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OF THE

STATE OF NEW JERSEY

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‡THOMAS L. HANSON

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EMMETT T. DREW

* Commissioner Joseph E. Conlon succeeded Commission President Harry Bacharach, whose term expired June 23, 1941.

† Commissioner Crawford Jamieson was sworn in May 22, 1942, to fill the unexpired term of Commission President Frank J. Reardon who died on April 13, 1942.

‡ Commissioner John E. Boswell, sworn in May 17, 1943, succeeded Commissioner Thomas L. Hanson, whose term expired on May 12, 1943.

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No. 2190

In the Matter of Proceeding Under R. S. 48:12–61 to 48:12–67, Relating to the Crossings of the Highways Known as Turtlebrook Road, Port Reading; Woodbridge Avenue, Port Reading; and the Tracks of the Central Railroad Company of New Jersey and the Port Reading Railroad Company, Operated by Reading Company; Woodbridge Avenue, Sewaren; and West Avenue, Sewaren; and the Tracks of the Central Railroad Company of New Jersey, in the Township of Woodbridge, Middlesex County, New Jersey.

Woodbridge Avenue, Sewaren

Leon E. McElroy, for Township of Woodbridge; *A. H. Elder* and *E. J. Harrington,* for the Central Railroad Company of New Jersey; *C. T. Wolfe,* for Reading Company; *A. J. Bittig,* for American Telephone and Telegraph Company and New Jersey Bell Telephone Company; *Edmund A. Hayes,* by *John T. Keefe* and *George R. Merrill,* for County of Middlesex; *C. S. Straw* and *J. H. Mulhern,* for Public Service Electric and Gas Company and Public Service Coordinated Transport.

An Order was issued by the Board on April 21, 1938, initiating proceedings and calling a hearing to determine whether an order should be entered directing the Central Railroad Company of New Jersey to vacate the present grade crossing of the highway known as Woodbridge Avenue, Sewaren, and the tracks of the Central Railroad Company of New Jersey, in the Township of Woodbridge, Middlesex County, New Jersey, by separating the grades of the railroad and the highway at the point of crossing.

Woodbridge Avenue, Sewaren, is a township highway crossing two main tracks and one side track of the Railroad Company at right angles and lying in an east and west direction, connecting with East Avenue about 275 feet to the east and West Avenue about 275 feet to the west of the crossing.

After notice to the interested parties the matter was heard and the Railroad Company presented a plan which proposed the elimination of this grade crossing by the diversion of Woodbridge Avenue to the north through an underpass with grades of 8 per cent and headroom beneath the railroad of 13 feet. This plan was estimated to cost about $119,000.

The proofs show (1) that the grade crossing is protected by gates and gateman for twenty-four hours a day (2) that two warning signs are located at the approaches to the crossing (3) highway traffic over the crossing is not unduly impeded (4) at a meeting held by Township of Woodbridge officials, attended

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by interested local residents, a majority voted to retain the present grade crossing as preferable to the proposed plan for elimination.

Considering all of the evidence, the Board is of the opinion that the Order to show cause of April 21st, 1938 should be and it is hereby dismissed.

Dated, October 20, 1938.

No. 2191

Formal Complaint August Bingler vs. Public Service Coordinated Transport In re Unauthorized Operation on Paterson-Butler and Paterson-Midvale Routes No. 86 and No. 88.

Edward G. Weiss, for August Bingler; *Charles S. Straw,* for Public Service Coordinated Transport.

Complainant, August Bingler, owner and operator of Paterson-North Haledon Bus route charges that Public Service Coordinated Transport conducted unauthorized operations on the Transport's Paterson-Butler route No. 86 and Paterson-Midvale route No. 88. The alleged violations are that:

1. Transport operated a "Short Service" daily on both routes beginning at Paterson Terminal and running to "Rock Cut" in the Borough of Haledon in both directions on a "Short Service" not specifically authorized by the Board,

2. Transport operates daily a "Short Service" on bus routes No. 86 and No. 88, beginning at the Paterson Terminal and running to what is known as "Cross Roads" in the Township of Wayne over a service not specifically authorized by the Board.

The substance of (1) and (2) is that the Transport operates the "Short Service" illegally between Paterson and Wayne and Paterson and Haledon on routes for which Transport holds certificates of approval for through services to Butler or Midvale and that the Transport's operation of the "Short Service" as indicated, is not specifically designated in the Board's approval and results in additional competition on a portion of the route for which Bingler also has the Board's authority to operate, thus creating unlawful additional competition.

3. Transport operates on Thursdays, Sundays and holidays from Paterson to Hope Dell, a Passaic County institution located on Oldam Road, Preakness, without the Board's authority.

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4. Transport operates more than three buses authorized by the Board between Paterson Terminal to Valley View Sanatorium on visiting days and that such operation is in competition with Bingler's Paterson-North Haledon Bus Line along West Broadway in Paterson.

It should be noted that the Board of Chosen Freeholders of Passaic County of which Hope Dell is a County Institution, objected to the suspension of service to Hope Dell on Thursdays, Sundays and legal holidays on the ground that cessation of service "will unduly cause a great deal of inconvenience and hardship for the many guests at Hope Dell who are advanced in years and who suffer physical handicaps."

Transport denies the violations and contends that as to (1) the "Short Service" to Rock Cut is over streets approved by the Board, and as to (2) that the "Short Service" to Cross Roads is likewise over streets approved by the Board; as to (3) that the service to Hope Dell on Thursdays, Sundays and holidays is not contrary to law but is a special service and is authorized by Chapter 144, Laws of 1926 as follows:

> "The holder of any consent for the operation of an auto bus may use such auto bus for special or occasional trips off its regular route whenever such auto bus is not required for the operation of the schedule on its regular route; provided, that no such special or occasional trips shall be in competition with any other auto bus route or street railway line."

It is contended, therefore, by respondent that the operations to Hope Dell on the days indicated are a lawful special service.

As to (4), the defense is that the operation to Valley View Sanatorium is with the Board's approval.

These issues involve questions of fact and law.

As to (1), there is no proof as alleged in the complaint that the respondent operates a "Short Service" daily between Paterson and Rock Cut "without proceeding along the route laid down by this Board." This "Short Service" is operated on an approved municipal consent. During the rush hours between 4:30 and 6:00 P. M. the bus turns back at Rock Cut and follows the regular route on the return trip to Paterson. The contention is that the bus should continue through to Butler or Midvale according to the schedule filed by the respondent. "Short Services" of this type are in the nature of "tripper" services and are permissible under the circumstances disclosed by the proofs.

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The same situation exists as to (2). Buses are turned back during the peak hours at "Cross Roads."

As to (3), the respondent operates one round trip between Paterson and Hope Dell on Thursdays, Sundays and holidays. The evidence shows that buses are operated over the regular approved route to a point on Hamburg Turnpike at Oldam Road, Wayne Township and at that point buses divert from the approved route to Hope Dell, a Passaic County Institution and return over the same route. The testimony discloses, however, that passengers are accepted and discharged indiscriminately along the approved route between Paterson Terminal and Oldam Road and in addition, passengers are accepted in this area for discharge at Hope Dell. It is contended that this operation is legal under R. S. 48:4–9.

We cannot agree with respondent's contention that the statute permits a bus operated on special or occasional trips to accept and discharge passengers on the regular approved route. Such auto bus may carry passengers only to or from the point located off the route.

As to (4), the proofs clearly refute the charge that more than three buses are operated on visiting days to Valley View Sanatorium.

Upon consideration of the proofs, the Board finds

1. That the proofs do not sustain the allegations of the complaint except as to the charge that the respondent accepts and discharges passengers on buses operated in special or occasional trips between Paterson Terminal and Hope Dell. The complaint, therefore, will be dismissed except that respondent will be directed to cease and desist from accepting and discharging passengers on buses operated on special and occasional trips between Paterson Terminal and Hope Dell.

Dated, December 8, 1938.

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No. 2192

In the Matter of Proceeding Under R. S. 48:12–61 to 48:12–67, Relating to the Crossing of the Highway Known as Tilton Road, Germania Station, and the Tracks of the Pennsylvania-Reading Seashore Lines, in the Township of Galloway, Atlantic County, New Jersey.

Thompson and Hanstein, by *Walter Hanstein,* for the Pennsylvania-Reading Seashore Lines; *Enoch A. Higbee, Jr.,* for Galloway Township; *J. B. Hardin,* for American Telephone and Telegraph Company and New Jersey Bell Telephone Company.

An Order was issued by the Board on November 30, 1938, initiating proceedings and calling a hearing to determine whether an order should be entered directing the Pennsylvania-Reading Seashore Lines to eliminate the present grade crossing of the highway known as Tilton Road, Germania Station, and the tracks of the Railroad Company in the Township of Galloway, County of Atlantic, State of New Jersey, by separating the grades of the railroad and the highway at the point of crossing.

