129, 134 (N.D. 1956).

operating in the state may be reassuring to some, but the statement is incorrect in at least one respect. The State Supreme Court has stated that the PSC "has only such powers, in the regulation of public utilities, as have been conferred upon it by the legislature."[7] Accordingly, it is important to look at the statutory language which gives the commission the following powers: (1) general jurisdiction over public utilities;[8] (2) general and some specific powers respecting utilities;[9] (3) power to regulate utility services;[10] and (4) an express denial of authority to exercise any regulatory power over certain types of utilities.[11]

One of the most important, but perhaps least comprehended powers given to the PSC, is the power to establish utility rates. In rather all-encompassing words, the legislature has declared:

> The commission shall supervise the rates of all public utilities. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities. Whenever the commission, after hearing, shall find any existing rates, tariffs, joint rates, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this title, the commission by order shall fix reasonable rates, joint rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.[12]

The North Dakota Supreme Court has construed this statute as imposing a continuing duty to supervise utility rates, coupled with the necessary regulatory power given to the commission.[13] A comprehensive definition of what constitutes a utility rate is given by statute,[14] and includes rules, regulations, practices, or contracts affecting the utility's compensation, charges, and the like. The other words used in this general ratemaking statute, e.g., such words as "tariffs," "charges," and "schedules" are not defined. However, they may be interpreted as synonymous with "rates."[15]

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7. Williams Elec. Cooperative v. Montana-Dakota Util. Co., 79 N.W.2d 508, 516-17 (N.D. 1956).
8. N.D. CENT. CODE § 49-02-01 (1960).
9. N.D. CENT. CODE § 49-02-02 (1960).
10. N.D. CENT. CODE § 49-02-04 (1960).
11. N.D. CENT. CODE § 49-02-01.1 (Supp. 1971). Since the commission has only such powers as are prescribed by law, an express denial of authority is unnecessary, but noteworthy.
12. N.D. CENT. CODE § 49-02-03 (1960).
13. Public Serv. Comm'n. v. Montana-Dakota Util. Co., 100 N.W.2d 140, 152 (N.D. 1959).
14. N.D. CENT. CODE § 49-01-01(4) (1960).
15. a. tarrif—a listing or scale of rates or charges for a business or a public utility.
b. charges—the price demanded for a thing or service.

In addition to the powers bestowed upon the PSC, (eliminating rates which it has found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law) the legislature has also prohibited the making, demanding, or receiving by a utility of any unjust and unreasonable rate or charge.[16] In the event a utility has charged an excessive or discriminatory amount for its service, or has discriminated against a consumer under its schedules, rates, and tariffs on file, a procedure is set up for a complaint against the utility, along with possible reparation to the wronged party.[17] To avoid this complaint, all rules and regulations made by any public utility affecting or pertaining to its rates or services to the public are required to be just and reasonable.[18] The utilities may not change their rates without the permission of the PSC nor can they change their rules, practices, or regulations without such approval.[19] The legislature has placed the burden of showing the reasonableness of such changes[20] in rates or rules, regulations, or practices on the utility applying therefore.

In spite of the statutory powers given to the PSC to regulate or establish utility rates, and the statutory restraints placed on the utilities with respect to their rates, there is one area in which the rules don't apply with the predictability that one might expect. Where rates for municipal uses are set by franchise, the PSC is without power to exert its otherwise considerable ratemaking influence.

An early case[21] in which the then board of railroad commissioners (predecessor of the PSC) was not a party, but in which the PSC's authority to regulate rates was in issue involved a franchise ordinance adopted by the City of Jamestown. The city had granted an electric company the right to use its streets for poles, wires and the transmission of electricity, in the operation of an electric light and power plant. By the terms of the franchise, the company was obligated to furnish power to light the city hall, the offices therein, and the engine house, without cost to the city. In addition, the company was to provide water pumping service for the city at a flat rate.

As time went on, the utility and the city fell into disagreement over the rates that the city should be paying for the service be-

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c. schedules—a written or printed formal list (as a schedule of freight rates). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged, 1971).

16. N.D. CENT. CODE § 49-04-02 (1960).
17. N.D. CENT. CODE § 49-02-15 (1960).
18. N.D. CENT. CODE § 49-04-17 (1960).
19. N.D. CENT. CODE § 49-05-06 (Supp. 1971).
20. *Id.*
21. Western Elec. Co. v. City of Jamestown, 47 N.D. 157, 181 N.W. 863 (1921).

ing rendered, the utility insisting that the city pay a higher rate than in the franchise, and the city refusing. It was contended by the utility that from and after the effective date of the Public Utilities Act, the contract rates set in the 1902 franchise were superseded. The basis of the utility's contention was that the effect of the act was to make unlawful any free supply of utility service, or any supply charge at a low or discriminatory rate. Thus, it was contended that after the Public Utilities Act became effective, the utility would violate state law by rendering service to the city at rates below fair, just, and reasonable rates charged to anyone else for a similar service.

The court met a number of the utility's contentions by stating some principles[22] which it found relevant to the construction of the state's new Public Utilities Act. The Act, said the court, granted to the board of railroad commissioners regulatory ratemaking powers over public utilities. It did not deprive a city of its powers and privileges in creating or enforcing a franchise granted to a utility for the use of its streets. Furthermore, the court emphasized that the Act did not pretend to grant the commissioners the power to determine what shall be the consideration for the use or exercise of the privilege of a franchise in a city. Moreover, as if by way of placing future legislatures on notice that there were limits to the authority that could be given to a regulatory board, the court asserted that the constitution[23] specifically reserved to cities the authority to grant or permit franchises to utility companies for the use of city streets, and to regulate the use of the same.[24]

The court then turned to a discussion of what the franchise granted to the utility really was, calling it a "right of value, a right of property, and validly, the subject of a legal contract."[25] Further, the franchise given by Jamestown was characterized as being a "contract between the state (through the municipality representing the state by its permission) and the company."[26] The court declared that "the city had the right to exact a charge for

22. *Id.* at 367.
23. *Id.*
24. N.D. CONST. art. 6, § 139:
No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes.
But see City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197, 205 (N.D. 1957):
Section 139 of the Constitution is not a grant of power to municipalities but a restriction upon the legislature designed to prevent it from authorizing indiscriminate use of the streets of a municipality by certain enumerated public utilities without control by the local authorities. To that extent it is a limitation upon the sovereign power of the state.
25. Western Elec. Co. v. City of Jamestown, 47 N.D. 157, 181 N.W. 363, 367 (1921).
26. *Id.*

the use of its streets as a consideration for the franchise."[27] In order to illustrate the forms that consideration for franchises may permissibly take, and perhaps to dispel fears that cities would be bargaining with their police power, the court explained that:

> The consideration for the exercise of this right might have been evidenced by the payment of a stipulated sum of money annually, or otherwise by the payment of a percentage of the gross or net revenues of the company earned in the city, or by doing certain service in and upon the streets or highways of the city and by furnishing as an equivalent, in lieu of money, a certain service or a certain commodity for the city's use. This furnishing of a certain service or a certain commodity for the city's public use may not be termed a bargaining of the municipal or state police power concerning rates, in the absence of a restrictive or prohibitive constitutional or legislative provision, but rather the "quid pro quo" of, or the consideration for, the exercise of the franchise.[28]

It may well be that a city could demand and receive some form of consideration for the privileges it conferred upon public utilities by the grant of a franchise. But if the consideration took the form of a special rate for the city's use, as it had in Jamestown, how could such rates be reconciled with statutory commands that rates not be discriminatory, or below rates charged others for similar service? That question was handled with this language:

> Presumably under the contract the service so rendered by the plaintiff (utility) is reasonably compensatory for the privilege so exercised by the plaintiff (utility). And likewise the value of this franchise might reasonably and presumptively measure the difference between the amount of actual charge in fact made to and paid by the city and the amount of the reasonable charge for the service rendered. The rate charged therefor under the contract cannot be termed in any event unreasonable or discriminatory.[29]

In holding that the Public Utilities Act had no application to the electric service rendered to the city by the terms of the franchise, the court warned that the right of a city to contract for consideration to be paid by a public utility, when the city consents to a franchise, was not to be confused with the state or municipal police power to regulate public service rates or a public utility.[30]