At the hearing held after due notice to all interested parties the evidence disclosed that (1) Tilton Road, Germania Station, is a public highway within the Township of Galloway, County of Atlantic, State of New Jersey; (2) two tracks of the Pennsylvania-Reading Seashore Lines cross the highway at grade; (3) the crossing is dangerous to public safety and that public travel on the highway is impeded thereby.

During the hearing the Railroad Company presented a plan marked "Exhibit R. R. 1," providing for the elimination of the grade crossing by constructing an overpass on the line of the existing highway with a hard surface 44 feet wide, all earth slopes to be seeded, and approach grades of 5 per cent on each side of the railroad, connected by a vertical curve 635 feet long. This is the usual type of overpass construction throughout the country. Two tracks of the railroad are spanned and a clear opening of 25 feet is provided on each side of the railroad span for future passage if necessary along a highway referred to as Atlantic Avenue, which is not now open but is indicated on a map of the Gloucester Township and Farm Association prepared in 1866. The Railroad Company estimated the construction cost of the proposed plan at $131,000.

Two highways parallel the railroad on each side and about 600 feet away from it, viz., White Horse Pike and Aloe Road. The

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approach to the proposed bridge will meet the present grade of Tilton Road some 300 feet from White Horse Pike, thus not changing the existing road conditions in the vicinity of the intersection of Tilton Road and White Horse Pike. The same is true at the intersection of Tilton Road and Aloe Avenue. Leipzig Avenue is an existing highway to the north of White Horse Pike and the evidence shows that it is now under construction by W.P.A. labor to the south of Aloe Avenue to the extent of clearing the land. At present, however, it does not cross the tracks of the railroad and cannot cross without the Board's permission. Permission has not been requested nor will an application, under present and prospective conditions, particularly because of the proposed overpass in the immediate vicinity, be justified. Leipzig Avenue does not physically exist on either side of the railroad between White Horse Pike and Aloe Avenue.

Some objection was offered to the plan on the ground that an overhead crossing would create a dead-end of Leipzig Avenue. It was clearly shown that those who might use Leipzig Avenue would follow the same route in going from north of White Horse Pike to south of Aloe Road after the new bridge is constructed as they do now. Objection was also interposed to the width of 25 feet allowed on each side of the railroad by the plan for Atlantic Avenue if and when required. It was stated variously in the testimony that this street was intended to be anywhere from 50 to 70 feet wide on each side of the tracks. No evidence was produced, however, to indicate a dedication of Atlantic Avenue, Leipzig Avenue, or any other streets in the vicinity of Tilton Road between White Horse Pike and Aloe Road.

There is no basis in the record for even a prophecy, prediction or prospect sufficient to justify a conclusion that traffic now demands or in the future will demand the extension of Atlantic Avenue to and underneath the overpass—certainly not to a width of more than 25 feet.

Other objections were presented by property owners who protested to an overhead crossing because of claimed large damage to their respective properties. Other persons who owned no property in the immediate vicinity and who lived at a considerable distance from the proposed crossing also objected.

It appears from the testimony and from an inspection of the terrain that the property in the proximity of the crossing is acreage, long unused for any purpose, overgrown with brush and

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small trees (except where the ground has been cleared along the railroad for the maintenance of fire lines) and there are no buildings approximately close to the project.

The objections just noted are not persuasive. Protection of life and limb outweighs any possible damage to the property indicated by the record.

Upon consideration of all of the evidence, the Board, therefore, is of the opinion that the plan presented by the railroad should be adopted.

The Board finds that the said Tilton Road, Germania Station, is a public highway, crossing at grade in the Township of Galloway, County of Atlantic, and State of New Jersey, a railroad operated by the Pennsylvania-Reading Seashore Lines; that the crossing is dangerous to public safety and that public travel is impeded thereby.

All of the above features are shown on a plan marked "Exhibit R. R. 1," entitled:

"A. C. 185
Pennsylvania-Reading Seashore Lines
East of Germania, N. J.
Elimination of Grade Crossing
Tilton Road
Galloway Township Atlantic County
Engineering Dept.
Camden, N. J., Nov. 9, 1938. Scale 1" = 50'"

which the Board finds to be a proper plan for the elimination of these grade crossings and hereby approves it.

The Board will set the first day of May, 1939, as the date for beginning the work, and eight months thereafter, or December 31, 1939, as the date for its completion.

This proceeding was brought under an Act of the Legislature entitled:

> "An Act to amend an act entitled 'A supplement to an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven,' approved March twelfth, one thousand nine hundred and thirteen,"

which was approved April 14, 1930, in which it is provided that the State pays fifty per centum of the expense "of such altera-

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tions, changes, relocation or opening, including damages to adjacent property and the cost of removing, relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways," and further:

> "Where the order of said Board shall require changes in, or the removal of the property or constructions of any street railway, telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, co-partnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said Board."

An Order in accordance herewith will issue.

Dated, December 22, 1938.

ORDER

An Order was issued by the Board on November 30, 1938, initiating proceedings and calling a hearing by virtue of the powers conferred on it by an Act of the Legislature of this State entitled:

> "An Act to amend an Act entitled 'A supplement to an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven,' approved March twelfth, one thousand nine hundred and thirteen,"

approved April 14, 1930, which constitutes Chapter 101 of the Laws of 1930, (R. S. 48:12–61 to 64, inclusive, and 67) to determine whether the highway known as Tilton Road, Germania Station, Township of Galloway, County of Atlantic, State of New Jersey, which crosses at the same level the railroad operated by the Pennsylvania-Reading Seashore Lines, is dangerous to public safety or that public travel on such highway is impeded thereby and what, if any, order shall be made by said Board for the elimination of said crossing by substituting for such crossing, a crossing not at the grade of such public highway, either by carrying such public highway under or over such railroad or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in place of the one ordered vacated and to determine any and all other matters which may be involved and the determination of

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which may be within the power of said Board in the separation of the grade of said highway and of said railroad.

The Board having fixed a time and place for a hearing before it, and having given notice thereof to said township, county, Pennsylvania-Reading Seashore Lines, and all corporations, co-partnerships and individuals interested therein, all in accordance with the provisions of said Act, and all of the parties in interest who appeared having been heard, the Board of Public Utility Commissioners filed a Decision on Thursday, December 22, 1938, of its findings and determinations, which said Decision is made a part of this Order by reference thereto herein, and it

Now appearing to said Board that Tilton Road, Germania Station, is a public highway and that the said public highway and the railroad operated by Pennsylvania-Reading Seashore Lines in said Township of Galloway, County of Atlantic, cross each other at the same level and that such crossing is dangerous to public safety and that public travel on such highway is impeded thereby and that the said crossing should be altered according to a plan approved by the Board, said plan having been prepared and approved, now, therefore, it is on the twenty-second day of December, 1938.

ORDERED and the said Board of Public Utility Commissioners, by virtue of the power and authority vested in it by the aforesaid Act, does

HEREBY ORDER Pennsylvania-Reading Seashore Lines to alter said crossing according to the plan therefor annexed and made part hereof, which plan is entitled,

"A. C. 185
PENNSYLVANIA-READING SEASHORE LINES
EAST OF GERMANIA, N. J.
ELIMINATION OF GRADE CROSSING
TILTON ROAD
GALLOWAY TOWNSHIP ATLANTIC COUNTY
Engineering Dept.
Camden, N. J., Nov. 9, 1938. Scale 1" = 50'"

by substituting a crossing not at grade of the public highway known as Tilton Road, Germania Station, by changing the lines, width and direction thereof and carrying so much of such highway as so changed over the said railroad according to and as

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shown on said plan for said purpose, and by vacating the remaining parts of said highway within the lines of the right-of-way of said Railroad Company by reconstructing said railroad and highway and by performing all such work required according to and as shown on the said plan.

Any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, co-partnership or individual, whose property or constructions it may be necessary to change or remove to carry said plan and this Order into effect, shall change or remove the same according to said plan.

AND IT IS FURTHER ORDERED that said Pennsylvania-Reading Seashore Lines, Township of Galloway, Board of Chosen Freeholders of the County of Atlantic, New Jersey Bell Telephone Company, American Telephone and Telegraph Company, Postal Telegraph Company, Atlantic City Electric Company, Western Union Telegraph Company, and all other parties to this proceeding, and each and every one of them, proceed with due diligence, to the execution of this Order and comply with all of the requirements thereof and the duties imposed upon them thereby and by the said Act under which this Order is made and the Laws of this State, and to that end, they and each of them, exercise in good faith all of the powers conferred upon them and each or any one of them, by the Laws of this State,

AND IT IS FURTHER ORDERED that the said Pennsylvania-Reading Seashore Lines begin the actual work of construction required in the performance and execution of this Order, on or before the first day of May, 1939, and continuously carry on same thereafter and perform and fully comply with the directions and requirements of this Order and complete all of the work thereunder required to be done within eight months thereafter, or by the thirty-first day of December, 1939.

This Order shall become effective immediately.