27. *Id.* at 368.
28. *Id.*
29. *Id.*
30. *Id.*

In a concurring opinion, Chief Justice Christianson cited two sections of the Public Utilities Act,[31] but noted that the board of railroad commissioners had made no adjudication that the rates agreed upon between the City of Jamestown and the electric company were discriminatory, or that the railroad commissioners had taken any action whatsoever regarding those rates.[32] Moreover, he noted that the rates in question were already in existence when the Public Utilities Act became effective. The Chief Justice found the rights of the parties before the court dependent upon and measured by their contracts.[33] He expressed no opinion as to whether the Public Utilities Act gave the commission the authority to change a rate which had been agreed upon between the public utility and a city for compensation for services rendered to the city (as distinguished from maximum rates fixed in the franchise to be charged customers generally)[34] and under which rate, stipulated in the franchise, the public utility was to operate. Nor did he "express any opinion as to whether Section 139 of the state constitution gave the legislature the authority to confer upon a public utility commission the power to change or alter such rates."[35]

It took approximately eight more years for a case to reach the State Supreme Court in which the board of railroad commissioners had taken action concerning rates set by a franchise for service to a city for municipal uses.[36] The then village of Belfield, in 1915, gave a franchise to an electric light company, the terms requiring the company to furnish electricity to the village for street lighting purposes at stated rates. In 1919, and after the village had been incorporated as a city, an ordinance was adopted amending the franchise and calling for an increase in rates to be paid by the city for street lighting. The utility filed its acceptance of the amended ordinance with the city.

However, about a year and a half later, the utility filed an application with the board of railroad commissioners, asking for a rate increase, both as to the city, and as to the inhabitants thereof. In May, 1921, the commission granted the utility higher rates applicable to the city for street lighting. Thereafter, and until January, 1927, the city paid for electricity at the rates specified by the board of railroad commissioners. After that date, the city refused to pay according to the rates set by the commission, but offered to pay in accordance with the rates specified in the franchise.

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31. *Id.* at 369.
32. *Id.*
33. *Id.*
34. *Id.* at 364. $.15 per kwh was set by the franchise as the maximum rate for all consumers.
35. *Id.* at 370.
36. Chrysler Light & Power Co. v. City of Belfield, 58 N.D. 33, 224 N.W. 871 (1929).

Justice Christianson, who apparently had some reservations about the sweep of the court's decision in *Western Electric,* wrote the unanimous opinion of the court in *Belfield.* The issue not presented in the former case was now squarely before the justices, and was stated by the court as follows:

> (1) Is the plaintiff (utility) entitled to compensation in accordance with the rates agreed upon in the franchise or is it entitled to be compensated according to the rates prescribed by the board of railroad commissioners?[37]

The court began its determination by setting out the text of Section 139 of the state constitution, and by saying this about it:

> The power reserved by section 139 of the Constitution to a village or city to either grant or refuse permission to an electric light company to occupy the streets of such village or city with the structures of such lighting company is not limited to a simple granting or denial of permission to use the streets for such purposes; a village or city may permit such use of its streets on certain conditions only, and, if the electric light company accepts the permission or franchise so granted, all valid conditions or restrictions attached thereto become binding upon it.[38]

Then the court continued by saying that the village (or city) of Belfield had the power to require compensation for the use of its streets by the electric company; that ". . . it might stipulate, as it did, that certain service should be furnished to the city at a certain stipulated price; it might even have stipulated that such service should be furnished to the city without charge."[39] As for the utility company, the court said the utility's acceptance of the franchise resulted in the acceptance of the conditions therein. In other words, the utility cannot be relieved from its contract nor can another be made in its place because it failed to make an advantageous bargain with the city.[40]

The court found the franchise between the city and the utility a binding contract to the extent that rates were agreed upon with the respective rights of the parties measured thereby.[41] However, the court turned to the Public Utilities Act to determine if there was anything in it which gave the board of railroad commissioners legitimate authority over those franchise rates determined to be the legal rates for the municipal service rendered to Belfield. The court

37. *Id.* at 874.
38. *Id.*
39. *Id.* at 874-75.
40. *Id.* at 875.
41. *Id.*

began by noting that "the board of railroad commissioners has only such powers to regulate rates of public utilities as have been conferred upon it by the Legislature. Such board can initiate no public policies of its own; it can act in no field which the Legislature has not authorized it to enter."[42] The court continued by stating that rate regulatory power was conferred on the board by the Public Utilities Act of 1919, and that the act furnishes the sole basis for the power sought to be exercised by the board in making the order an issue[43] in the instant litigation. Furthermore, the opinion stated, if the power in the board to make a rate order as it made in the *Belfield* case is not conferred on the board by the legislative enactment, the power admittedly does not exist.[44]

> We fail to find in the Public Utilities Act any language indicative of a legislative intention to confer any authority upon the board of railroad commissioners to interfere with the rates for electric current to be furnished by an electric light company to a city, where such rates are fixed by contract in the franchise granted by the city to the electric light company.[45]

Having so construed the Public Utilities Act, the court then quoted from the following its holding in *Western Electric*.[46] It would seem sufficiently clear that the board of railroad commissioners had exceeded its authority in the *Belfield* case, from what the court had already said. However, the court offered a postscript to its opinion in that regard, and met the question of legislative power to grant the authority or exercise it itself, by writing:

> It is unnecessary to consider whether the Legislature can interfere with rates for electric current for street lighting, which have been fixed in the franchise granted by a city to an electric light company. The question of legislative power to interfere with such rates can arise only when and if the Legislature attempts to interfere with such rates, or to confer upon some regulatory board the power to do so, and we are wholly agreed that the Legislature has not conferred or attempted to confer any such authority upon the board of railrload commissioners by chapter 192, Laws 1919. The order entered by the railroad commission was clearly outside of its powers; such order created no obligations and vested no rights.[47]

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id. See also* Western Elec. Co. v. City of Jamestown, 47 N.D. 157, 169, 181 N.W. 363, 367.
47. *Id.*

A generation passed before another case involving electric rates to a city set by the terms of a franchise found its way to the Supreme Court.[48] One questions why the case was prosecuted, since the statutory authority[49] under which the PSC felt itself compelled to act was almost identical to the corresponding section in the Public Utilities Act of 1919[50] which had been construed by the court as giving no authority to the board of railroad commissioners.

The case was initiated by the Public Service Commission's order to Montana Dakota Utilities Company and the City of Williston to show cause why the rate agreed upon in a contract between the city and the utility for electricity for municipal uses should not be found unjust, unreasonable, unjustly discriminatory, and otherwise in violation of law, and why the commission should not by order fix a reasonable rate to be followed in the future. Upon the hearing of the order to show cause, the PSC concluded that the rate Williston was paying for power for its municipal uses was in violation of law. The court noted further that a tariff previously filed and approved for the utility's patrons, at rates higher than those complained of, should govern the relations of the parties. Both the city and the utility appealed the commission's order, contending that the commission lacked jurisdiction in the matter, because the contract which established the rate to the city included, as part of the consideration therefor, the granting by the city of a franchise to the utility to use the streets and public ways of the city. Thus, it was argued that Section 139 of the state constitution made such a contract exclusively within the authority of the city.

The Supreme Court, in affirming the district court, followed its earlier decisions on the subject[51] by expressly setting out the previous language which had determined that the value of a franchise may well measure the difference between the amount paid by a city, and the reasonable charge for the service,[52] and that a rate charged under such a contract cannot be termed unreasonable or discriminatory. It also expressly reaffirmed its earlier holding[53] that the commission had not been conferred any authority to interfere with the rates for electricity furnished a city where the rates are fixed by contract in the franchise granted by the city to the electric utility.