Dated, December 22, 1938.

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No. 2193

In the Matter of the Complaint of W. Howard Demarest on Behalf of Residents of Blairstown vs. Delaware, Lackawanna and Western Railroad Company In re Service Rendered Between Blairstown and Newark or Hoboken, New Jersey.

W. Howard Demarest, for complainants; *W. J. Larabee,* for respondent.

BY THE BOARD:

Petitioner (who is a resident) and commuters and others residing in and around Blairstown during the summer with business in Newark and New York, complain that the train service both east and west between Blairstown and New York is (1) inadequate and inconvenient and (2) that the passenger cars on the trains which petitioners are obliged to use are unclean and unsanitary.

There was some criticism because of the occasional delay in the arrival of the westbound train at Blairstown, but that complaint was in effect waived at the hearing. It was presented to complete the picture.

First as to (1):

The complaint is directed solely to the so-called winter schedule. During daylight saving time the service seems to be satisfactory. From October 1, to May 1, the only available morning train, eastbound, is scheduled to leave Blairstown at 6:03 A. M., arriving at Newark at 7:30 and New York at 8:12 A. M., much too early according to the commuters' testimony for normal business operation.

The next train is 12:33 P. M., much too late, of course, for business commuters. The suggestion was to change train No. 8 to leave Blairstown at 7:00 A. M., during the winter months an hour later than the present schedule, and similar to the summer schedule. Train No. 8 leaves Buffalo at 10:30 P. M., and carries a connection from the Nickle Plate from Cleveland and Chicago to New York. This train usually consists of a smoker, one or two day coaches, one of which is transferred from the Nickle Plate Line, Pullman cars, a combination club pullman, and dining car, aggregating about twelve or fourteen cars. If train No. 8 was advanced one hour the connecting service from Chicago and

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Cleveland to New York would be disrupted. It would not be reasonable to disrupt a through passenger train schedule of long standing with many closely timed connections to meet the convenience, however desirable, of a few winter commuters between Blairstown, Newark, and New York.

It was further urged that if because of practical operating difficulties, train No. 8 could not be scheduled an hour later at Blairstown, that then the company should be ordered to operate an additional train from Stroudsburg to Dover stopping at Blairstown and points en route at about 7:00 A. M., and connecting at Dover with electric trains between Dover and New York. [It is estimated that the cost of the operation of such a train would approximate $1,823.12, a month of twenty-six operating days without any assurance of the fair return. This figure includes nothing for depreciation, interest on investment, station expense, etc. The right to order a railroad to provide adequate service would be abused if such adequate service was not fairly compensatory.]

[Since there are at present only one or two winter commuters, although a few more are assured if convenient train service is established, it is clear that the returns from two or three commuters would not even remotely pay the expense of the operation.]

It was then suggested that the cheapest alternative would be the operation of an engine and two coaches or a combination coach and regular coach out of Port Morris in the morning to Hopatcong and there change on the regular service from Hopatcong to Dover and then change at Dover for Newark and New York. The out-of-pocket cost of this service for twenty-six operating days is estimated at $965.12 per month. Based upon the local rate of fare of 2.5c a mile for coaches, a passenger who used the train from Blairstown to Hopatcong en route to Newark would pay 48c and, therefore, 77 passengers would have to be carried daily in order to produce revenue sufficient to cover such out-of-pocket costs. According to the testimony, not more than 20 passengers at the outside would use this service. Such a plan, of course, would not provide convenient service and there is no assurance from the testimony that any commuter would use such a service. Upon these facts so far as train No. 8 is concerned, it must be conceded that the schedule cannot be changed as requested nor can the Board justifiably order alternative service for the reasons stated.

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Petitioners also request that train No. 25, westbound, leaving New York at 3:40 P. M., and Newark at 4:15 P. M., be changed to leave New York and Newark, approximately one hour later than the present winter schedule. Train No. 25 is satisfactory to petitioners in the summer time. These commuters, however, with one or two exceptions, do not commute during the winter months. Some, however, intimated that if No. 8, eastbound and No. 25 westbound were changed as requested, that they might commute until about December 1—but that is only a possibility—and railroads cannot operate on remote possibilities of increased travel.

It is claimed and with some reason, that commuters are obliged to leave their business before four o'clock to use train No. 25 which arrives in Blairstown at 5:44 P. M. It is suggested that this train be scheduled one hour later which would then provide reasonable commuters' service or in the alternative, to stop train No. 5 at Blairstown.

There is no general demand for increased service over the territory traversed by the railroad nor is there a reasonable probability that the carrier might hope to create sufficient new passenger traffic from the Blairstown vicinity to justify a direction to the railroad to substantially change or supplement its present schedules and service.

As to the alternative suggested, stopping train No. 5 at Blairstown, this train leaves New York at 4:37 P. M., Newark at 4:55 P. M., and passes Blairstown at about 6:30. This train is the Chicago Limited and is not engaged in local traffic. Such traffic is provided for by train No. 25. The reason testified to by the railroad officials for refusing to stop train No. 5 at Blairstown, which station is also used by Johnsonburg and Greendell residents is that from railroad operation, it is impractical to stop the train at Blairstown because its present running time is now as fast as is consistent with safety and the necessity for arriving in Buffalo in ample time to permit the interchange of through cars with the Michigan-Central, which interchange requires about one hour. This seems to be the only reason for declining to stop No. 5 at Blairstown except the cost of making the stop. That cost does not appear in the testimony although operating officials of the railroad were present and testified at the hearing. Unless some more important reason exists, than appears in the case, it seems to the Board that the railroad should in its own interest, stop train No. 5 for an experimental period of thirty days to de-

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termine whether such stopping of the train will attract any additional patronage. Although it is doubtful if any passengers will be gained by a more convenient late afternoon service, the real objection, human nature being what it is, is to the eastbound before sunrise schedule at Blairstown.

Now as to (2)

The substance of the complaint of uncleanliness and unsanitary conditions includes strong odors, general stench, banana peels, orange peels and remnants of food on the floor. Another witness describes the condition as refuse in the cars.

While there was some testimony by a railroad official that on a recent inspection such conditions were not observed, the preponderance of proof is to the contrary. These day coaches in which this condition exists carry passengers from Chicago in an all night trip, many eating their breakfasts in the cars and occupying more than one seat with their baggage and bundles making it extremely difficult for passengers boarding the train at Blairstown and other points to find a seat without requesting removal of baggage and bundles, which experience indicates is not easily accomplished.

This condition, according to the testimony, has been eliminated to some extent but it is susceptible of further improvement by exercise of proper attention on the part of the conductor and brakemen on the train. To that extent at least, service will be more attractive.

For the reasons stated, the petition must be, and therefore is denied, except that the railroad company is hereby directed to correct forthwith the cause of the complaints as to the unsanitary and unclean condition of the passenger cars referred to herein.

Dated, March 9, 1939.

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No. 2194

In the Matter of the Application of the City of Long Branch for an Order Determining That the Income from the Proposed Sewerage System of the City Is Sufficient to Make the Said Utility Self-Liquidating.

Henry E. Russell and *Leo J. Warwick*, for the City of Long Branch; *M. A. Potter*, for Long Branch Sewer Company; *Basil B. Bruno*, for objectors.

BY THE COMMISSION:

The City of Long Branch by petition dated March 2, 1939, submits that it desires to purchase the plant and facilities owned by the Long Branch Sewer Company and to install the necessary improvements and extensions to connect the present municipal systems with the company system to permit unified operation. The petition requests that this Board make an Order determining that the income of the proposed sewerage system is sufficient to make said utility self-liquidating, pursuant to R. S. 40:1–78 and 40:1–79.

Considerable testimony was introduced on behalf of both the petitioner and certain objectors. The record is replete with contradictory evidence relating to the issues which the Board is charged with determining by the Statutes.

Paragraph 17 of the petition states:

> "Said City has received all permits and orders of the State Department of Health of New Jersey necessary for carrying out the project."

The record shows that the plans and specifications which form the basis for the Engineer's Project Report have not been approved by the State Board of Health as required by R. S. 58:12-2 and 58:12-3.

If the State Board of Health should deny approval, a certificate of self-liquidation theretofore issued by this Board would be of no avail to the municipality.

If the State Board of Health should grant approval conditionally and the conditions imposed should require expenditures beyond those contemplated by the plans and included in the estimates now submitted, hearing anew by this Board would be necessary to determine whether the altered plan would be self-liquidating.

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In view of the failure to obtain the approval of the State Board of Health, this Board does not deem it necessary to make any determination on the merits at this time and, therefore, dismisses the application without prejudice.

To avoid delay and possibly futile expenditure of public funds in hearings, this Board now gives notice that hereafter applications pursuant to R. S. 40:1-78 and 40:1-79 will not be set down for hearing and will be returned to the petitioner unless there is attached to the petition proper evidences that the petitioner has first obtained from Federal, State or municipal bodies all the necessary approvals, certificates or endorsements which, together with the approval of this Board, would permit the petitioner to go forward with the proposed project in accordance with law.

Dated, May 4, 1939.

No. 2195

In the Matter of the Application of the Pennsylvania-Reading Seashore Lines for Approval of the Abandonment of Passenger Train Service Between Newfield and Atlantic City, New Jersey.

Smathers, Scott and Munyan, by *Thomas H. Munyan,* for the Petitioner; *Enoch A. Higbee, Jr.,* for Hamilton Township; *Louis D. Champion,* for Pleasantville; *Charles S. Straw,* for Public Service Co-ordinated Transport; *Philip L. Lipman,* for Mizpah Toy and Novelty Company, Borough of Newfield, Township Committee of Franklin Township, Township of Buena Vista, Mizpah Civic Club.

BY THE COMMISSION:

The Pennsylvania-Reading Seashore Lines applies for permission for "the abandonment of passenger service between Newfield and Atlantic City, New Jersey" for the reason that the "passenger train business handled between Newfield and Atlantic City, New Jersey, over the said Newfield Branch, has declined to such a point that it does not justify the continued operation of the gasoline rail motor car" and "that public needs no longer require the continuation of such passenger train service."

The Newfield Branch extends for a distance of thirty-four miles and serves Newfield, Forest Grove, Minotola, Buena, Richland, Mizpah, Mays Landing, McKee City, Reega, Cardiff, Mount Calvary, Pleasantville, and Atlantic City. Passenger service is

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operated daily except Sunday, on a two round trip basis between Atlantic City and Newfield and three round trips between Atlantic City and Mays Landing. The equipment consists of one gasoline electric motor car. United States mail and express packages are carried on some of the trips.

On November 25, 1936, the Board denied an application, based upon similar reasons urged in this proceeding, to substitute motor bus service for passenger train service between Newfield and Atlantic City. It then appeared to the Board that the loss alleged was not "so great that it would justify the Board in reaching the conclusion that the residents should be deprived of the convenience of railroad transportation." This application was likewise opposed. Several protestants appeared at the hearing, including representatives of some of the municipalities served by the railroad. In addition, numerous letters and two petitions were received in opposition to the proposed abandonment. The objections to the complete cessation of service were that such cessation would deprive the residents of the communities along the thirty-four mile line of all passenger service.

In support of its petition, the applicant stressed the great lack of patronage which in turn is reflected by sustantial financial loss in the operation of the branch line. It was further asserted that this lack of patronage indicated that public necessity and convenience does not require further operation of the trains.

The proofs in support of the contentions of the applicant and the objectors have been carefully considered. While the Board is not unmindful of the financial plight of railroads and realizes economies must be effected to offset declining revenues, the fact remains that the applicant, under its franchises, is obligated to serve the public.

In this connection it was vigorously contended by the municipalities that the train schedule was not convenient to the public and that if the trains were operated at more appropriate times and better equipment was provided the service would be more likely to appeal to the public.

It must be pointed out that the applicant must continue the maintenance of the roadbed and the tracks so as to provide for the operation of the freight service on the line.

The Board has read and considered the cases to which its attention was directed by counsel for the applicant, Vol. XI, p. 117; Vol. XIII, pp. 251, 389, 392; and Vol. XV, pp. 87, 755, 757. It

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is fundamental that no general rule can be applied to any specific case. Every case must be decided upon the facts produced in the particular proceeding. From an examination of the decisions upon which applicant depends, in support of this application, it clearly appears that the cases are not analogous and therefore not applicable to the pending application.

Upon consideration of the evidence in this case the Board concludes that the proofs do not justify the entire abandonment of all train service as requested, but the Board further finds that public necessity and convenience does not require the operation of trains Nos. 959, 960, 976 and 977.

The Board therefore denies the application except as to trains Nos. 959, 960, 976 and 977. This decision to become effective on May 20, 1939, and the applicant is directed to post appropriate notice of the discontinuance thereof in the trains, at the stations and at the terminals at Camden and Philadelphia ten days in advance of the effective date.

Dated, May 4, 1939.

No. 2196

In the Matter of the Formal Complaint of Public Service Coordinated Transport vs. Downtown Bus Company, Inc. In re Unauthorized Operation on the Journal Square-Holland Tunnel Route in Jersey City.

Charles Stuart Straw, for Public Service Co-ordinated Transport; *Morris E. Barison,* for Downtown Bus Company, Inc.

BY THE COMMISSION:

Complainant submits to the Board two (2) traffic checks taken on the west side of the intersection of Palisade Avenue with Hoboken Avenue in Jersey City on Monday, August 1, 1938 and Friday, September 16, 1938. These checks show that respondent is discharging passengers on trips from Journal Square at the point of check and is accepting passengers at the point of check on trips in-bound toward Journal Square. Complaint alleges that this is unauthorized in that it is in violation of the following restriction now in effect on respondent's line:

> "The operators of the bus shall not accept passengers who begin and end their trips between Journal Square and the intersection of Palisade and Hoboken Avenues in the City of Jersey City."

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Respondent contends that the operation of its service was designed to permit passengers whose origin or destination was within the restricted area to board or leave the buses on the east side of the intersection of Palisade Avenue and Hoboken Avenue; that subsequently, however, more particularly in view of police regulations inaugurated as a safety measure, the buses were no longer permitted to stop at this point and were directed, if they stopped at this intersection, to make their stop on the west side of the intersection. Complainant contends that the west side of the intersection is within the restricted area.

The fundamental object of restrictions imposed upon the operation of a transportation utility is the protection against undue and prejudicial competition to be afforded another operating utility.

Each case must be determined upon its own distinctive merits. The circumstances of location, convenience to the traveling public, safety in boarding or alighting from a bus and possibly other factors all make for the construction to be attributed to the imposition of a restriction.

The restriction in this case and under the circumstances of this location is hereby defined to mean that: Passengers who board the bus at Journal Square or any point between Journal Square and the intersection of Palisade Avenue and Hoboken Avenue may not be discharged until they arrive at said intersection and conversely, in the west-bound direction, no passengers may be permitted to board the bus after it leaves said intersection.

This intersection by reason of its conditions would cause inconvenience, even danger, to passengers required to alight on the east side of Palisade Avenue. The Board therefore hereby authorizes a stop to be made at the west side of Palisade Avenue and Hoboken Avenue in either direction and considers such stop as in compliance with the restriction heretofore recited. In accordance with this determination the complaint is hereby dismissed.

Dated, May 18, 1939.

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No. 2197

Erie Railroad Company Petition for Determination of Public Service Coordinated Transport's Proportion of Cost of Eliminating Grade Crossings in Section "A" in the Matter of Application of City of Paterson for Elimination of Grade Crossings on Line of Erie Railroad.

G. R. James, George S. Hobart and *John J. Gaffey,* for Erie Railroad Company; *Charles S. Straw* and *George H. Blake* for Public Service Coordinated Transport.

BY THE COMMISSION:

This matter comes before the Board on the petition of the Erie Railroad for the determination of the Public Service Coordinated Transport's proportion of the cost of eliminating the grade crossings at Market Street—Park Avenue and Broadway in Paterson, New Jersey. These grade crossings have been eliminated for years. The allocation of costs between the railroad and the Transport Company has not been fully determined. Questions of law involved are similar to those considered in a proceeding filed on October 14, 1929, by Public Service Coordinated Transport to determine the proportion of cost in connection with the elimination of the River Street grade crossing in Paterson, in which proceeding the Board determined the cost chargeable to River Street and ordered the Transport to pay 10 per cent as provided by law.

The Board, in the proceeding relating to the River Street crossing, fixed the amount of the expenses of the alterations, changes, relocation and opening directly chargeable to the crossing used by the said street railway operated by Public Service Coordinated Transport and ordered the Railway Company to pay ten per cent, of such cost.

The decision of the Board provided:

> "And the said Erie Railroad Company and said Public Service Railway Company are ordered to keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by said street railway of said Public Service Railway Company, and leave is hereby given to said companies, or either of them, to make application to the Board for further order in the event that they cannot agree upon the amount of such expenses so directly chargeable to said crossings used by the street railway operated by said Public Service Railway, or any of them."

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The Companies being unable to agree, the Board decided the matter.

The present proceeding differs from the River Street case only in factual aspects except that now, for the first time, Public Service presents claims against the Erie Railroad for work done to accomplish changes in its own property required by the Board's order.

Since no satisfactory reason appears justifying a change in the formula adopted in the River Street proceeding, that formula will be followed in this case.

The Erie Railroad claims that the expense chargeable to the Market Street—Park Avenue crossing amounts to $576,568.10 of which ten per cent or $57,656.81 as the Erie contends, is chargeable under the law to Public Service Co-ordinated Transport. The Public Service Company contends that the cost of the work chargeable to it was $270,218.03 and upon that basis it should be required to pay only the sum of $27,021.80.

The detailed statement of the items aggregating $576,568.10 submitted in evidence has been carefully considered by the Board.