In following its earlier precedent, the court determined that

48. Public Service Comm'n v. City of Williston, 160 N.W.2d 534 (N.D. 1968).
49. N.D. CENT. CODE § 49-02-03 (1960).
50. N.D. SESS. LAWS ch. 192 (1919).
51. N.D. CONST. art. VII, § 139. Public Service Comm'n v. City of Williston, 160 N.W.2d 534, 536 (N.D. 1968).
52. *Id.*
53. *Id.* at 537.

the city was entitled to something for the franchise, that the rate was not discriminatory or unjust and that the relationship between the city and the utility under the circumstances was beyond the reach of the regulatory powers conferred on the PSC. However, it was argued by Northern States Power Company, (NSP)[54] in an *amicus curiae* brief, that the then board of railroad commissioners had made a determination, only two years after the *Western Electric* decision, which, in effect, reversed the court. The board acknowledged the Supreme Court's ruling that the free service and special rate given Jamestown was the consideration for the franchise. The board then found that the free service and the rates were unjustly discriminatory, and that the practice placed an undue burden on the utility's consumers, since the utility was indirectly charging them for the losses it incurred.[55] NSP further argued[56] that because of that decision by the board, and other similar ones, the practical construction of the Public Utilities Act was that the board had jurisdiction to determine the reasonableness of rates charged cities, whether part of a franchise or not. Moreover, according to NSP,[57] the legislature had approved the board's reversal of the Supreme Court when it enacted a bill granting villages the power to contract for electricity or gas. The enactment expressly declared that it was not to be construed as depriving the board of railroad commissioners of any of its existing regulatory powers with reference to such contract rates.

The court's response[58] to the disclosure that the board had reversed the court's earlier decision was understandable and predictable. It held that the legislature referred to "existing regulatory powers" in the context of those powers which the Supreme Court had already determined as belonging to the board. They did not give the Board any new powers.[59] The court emphasized that if the legislature had wished to give the commission authority over the matter of utility rates set by municipal franchise, contrary to the court's earlier construction of the Public Utilities Act, it would have specifically so provided.[60] The same result, said the court, was obtained with respect to a later enactment.[61]

Both Northern States Power Company and the PSC argued in the *Williston* case that the consequence of the court's ruling in the

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 537-38.
58. "The question arises, Under what authority could the Commission have reversed a decision of the Supreme Court? There is no such authority." *Id.* at 538.
59. *Id.*
60. *Id.*
61. *Id.* at 538-39.

earlier cases was that utility consumers in cities other than the exacting city would pay for the consideration for franchises, where it was demanded and received by a city. The PSC contended that the impact of the *Western Electric* and *Belfield* cases was not felt outside the respective cities because of the status of the electric industry at that time. Thus the PSC claimed that the court's holding allowed Williston a bargain rate that would be felt by Montana Dakota Utility's (MDU) patrons across the state.

In both cases the court's response was the same, namely, that if NSP's and the PSC's arguments were sound, they should be addressed to the legislature.[62] However, if the legislature was to be convinced of the merit of the PSC's argument, another problem would remain. Section 139 of the state constitution still exists, its effect not discussed by the court in the *Williston* case.[63]

It remains to be seen what the legislature will do about the *Williston* case. When it does act, either attemping to legislate directly in the field, or by delegating authority to the public service commission, the constitutional provision giving the franchise power to cities or villages will have to be examined anew. The court in *Williston,* as in *Belfield,* found the attempted regulation of rates set by franchise outside the statutory powers of the PSC and did not deal with the constitutional question of legislative authority in the area. To date, the legislature has not granted power to the PSC to involve itself in matters involving municipal franchises given to utilities, though the PSC admittedly possesses extensive regulatory power over the utilities themselves.

The drafters of the state's first comprehensive utility regulatory statute foresaw that cities would exact payment for franchises. Thus, they made provisions[64] allowing the utility to capitalize what it had to pay for the franchise in the same way that all other property used in providing the utility service is capitalized, and upon which the utility is entitled to earn a reasonable rate of return. Local taxes and annual charges are allowed, in addition to the actual consideration paid to the political subdivision that charges for the utility's use of the streets, highways, or public ways. The PSC is required to investigate and determine the value of the public utility's property, and the determination so made is known as the utility's rate base. NSP admitted knowledge of this fact[65] in the *Williston* case, but argues that evils would stem

62. *Id.* at 539-40.
63. *Id.* at 540.
64. N.D. SESS. LAWS ch. 192 (1919). Now codified as N.D. CENT. CODE § 49-06-01 and § 49-06-03 (Supp. 1971).
65. Public Service Comm'n v. City of Williston, 160 N.W.2d 534, 539 (N.D. 1968).