After consideration the Board has concluded that only the following items are properly chargeable to Public Service Co-ordinated Transport:

EXPENSES CHARGEABLE TO ELIMINATION OF GRADE CROSSING AT MARKET STREET AND PARK AVENUE, PATERSON, N. J., BASED ON ORDER OF THE BOARD OF PUBLIC UTILITY COMMISSIONERS DATED APRIL 20, 1915.

Description	*Determined by Board of P. U. C.*
Grading—embankment, etc.	$45,927.16
Retaining wall—east of Ellison St. (Express Bldg.)—south side	8,612.37
Retaining wall—east of Essex St.—south side	1,328.22
Retaining wall—west of Essex St.—north side	6,978.42
Retaining wall—west of Park Avenue—north side	1,065.10
Market St.—Park Ave. bridge (to West St. line)	36,802.31
Station viaduct	97,739.62
Ballast	7,337.10
Track laying and surfacing	11,016.65
Guard rail on bridges (material and labor)	1,188.13
Street changes—Market St. and Park Ave.	8,519.04
Express Co. Bldg. (including canopy and driveway)	36,951.21
Station platforms	13,509.76
Station stairways	8,461.76
Electric lighting and station signs	1,848.25
Telegraph and telephone	1,131.64

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Description	*Determined by Board of P. U. C.*
Signals and interlockers	1,588.90
Operating expenses	45,196.73
	$335,202.37
Engineering	33,280.77
	$368,483.14
Team yard at Getty Ave.	4,685.76
Ramp—east of Straight St. and Clay St. (part value)	14,623.39
	$387,792.29
Credit salvage	2,416.09
	$385,376.20
P. S. Railway (PSCT) Share 10 per cent	$38,537.62

EXPENSES CHARGEABLE TO ELIMINATION OF GRADE CROSSINGS AT BROADWAY, PATERSON, N. J., BASED ON ORDER OF THE BOARD OF PUBLIC UTILITY COMMISSIONERS DATED APRIL 20, 1915.

Description	*Determined by Board of P. U. C.*
Land	$5,314.59
Grading, embankment, etc.	2,658.52
Retaining wall—east of Broadway—south side	9,032.40
Concrete crib—east of Broadway—north side	285.55
Retaining wall—west of Broadway—south side	6,845.60
Broadway bridge	22,628.26
Ballast	754.97
Track laying and surfacing	467.74
Guard rail on Broadway bridge (material and labor)	319.82
Street changes at Broadway	6,952.37
Telegraph and telephone lines	387.59
Signals and interlockers	293.83
Operating expenses	4,606.29
	$60,547.53
Engineering	5,733.18
Team yard at Getty Ave.	4,685.76
Ramp—east of Straight and Clay Sts. (part value)	14,623.39
	$85,589.86
Credit salvage	361.90
	$85,227.96
Public Service Co. (PSCT) Share 10 per cent	$8,522.80

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These adjustments result in the determination that the cost directly chargeable to the elimination of the grade crossing at Market Street and Park Avenue in Paterson, based on the Board's order dated April 20, 1915, is the sum of $385,376.20 and the amount chargeable to elimination of grade crossing at Broadway is $85,227.96 or an aggregate of $470,604.16. Ten per cent of this sum or $47,062.42 is to be paid by Public Service Coordinated Transport to the Erie Railroad Company.

There is no provision under the statute applicable in this case for assessing any of the costs incurred by the street railway company against the railroad and for that reason the claim of the railway company must be denied.

Dated, June 29, 1939.

REHEARING

BY THE COMMISSION:

This is an application for rehearing of the Board's determination of the proportionment of the cost of eliminating grade crossings in Section A of the Paterson grade crossing elimination proceeding chargeable to and to be paid by Public Service Coordinated Transport to the Erie Railroad Company in the sum of $47,062.42.

The application is based upon the contention that:

> "There is no provision under the statute applicable in this case for assessing any of the costs incurred by the street railway company against the railroad and for that reason the claim of the railway company must be denied."

The claim is that the Board's finding is not justified by the statute. This same contention was argued in respondent's brief and, after careful consideration, overruled.

The re-argument did not change the Board's views. Therefore, the application to modify is denied.

Dated, March 27, 1941.

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ORDER

Application having been made to this Board by Erie Railroad Company on November 25, 1936, for an order determining the true amount of the expense directly chargeable to Public Service Coordinated Transport on account of the elimination of grade crossings, to wit, Park Avenue-Market Street, and Broadway, both located in the City of Paterson, County of Passaic and State of New Jersey, pursuant to leave to make such application contained in an order issued by this Board, dated April 20, 1915, which provides in part as follows:

> "And it appearing to the Board that the street railway operated by Public Service Railway Company uses the said crossings at (1) Park Avenue and Market Street, (2) Broadway, and (3) River Street, the Board in accordance with the power and authority vested in it by said act further ORDERS the Public Service Railway Company to pay ten per centum of the expenses of the alterations, changes, relocation and opening, required by this order, including damages to adjacent property, directly chargeable to the crossings, and each of them, so used by the said street railway operated by it.
>
> "And the said Erie Railroad Company and said Public Service Railway Company are ordered to keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by said street railway of said Public Service Railway Company, and leave is hereby given to said companies, or either of them, to make application to the Board for further order in the event that they cannot agree upon the amount of such expenses so directly chargeable to said crossings used by the street railway operated by said Public Service Railway, or any of them."

And it appearing that subsequent to the date of the aforesaid application to this Board by the Erie Railroad Company, to wit, on April 18, 1938, said Erie Railroad Company filed a petition in the Federal Bankruptcy Court for reorganization under Section 77 of the Federal Bankruptcy Act and as a consequence thereof Robert E. Woodruff and John A. Hadden are presently the duly appointed and acting trustees of the property of the Erie Railroad Company.

And this Board having on due notice to all interested parties held hearings on the application of the petitioner in this case, and heard the evidence of the petitioner and the Public Service Coordinated Transport, and considered the briefs filed respectively by them with this Board, and thereafter, to wit, on the 29th day of June, 1939, this Board did file a decision containing its findings

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and determinations, which decision is made a part of this Order by reference thereto herein;

And it appearing that application was made to this Board on July 26, 1939, by Public Service Coordinated Transport for reargument of this Board's decision, to the end that said Board modify its determinations;

And this Board having considered the grounds urged by said Public Service Coordinated Transport on reargument and having filed its decision thereon, dated March 27, 1941, which said decision is made a part of this Order by reference thereto herein, denying the petition of Public Service Coordinated Transport to modify the determinations of this Board, as contained in its decision of June 29, 1939, the said Board

HEREBY FINDS AND DETERMINES that the amount of Three Hundred Eighty-five Thousand, Three Hundred Seventy-six Dollars and Twenty Cents ($385,376.20) as the expense directly chargeable to the grade crossing elimination at Market Street-Park Avenue in the City of Paterson, New Jersey; that the amount of Eighty-five Thousand, Two Hundred Twenty-seven Dollars and Ninety-six Cents ($85,227.96) be fixed as the expense directly chargeable to the elimination of grade crossing at Broadway, in the City of Paterson, New Jersey; or an aggregate expense for the elimination of the within mentioned grade crossings of Four Hundred Seventy Thousand, Six Hundred Four Dollars and Sixteen Cents ($470,604.16) in which the Public Service Coordinated Transport shall participate in the amount of ten (10) per cent thereof, or Forty-seven Thousand Sixty Dollars and Forty-two Cents ($47,060.42).

Dated, June 5, 1941.

AMENDED ORDER

A stipulation in the above entitled matter having been entered into by the parties thereto, copy of which is attached, the Board hereby amends its Order of June 5, 1941, and ORDERS that Public Service Coordinated Transport pay the Erie Railroad Company Thirty-five Thousand and Twenty-seven Dollars and Eight Cents ($35,027.08) as its share of the expenses directly chargeable to the grade crossing elimination at Market Street, Park Avenue, and Broadway in the City of Paterson.

Dated, July 20, 1944.

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STIPULATION

Erie Railroad Company and Public Service Coordinated Transport, successor to Public Service Railway Company, through their counsel, stipulate as follows:

1. By decision of June 29, 1939, in the above entitled matter the Board of Public Utility Commissioners found the Erie expense chargeable to the elimination of the grade crossings at Market Street, Park Avenue, and Broadway to be $470,604.16.

2. The Board denied the claim of the railway company that its costs should be added to the costs of the Erie Railroad in computing the total cost of the project.

3. The Order of the Board of Public Utility Commissioners was removed by certiorari to the New Jersey Supreme Court, which Court on the 16th of August, 1943, reversed the Order of the Board, and ordered that the expense of Public Service Coordinated Transport be added to the cost of the project. Upon appeal, the Court of Errors and Appeals sustained the Supreme Court.

4. The parties hereto have agreed upon the amount of the Erie expense and the Public Service expense at the Market Street, Park Avenue, and Broadway crossings as set forth below:

SETTLEMENT STATEMENT

(1)	Erie expense (P. U. Order, June 5, 1941)		$470,604.16
(2)	P. S. expense:		
	(a) P. S. Ex. No. 3 (Market St.—Park Ave.)	$3,803.44	
	(b) P. S. Ex. No. 4 (Broadway)	10,547.05	
			14,350.49
(3)	Total		$484,954.65
(4)	P. S. 10 per cent		48,495.47
(5)	Less P. S. expense		14,350.49
(6)	Balance		$34,144.98
(7)	Erie expense for P. S. crossing frogs		1,227.62
(8)	Total		$35,372.60
(9)	Less taxed costs:		
	(a) N. J. S. C.	$323.05	
	(b) Ct. of E. & A.	22.47	
			345.52
(10)	Net balance due from P. S. to Erie		$35,027.08

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The parties hereby stipulate that the net sum due the Erie Railroad Company from Public Service Coordinated Transport is $35,027.08..

ERIE RAILROAD COMPANY,

By HOBART, MINARD & COOPER, *Attorneys.*
By DUANE E. MINARD.

PUBLIC SERVICE COORDINATED TRANSPORT

By GEORGE H. BLAKE,
Executive Vice-President.

Dated, July 14, 1944.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

No. 223. October Term, 1942.

NEW JERSEY SUPREME COURT.

Public Service Coordinated Transport,
Prosecutor,
vs.
Board of Public Utility Commissioners, et al.,
Defendants.

Argued October 7, 1942; Decided

On writ of certiorari.

Before *Justices Case, Donges* and *Colie.*

For the prosecutor: *William H. Speer, Esq.*

For the defendants: *Hobart, Minard & Coiper, Esqs., Duane E. Minard. Esq.,* and *John J. Gaffey, Esq.*

PER CURIAM:

This writ of certiorari brings up for review an Order of the Board of Public Utility Commissioners. It is agreed between the parties hereto, Public Service Coordinated Transport, prosecutor, and Erie Railroad Company, defendant, that

> "The only question in controversy is whether the decisions dated June 29, 1939 and March 27, 1941, respectively, of the Board of Public Utility Commissioners are valid under chapter 57 of the laws of New Jersey,

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approved March 13, 1913; that is to say, did the Board err in and by said order of June 5, 1941, in refusing to add to Erie's cost of the project, expenses incurred by Public Service in altering its property and structures in compliance with the order of April 20, 1915; for the purpose of ascertaining the total cost to which Public Service's 10 per cent was to be applied, and deducting from the amount of the 10 per cent so ascertained the amount of Public Service's expenses, in determining the amount of money payable by Public Service under the statute and said order of April 20, 1915."

The Order of the Board of April 20, 1915, was made in pursuance of the Fielder Act, Chapter 57 of the Laws of 1913. That Order directed the elimination of certain grade crossings in the City of Paterson and provided, amongst other things:

"And it appearing to the Board that the street railway operated by Public Service Railway Company uses the said crossings at (1) Park Avenue and Market Street, (2) Broadway, and (3) River Street, the Board in accordance with the power and authority vested in it by said act further orders the Public Service Railway Company to pay ten per centum of the alterations, changes, relocation and opening, required by this order, including damages to adjacent property, directly chargeable to the crossings, and each of them so used by the said street railway operated by it.

"And the said Erie Railroad Company and said Public Service Railway Company are ordered to keep specific and complete records of the expenses directly chargeable to the crossings and each of them, so used by said street railway of said Public Service Railway Company and leave is hereby given to said companies, or either of them, to make application to the Board for further order in the event that they cannot agree upon the amount of such expenses so directly chargeable to said crossings used by the street railway operated by said Public Service Railway, or any of them."

It is observed that this Order of 1915 does not specifically determine the question posed in the above quotation from the stipulation in the present case.

The pertinent portions of the Fielder Act, P. L. 1913, page 91, are as follows:

"2. The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event the board may order not exceeding 10 per centum of such expense directly chargeable to the crossing used by the street railway company, to be paid by the company operating such street railway and the balance to be paid by the company operating such railroad."

"4. Where the order of said Board shall require changes in, or the removal of the property or constructions of any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said board. They shall be deemed

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parties in interest and shall be given notice of hearing and an opportunity to be heard."

The Board of Public Utility Commissioners has determined $470,604.16 as the total cost to the Erie Railroad Company of the elimination of the crossings in question. The Public Service expended the sum of $22,261.60. The question is, is the "entire expense," and the "such expense," mentioned in Section 2 of the Fielder Act of which the street railway may be required to pay ten per cent, $470,604.16 plus $22,261.70, which amounts to $492,865.76 of which the Public Service must pay $49,286.58 and has already paid $22,261.60; or is the "entire expense" the $470,604.16 expended by the Erie of which Public Service must pay $47,060.42 plus all its own expense. The Board has determined that the latter of these propositions is the true construction of the statute and Public Service challenges that holding.

It is to be noted that in Section 4 of the Act, where the entire cost of moving their facilities is imposed upon certain utility companies, street railway companies are not specifically mentioned. They are mentioned in Section 2 and only in Section 2, and we are of the opinion, therefore, that they are affected only by Section 2 and not by the provisions of Section 4. This view is supported by the fact that when the statute was amended in 1930, Chapter 101, R. S. 48:12-63, by which amendment the railroad companies were required to pay only 50 per cent of the cost of eliminating crossings and the requirement that the street railway pay 10 per cent was abolished, Section 4 was also amended to include street railways in the class of utilities required to pay all their own costs.

The original order of the Board of April 20, 1915, was challenged in the courts in several proceedings. While the point now raised was not involved in those cases the language used in the several opinions is not without pertinence. Mr. Justice Garrison, speaking for this Court in *Public Service Railway Co.* vs. *Board of Public Utility Commissioners,* 89 N. J. Law 24, said at page 29:

> "The fact that by such a collision as we have suggested the lives of the passengers on the steam railroad are also imperiled, so far from demonstrating that the entire expense of eliminating the dangerous condition should be borne by such railroad, merely emphasizes the participation of each carrier in the production of a common source of danger, and hence points to their joint contribution to the expenses of its elimination."

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In the opinion of this Court in *Erie Railroad Co.* vs. *Board of Public Utility Commissioners,* 89 N. J. Law 57 (affirmed on the opinion of the Supreme Court, 90 Law 672), we find the following language, at page 79:

> "The contention that the order is invalid, in that it requires the prosecutor to do the physical work of removing and changing the property of the Public Service Railway Company, is not well founded in fact. The order does not require the prosecutor to do that. It requires the Public Service Railway Company to change and remove such of its property and construction as is necessary to carry into effect the order, and further directs that both the prosecutor and the Public Service Railway Company keep specific and complete records of the expenses directly chargeable to the crossings, and each of them, so used by such street railway company.
>
> "The order directs the Public Service Railway Company to pay 10 per centum of the expenses of the changes required by the order directly chargeable to the crossings used by it. This was the maximum amount allowed by the statute and, of course, the prosecutor cannot complain that it was so limited."

And again at page 85:

> "The contention that the legislature could not lawfully limit the proportion of expense to be borne by the street railway company to ten per cent of the total expenses of the alteration of a crossing is, of course, unsound if the entire expense might at the legislative will have been placed upon the prosecutor. The opposite contention, viz., that the imposition of any part of the expense upon the trolley company was unlawful is, of course, not now under consideration."

In the opinion of the United States Supreme Court, in *Erie Railroad Company, et als.,* vs. *Board of Public Utility Commissioners,* 254 U. S. 394, 65 L. Ed. 322, it was said by Mr. Justice Holmes:

> "While the Railroad Company contends that the Public Service Railway Company should be charged more, the latter company comes here upon the proposition that it should be charged nothing. We agree with the courts below that a street railway crossing the tracks of a steam railroad at grade in a public street increases the danger, and may be required to bear a part of the expense of removing it. The amount charged does not appear to be excessive, and upon the principles that we have laid down the payment of it may be made a condition of the continued right to use the streets."

We think that the language used by the courts on these occasions is indicative of the view that the combination of a railroad crossing a highway at grade and the use of that highway by a street railway operates to produce an unusually dangerous condition which the State has the power to eliminate at the joint

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expense of the railroad and railway companies. The wording seems to indicate that the elimination of the dangerous condition is a unit, an entirety, not the separate operations of the elimination of the grade crossing, at the joint expense of the railroad and railway companies, and then the removal of the street railway tracks at the expense of that company alone.

Furthermore, we think the words of the statute of 1913 require that construction. Section 2 mentions the "entire expense" of the elimination, and, in cases where a street railway exists, provides that 10 per cent of "such expense" shall be borne by the street railway company and the balance by the railroad. By the simple meaning of the words and by the rules of grammatical construction, "such expense" refers back to "entire expense." And where a street railway is in existence, naturally the entire expense is increased by the cost of moving the tracks and facilities of such railway. As stated above, the failure to mention street railways in Section 4 and the later amendment of that section to include them, when the 10 per cent provision of Section 2 was eliminated, is also of significance.