from allowing the value of the franchise in the rate base if localities began to compete for a greater piece of the pie. Northern States Power also suggests that it may not be permissible to compute and include the value of the franchise component in the rate base when the consideration for the franchise is a lower rate than the filed rates. That argument seems unwarranted, however, in light of the court's repeated holding that the value of the franchise where a rate is involved is at least the difference between the rates paid the utility and the regular tariff.[66] What has been said about the statutory requirements that the PSC allow the utilities to capitalize and include in their rate base the aggregate amounts paid for their franchises applies equally to any taxes levied on utility revenues by a municipality which has reserved that power to itself by means of a home rule charter.[67] Finally, it also appears that there is authority for the PSC to allow a utility to treat franchise payments as a utility expense[68] in rate cases. The better view, however, is to include such payments in the rate base since the legislature has expressly named franchises as an allowable component in a utility rate base, whereas it has dealt generally[69] with other expenditures allowed as expense.

One might think that the *Williston* case settled the matter of whether a city can exact a consideration for a franchise given to a utility, and that payments, rate differentials, services provided at no charge, and the like, would be computed and capitalized in the utility's rate base. Although the *Williston* case may have settled for now the question of whether a city can have a municipal rate lower than the utility's tariff when the rate is part of the consideration for a franchise, the matter of how the utility is to be allowed to handle municipal exactions seems far from settled, regardless of apparently clear statutory language describing such handling. In recent years, utilities have filed, and the PSC has approved, rules and regulations which form part of the rates or tariffs that permit the utility to surcharge the ratepayers in any city that exacts something from the utility. One company's formulation provides:

> Adjustment for Municipal Payments
> In the event that a Municipality collects or receives any payment or payments from the Company for or by reason

66. *Id.* at 536. Western Elec. Co. v. City of Jamestown, 47 N.D. 157, 181 N.W. 363, 368 (1921).

67. N.D. CENT. CODE § 40-05.1-06 (10), (12) (Supp. 1971). N.D. CENT. CODE § 49-06-01 (Supp. 1971) speaks of " . . . any tax or annual charge . . . actually paid to any political subdivision of the state . . ."

68. N.D. CENT. CODE § 49-05-05 (Supp. 1971); *see* Application of Montana-Dakota Utilities Co., 102 N.W.2d 329, 341 (N.D. 1960).

69. The special provisions should control over general provisions if it be found they are in conflict, N.D. CENT. CODE § 1-02-07 (1960).

> of the use of the streets, alleys and public places of the Municipality, or for or by reason of the operation of the utility business or any portion or phase thereof in the Municipality, whether such payments be called a tax, assessment, license fee, percentage of earnings or revenues, lump sum payments, or otherwise, or whether such payments are made under the provisions of any ordinance, resolution, franchise, permit, or otherwise, bills for electric service in such Municipality will be increased during the period or periods in which any such payment or payments are collected or received by an aggregate amount approximating the amounts of such payment or payments, and bills rendered under the several Rate Schedules in effect in such Municipality will be increased by the applicable proportionate part of any such payment or payments.[70]

What has taken place through the tariff filings, with the approval of the PSC, is that the utilities are allowed to grant themselves an *ad hoc* rate increase on ratepayers using the utility service within the municipality that exacts a consideration for a franchise from a utility. Worse still, the rate increase is granted without a hearing.[71] Under the blanket authorization allowed in advance, through the vehicle of rules and regulations, the utilities are not even required to file for approval or suspension[72] the rate increases placed into effect when a city takes what it has a right to take. The PSC, for reasons of its own, apparently prefers to allow the utilities automatic rate increases instead of taking the trouble of evaluating the franchise component of the utility's rate base, with a view to setting reasonable rates for the utility's entire system. How hollow the PSC's cry of discriminatory rates sounds in the *Williston* case when the PSC itself participates in a form of rate discrimination against cities that exact a consideration for the grant of a franchise to a utility. How hollow, indeed, the PSC's cry for fair and reasonable rates in *Williston* seems as it waives statutory obligations placed upon it to prevent rate discrimination and utility-determined rate increases.