A further element to be considered in the inclusion in the Board's order of 1915 that both the Erie and the Public Service keep records of their expenses in these operations. We can see no logical reason for requiring the Public Service to keep a record of its expenses unless that record was to be used in arriving at the apportionment of the cost between the parties. If it was to bear the entire expense of moving its facilities, the cost of doing so was of concern to no one but itself.

The Erie Railroad Company contends, and it appears to be the fact, that in the adjustment of the costs of other projects the construction contended for by it and adopted by the Board was used without protest by Public Service and there prosecutor has acquiesced in that construction. Whatever may have happened in previous instances, we think the prosecutor is not precluded from raising the point at this time.

The Erie also complains of certain items of expense which have been included in the figures of the prosecutor, but we are determining the question submitted by the paragraph of the stipulation cited at the head of this opinion, and do not deem that the individual items are under review.

The Order of the Board is reversed, with costs.

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Decision of Court of Errors and Appeals follows:

NEW JERSEY COURT OF ERRORS AND APPEALS.
No. 44. October Term, 1943.

Public Service Coordinated Transport,
Respondent,
vs.
Board of Public Utility Commissioners of the State of N. J.,
Appellant.

Appeal from Supreme Court.

Error to Court.

PER CURIAM:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Per Curiam in the Supreme Court, reported at 130 N. J. Law 409.

Endorsed:

"Filed January 27, 1944,
J. A. BROPHY,
Clerk."

No. 2198

In the Matter of the Complaints of Jerry H. Bennett and Somerset Bus Company vs. Public Service Coordinated Transport, In re Reduction of Fares on the Raritan Bus Route No. 60.

In the Matter of the Complaint of Somerset Bus Company vs. Public Service Coordinated Transport, In re Reduction of Fares on Union All-Service Vehicle Line No. 47-49, Newark and Bound Brook.

James I. Bowers, for Florence Bennett and Myrtle E. Dilts, executrixes of the estate of Jerry H. Bennett, deceased, t/a Millstone Bus Line; *Harry V. Osborne,* for Somerset Bus Company; *B. D. Branch,* for the Central Railroad Company of New Jersey; *C. S. Straw,* for Public Service Coordinated Transport; *John Macko,* for Town of Raritan.

BY THE COMMISSION:

These cases were listed independently on the Board's calendar. At the hearing both matters were consolidated and tried together.

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The issue involves a proposed reduction in fares on both bus routes. Objections were made to the proposed reduced rates becoming effective on the ground that such reductions would effect undue and prejudicial competition. An examination of the exhibits discloses that no provision is made for reduction in fares in the non-competitive area. The Board recognizes that as a general theory rate reductions in the public interest, all other things being equal, are not to be lightly denied. However, such proposed reductions must not of necessity be approved by this Board where it appears that such reductions will unduly prejudice other operating utilities susceptible of being affected, if it does not appear that the lawfully existing rates are unjust and unreasonable.

The testimony in this case adequately shows that the rate structure will be left in such a posture that the proposed schedule of rates will not effect or afford a reduction in rates in the non-competitive area. Neither does the testimony disclose any contention on the part of the company seeking approval of the proposed reduced rates that the proposed reduction is advocated on the theory that the present rates are unjust and unreasonably high and therefore ought to be supplanted by the lower rate. The record clearly indicates that the basis of the application is upon the theory that the reduction of the rates will result in the recovery of business from the riding public in the area where the proposed rates would become effective, but there is no testimony which demonstrates that in the area served the lower rate would create such new business or that the locale is susceptible of affording such new business by reason of any new or changed conditions.

Since, therefore, the reductions sought to be effected are confined to the competitive area only, and since there is not sufficient evidence to satisfy the Board that the present rates are unjust or unreasonable, the Board, upon consideration of all of the testimony and exhibits, hereby denies its approval of the application of Public Service Co-ordinated Transport for the reduction, change or alteration of the existing lawfully established rates, and the proposed reductions which are the subject matter of this proceeding may not become effective.

Dated, June 29, 1939.

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No. 2199

In the Matter of the Application of Bill's Bus Line for Approval of Revised Fare Schedules for the Saddle River Bus Route, P. U. C. Route File No. 287-040, Operating Between Paterson and Saddle River.

Charles F. Black, for the Petitioner; *Charles S. Straw,* for Public Service Coordinated Transport; *Frank D. Livermore,* for Village of Ridgewood; *John J. Reilly,* for Borough of Waldwick; *Ryan Vanderhoff,* for Borough of Hawthorne; *Winthrop Travell* and *C. C. Henkel,* for Residents of Ridgewood.

BY THE COMMISSION:

Applicant requests approval of reduction of fares on its line operating between Paterson and Saddle River. Analysis of the present fare schedule discloses there are presently six fare zones on this route, which are of varying length, but result in a through fare of 35c, the first five zones having a 5c fare and the last, or sixth zone having a 10c fare. The proposed schedule will eliminate former zone No. 2, which was 0.4 of a mile in length and zone No. 4, which was also 0.4 of a mile in length, and reduce the fare in the former sixth zone from 10c to 5c. This results in a proposed new through fare of 20c against the former 35c fare. It also results in a reduction between Paterson and Ridgewood from 15c to 10c, between Ridgewood and Allendale from 15c to 10c and between Paterson and Allendale from 25c to 15c, together with other minor adjustments lengthening present 5c fare zones. Under the proposed fare schedule the 5c fare zones will be 4.6 miles, 4.5 miles, 3.2 miles and 0.7 miles in length, the shortest zone being that which is within Saddle River at the northerly terminal of the line.

Public Service Coordinated Transport objected to the granting of this application on the ground that it would make available to this line fares which would permit undue competition with certain of their operations in this territory. Objector operates lines between Paterson and Ridgewood over different routes but joining applicant's line at the Paterson Terminal, paralleling applicant's line for a short distance along Lincoln Avenue in Glen Rock and Hawthorne, again paralleling applicant's line for a few blocks near the center of Ridgewood, operating not far from applicant's line in Midland Park and paralleling applicant's line for a block in Allendale. The fare now charged by Public Service Coordinated Transport between the Paterson terminal and

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the short paralleling area in Ridgewood is 15c and its fare between Paterson and Allendale is 20c.

There is no evidence in the record with respect to the number of persons carried on objector's lines between the points mutually served by the objector and the applicant. The points of principal concern are between the Paterson Terminal and the center of Ridgewood where objector now charges a 15c fare and applicant proposes to charge 10c. Analysis of this situation discloses that Public Service now carries persons from the Paterson Terminal to a point not far from the center of Ridgewood for a fare of 10c, this point being at the intersection of Doremus Avenue and Ackerman Avenue. It is evident that in many cases persons may leave the bus at this last named intersection and walk without too great inconvenience to points within the 15c area and thus save the additional 5c required for transportation to those points. There can be no question but that a great many persons do this. There is no evidence in the record how many, if any, persons actually ride between the Paterson Terminal and the central portion of Ridgewood on objector's line, who now pay the 15c fare. In view of this situation it is the Board's conclusion that a 10c fare between these points on the applicant's line will not result in prejudicial competition so far as the objector's operations are concerned. With respect to other points mutually served it is the Board's conclusion that the volume of business between these points is so small, no evidence being submitted to the contrary, that no material loss of business could result to the objector.

The fare schedule proposed under this application is as follows:

Miles	*Zone No.*	*Zone Area*	1 c	2 c	3 c	4 c	5 c	6 c	7 c
1.3	1	Within Paterson and Prospect Park ..	R	5	10	10	15	15	20
3.3	2	Within Hawthorne or Glen Rock, south of Rock Road		5	5	10	10	10	15
2.8	3	Within Ridgewood or Glen Rock, north of Rock Road			5	5	10	10	15
1.4	4	Within Midland Park				5	5	5	10
0.8	5	Within Waldwick					5	5	10
2.1	6	Within Allendale						5	5
0.8	7	Within Saddle River							5

R—Restricted to no local business

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That this fare schedule be approved was strongly urged by representatives of the Village of Ridgewood, the Borough of Waldwick and the Borough of Hawthorne.

Upon consideration of the evidence the Board finds and determines that the proposed fares will result in a benefit to the residents of the area served by this line and will not result in prejudicial competition with any other operations in this area and, therefore, herewith permits the proposed fares to be made effective.

Dated, June 29, 1939.

No. 2200

In the Matter of the Complaint of Independent Operators on the South Orange Line vs. Public Service Coordinated Transport Concerning Proposed Weekday and Saturday Schedules—South Orange Vehicle Line No. 31.

Charles S. Straw, for Public Service Co-ordinated Transport; *Israel B. Green,* for Independent Operators on South Orange Avenue Line.