CITIES' RESPONSE TO WILLISTON AND PREDECESSOR DECISIONS

It may be of interest to review the experiences of a few representative cities in North Dakota with utilities, in connection with the grant of franchises and consideration therefor.

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70. Otter Tail Power Company, General Rules and Regulations—Electric, NORTH DAKOTA PUBLIC SERVICE COMMISSION (1970). Northern States Power Company's general rules and regulations, and those of Northwestern Bell Telephone Company were also found to have the same purport and effect as Otter Tail's.

71. N.D. CENT. CODE § 49-02-03 (1960) allows the PSC to alter rates, after notice and hearing.

72. N.D. CENT. CODE § 49-05-06 (Supp. 1971).

Grand Forks—In November of 1968, the city granted franchises[73] for a period of twenty years to Northern States Power Company to operate its electric and gas systems in the city. The ordinances recite that, for the privilege of operating its systems under the franchises, the company shall pay a franchise fee equal to two per cent of the company's gross revenues (as defined) earned in the city. The fee payable by the company can be raised to three per cent under conditions stated in the franchises. By the terms of NSP's tariff on file with the PSC, the rate payers are surcharged two per cent on their utility bills because of the franchise fee being paid to the city.

Minot—In June, 1972, NSP was given franchises[74] to operate its electric and telephone utilities in the city for a period of twenty years. The ordinances both recite that for the privilege of operating in the city, the company may be obligated to pay a franchise fee equal to two per cent of gross revenues (as defined) earned in the city. The electric franchise requires a separate ordinance to implement the franchise fee, and further provides that the fee may be increased at stated intervals to a total of five per cent. The telephone franchise provides that the implementing ordinance may not be adopted by the city until the federal excise tax on telephone service is reduced by at least two per cent. The rest of the terms are the same as the electric franchise with respect to the franchise fee. No franchise fee ordinance has yet been adopted by the city, but Northern States Power would, as it does in Grand Forks, begin immediately to surcharge the ratepayers at Minot to pass the franchise fee along as part of its rate.

West Fargo—This city gave Northern States Power a franchise in February 1972, granting the company the right to operate within the city for a period of twenty years, but without any apparent consideration for the privileges so exercised.[75]

Jamestown—Otter Tail Power Company was granted a twenty year franchise[76] to operate its electric system in the city in July, 1965. There was no consideration for the franchise.[77]

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73. GRAND FORKS, N.D., ORDINANCES § 1398 and § 1399 (1968).
74. MINOT, N.D., ORDINANCES § 1785 and § 1786 (1972).
75. WEST FARGO, N.D., ORDINANCE § 173 (1972).
76. JAMESTOWN, N.D., ORDINANCE § 428 (1965).
77. *Id.* Jamestown received a percentage of Otter Tail's gross revenues, as defined, earned in the city by the terms of JAMESTOWN, N.D., ORDINANCE § 262 (1932). The consideration so exacted was described as compensation for the right and privileges granted to the utility, and was further conditioned on the city's agreeing not to authorize a municipal electric plant. The payments were to be treated as operating expenses of the utility. Northwestern Bell Telephone Company furnishes 13 local exchange telephones free of charge during the 20 years of its franchise, and agrees that the city may attach the city's fire alarm and police signal wires to the company's poles. Letter from Earl W. Benser, Vice President and General Manager, Northwestern Bell Telephone Company, to City Council, Jamestown, N.D., June 4, 1963. The local CATV operator pays the city 2-1/2% of its gross annual revenues (retail) for the privileges granted by a 10 year franchise. JAMESTOWN, N.D., ORDINANCE § 401 (1964).

Fargo—As a home rule city, Fargo can adopt an ordinance levying a tax on the franchise given a utility. It can also, as can other cities, exact a charge for the privileges conferred by the grant of the franchise. In any event, ratepayers of Northern States Power are being surcharged two per cent pursuant to Northern States Power's tariff, because of the fact that Fargo is exacting something from that utility, under one or both of the theories upon which such exactions can there be made.

It remains to be considered what the relationship of a city to a utility is in the matter of rates for municipal uses of the utility service when the rates are not agreed upon in, or as consideration for, the franchise. North Dakota law provides, in the municipal code, that cities are allowed to contract[78] for certain utility services required for city purposes. The power of the city to contract, however, is subject to the PSC's regulatory powers with reference to contract rates. A general power to approve contract rates is given to the PSC[79] in the utility code.

Two examples may suffice to illustrate some of the apparent discrepancies in this area mentioned in the preceeding paragraph. In Minot, the rates paid to Northern States Power for municipal uses of electricity conform, in almost every detail, to the tariffs Northern States Power has on file at the PSC for municipal service.[80] One may conclude that, for Minot, the power to contract for municipal uses of utility service is a nullity. At Jamestown, the rates paid by the city to Otter Tail Power Company vary from the municipal tariffs on file with the commission. The rates for Jamestown are contained in a document entitled "Municipal Contract,"[81] however, so it may be concluded that Jamestown has taken advantage of the power it has to contract for rates outside a franchise. Of course, this power is limited by the PSC's power to approve those rates set by contract, after such rates are filed with the PSC. But a check with the PSC discloses that the Jamestown contract rates are not filed and approved,[82] and that Otter Tail's municipal contract forms which include contract rates are apparently only filed for informational purposes.[83] Municipal contracts are not required to be filed and

78. N.D. CENT. CODE § 40-05-05 (1960).
79. N.D. CENT. CODE § 49-04-07 (1960).
80. Rates paid by the municipality to Northern States Power were described as the city's water pumping, sewer pumping, and street lighting contracts with the utility. Northern States Power's tariffs on file for municipal service were furnished by the PSC. The tariffs were effective on October 21, 1971. Letter from R. A. Schempp, Finance Director, City of Minot, to Daniel E. Buchanan, Aug. 15, 1972.
81. Jamestown, N.D. and Otter Tail Power Co. contract, May 4, 1964. This was furnished by Rex C. Brisben, City Auditor, Jamestown, and was compared to Otter Tail Municipal Contract forms on file with the PSC, and furnished by the PSC.
82. Letter from Wallace M. Owen, Chief Engineer, PSC, to Daniel E. Buchanan, Aug. 25, 1972.
83. *Id.*

approved.[84] Thus, one may conclude that the provisions in the utility code administered by the PSC are a nullity in the case of Jamestown. The PSC clearly has the authority and the responsibility to act in individual cases on municipal contracts, but apparently leaves that area of rate regulation to the utilities also.

One of the running legal battles being waged for approximately a half century in North Dakota, is the conflict over rate concessions or other consideration for cities when giving franchises to utility companies. The PSC has acted repeatedly to curtail what it saw as discriminatory practices, only to be found exceeding its authority each time the courts have considered the issue. The PSC, in its desire to regulate the relationship between utilities and cities when the relationship is grounded in a municipal franchise, has even attempted to issue orders directly contrary to Supreme Court decisions on the subject. Its resourcefulness in dealing with the evil it sees is seemingly endless. It has devised extra-statutory ways of dealing with what it must see as unrepentant cities exploiting utility ratepayers.

While the PSC tries to find statutory power to regulate franchise rates, it waives other clear statutory duties that are designed to provide a way for the utility to be reimbursed for local exactions. It also waives, in an indeterminate number of cases, the duties it has in approving and regulating reasonable contract rates between cities and utilities. One cannot dismiss the impression that the PSC displays an attitude of paternalism and self satisfaction; that it thinks it knows what is best for all concerned, and that it will administer the laws with a sense of equity and fair dealing for all, regardless of pronouncements by the Supreme Court or the legislature to the contrary. There is a presumption that public officials have done their duty, and such presumption is not to be overcome except by evidence to the contrary. But the evidence seems overwhelming that the commission does its duty as it sees it, and not otherwise.

If the PSC's behavior in the area discussed in this article is a result of a genuine concern for ratepayers in other cities than the exacting city, then the PSC should go to the legislature to ask for appropriate and constitutionally permissible authority to intervene in the area they insist on regulating. Otherwise, the PSC should act within the provisions of the statutes giving it the power to act, and which prescribe the precise and only way in which the PSC can act.

84. *Id. But see* N.D. CENT. CODE § 49-04-07 (1960), which is the requirement that the PSC approve the filed municipal contracts with utilities.