BY THE COMMISSION:

In this case Public Service Coordinated Transport filed a schedule of proposed operations (trip and headway schedule) intended to become effective about May 15, 1939. The schedule was objected to by the complainants and in accordance with the Board's practice, the objection to said schedule was set for hearing.

The presently operated schedule on file with the Board prior to the filing of the schedule which is the subject matter of this proceeding is presumed to afford (subject to proof to the contrary) adequate service on the line in question operated by Public Service Coordinated Transport. Therefore, it becomes the duty of the proponent of any new schedule of service to sustain it by evidence of its need in relation to the rendition of service to the public.

Counsel for the objectors asserted on the record that two or three times he has raised the question as to the procedure before administrative tribunals and "I hope sometime I may get a determination of that."

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Here is the answer to his question as to procedure. We hope it will settle for all time any further illusory constitutional crisis so far as this class of proceeding is concerned.

The objectors in this class of case have no vested interest or right to either object to or be heard on the question of the sufficiency or insufficiency of another operating service as a matter of constitutional right.

The Board, however, does, provide a practice procedure whereby all operators of transportation facilities may appear and be heard on their objection to the end that regulation of service in the public interest may conform to the statutory standard of safe, adequate, and proper service. The only limitation on the Board's power is that it must determine that question "after hearing." In its procedural method the Board provides a hearing broader than either Constitution or statute required. It is under this procedure that the objectors were heard.

As to hearing, the parties must have the right to secure and present evidence; they must be given the opportunity by proof and argument to contravert the claim asserted before a tribunal bound not only to listen, but to give legal effect to what has been established. When this is done, all has been done which gives the substance of right without unreasonable burden. We believe these observations should make clear our views as to any constitutional contentions raised or implied, or which are susceptible of being raised or implied in a proceeding of this character.

The evidence in this case is highly contradictory. Traffic checks and other exhibits have with the testimony in respect thereto, only made "confusion more confounded."

The proponents of the new schedule contend that the volume of riding on the route or line in question purports to show an overloading. The objectors deny this and, in fact, contend that no additional service is required.

The schedules offered in evidence show that it is proposed to increase service 33 per cent between 12:30 and 4:00 P. M., during which period the loads average 36 passengers per trip, full seating capacity. It is also proposed to add 33 per cent between 9:00 A. M., and 12:30 P. M., when the average load is only 26 passengers per trip, less than the average that would be carried during the afternoon period with the 33 per cent increase in effect. During the evening hours between 6:00 P. M., and Midnight, with average loads of 3 passengers per trip in ex-

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cess of seating capacity, no added service is asked. The inconsistency of this situation is apparent.

Checks submitted in support of the proposed Saturday schedule show the operation of 15 per cent less service than the Board has heretofore authorized. This unauthorized 15 per cent cut in service results in markedly excessive loading throughout most of the day (Saturday).

An analysis of all the testimony and exhibits, supported by the Board's own investigation, leads us to the conclusion that no additional service is required on this line between the hours of 9:00 A. M., and 12:30 P. M., that some additional service is required on the line between 12:30 P. M., and 4:00 P. M., that although the applicants' proposed schedule does not show intended increased service after 6:00 P. M., on week days, the Board is definitely of the opinion that a substantial increase in service on this line is required between 6:00 P. M., and Midnight. Under its power the Board may require such additional service even though it is not contemplated by the proposed new schedule.

Therefore, the Board finds and determines that adequate and proper service will not be afforded under the proposed new schedule as presently constructed; and therefore requires the Public Service Coordinated Transport to file a new proposed schedule of trips not exceeding 270 in number on week days, and 254 in number on Saturdays, which schedule shall be in conformity with the views herein expressed as to hours of service and which schedule shall also conform to the following limitations, viz.:

1. The distribution of service under the total number of trips herein authorized, must be kept reasonably consistent with the distribution of passenger loads during the day.

2. The scheduled times of trips shall be such as to conform, as nearly as possible, with a reasonable co-ordination of applicant's and independent buses on the South Orange Bus Route No. 32. Undue conflict with independent bus operators' trips will not be allowed.

Accordingly, the schedules submitted in connection with this matter will not be accepted by the Board as conforming to proper service, and Public Service Coordinated Transport is directed to file new time schedules that are within the requirements hereinabove prescribed.

Dated, June 29, 1939.

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No. 2201

In the Matter of the Formal Complaint of Ironbound Transportation Company vs. Public Service Coordinated Transport, In re Illegal Parking of buses in Newark.

Andrew B. Crummy, for the Complainant; *Charles Stuart Straw,* for the Respondent.

BY THE COMMISSION:

Petitioner's complaint states:

> "1. During the baseball season on days on which games are played at home by the Newark Bears, the buses of the Public Service Coordinated Transport while off their designated route transport patrons to the baseball park and after discharging the patrons, the buses are lined up along the streets surrounding the ball park and streets adjacent thereto. The operators of the buses go to the ball game and during the entire time the game is played the buses are left on the streets unattended and tend to and do clutter up the street and impede the movement of petitioner's buses. Immediatedly after the game the buses of respondent are loaded and the buses of the petitioner have no way of pulling up to the curb to receive passengers who desire to board petitioner's buses, and as a result thereof petitioner's business is materially interfered with causing a great loss of revenue to petitioner.
>
> "2. Petitioner charges that respondent has ignored the rights of petitioner and has parked its buses in the streets in violation of police regulations."

In baseball parlance, the Ironbound Company claims that the respondent "spikes" its activities and that this Board as umpire should declare the respondent "out". The fact is that Ironbound had "two strikes" on it before the filing of the petition because it admits that the parking of buses was in violation of police regulations over which the Board has no jurisdiction. Nor would we, even if we had the authority, deprive the "operators of buses" from watching

> "Casey, the mighty Casey, advancing to the bat, * * *" for
>
> "There was ease in Casey's manner as he stept unto his place;
> There was pride in Casey's bearing, and a smile on Casey's face.
> And when, responding to the cheers, he lightly doffed his hat,
> No stranger in the crowd could doubt 'twas Casey at the bat.
>
> "Ten thousand eyes were on him as he rubbed his hands with dirt,
> Five thousand tongues applauded when he wiped them on his shirt;
> Then while the New York pitcher ground the ball into his hip,
> Defiance gleamed in Casey's eye, a sneer curled Casey's lip."

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The claim that "fans" who patronize the Ironbound buses cannot board the buses at the curb does not appeal to us. "Fans" generally, flushed with victory or depressed by defeat, little note or long remember the order of their coming from or going to a game, for

> "Somewhere in this favored land the sun is shining bright;
> The band is playing somewhere, somewhere hearts are light,
> And somewhere men are laughing, and somewhere children shout;
> But there is no joy in Mudville—mighty Casey has struck out."

The "balk" called on respondent is overruled and the petition dismissed.

Dated, July 26, 1939.

No. 2202

In the Matter of the Application of Public Service Coordinated Transport for Approval of Municipal Consent of the City of Newark for Operation of Five (5) Buses on McCarter Highway Bus Route No. 100 Within Newark.

Charles S. Straw, for Public Service Coordinated Transport; *Israel B. Greene,* for North Newark Bus Owners' Association, A. Gershkowitz, John A. Policastro & Company, Inc., Patsy Palangio, Timothy J. Ryan, Irving Transit Company, and Van Buren Bus Company.

BY THE COMMISSION:

Applicant applies for approval of a municipal consent of the City of Newark, dated October 20, 1938, for the operation of five (5) buses by the applicant on a line to be known as the McCarter Highway Bus Route No. 100, P.U.C. Route-file No. 290-348, over the following streets in the City of Newark:

> "From Newark-Belleville City Line, via State Highway No. 21, Riverside Avenue, Chester Avenue, Herbert Place, Broadway, Harvey Street, Ogden Street to the McCarter Highway, Raymond Boulevard, Raymond Plaza, west to the Pennsylvania Station; returning via Raymond Plaza, east to Raymond Boulevard, Mulberry Street, McCarter Highway, thence via the same route to the Newark-Belleville City Line. When said highway is completed, buses will operate on that highway from the Newark-Belleville Line to Raymond Boulevard, and from Mulberry Street to the Newark-Belleville City Line."

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The proposed operation will provide a direct service to the Pennsylvania Railroad Station from the area adjacent to the Passaic River north of Mount Pleasant Cemetery between Broadway and McCarter Highway not now served by any other facility in the immediate area. The nearest available service is that by the buses operated on Broad Street and on Broadway passing the intersections of Herbert Place, Chester Avenue, Grafton Avenue and Verona Avenue with McCarter Highway. The distance to Broadway from McCarter Highway is 1,200 feet and from that highway to Summer Avenue is 2,000 feet. The nearest available direct service to the Pennsylvania Station from McCarter Highway at the intersection of the streets just indicated is on Summer Avenue, approximately two-fifths of a mile from the proposed route. This service is now being furnished by the applicant.

At the beginning of the hearing the objectors moved the dismissal of the application on the following grounds:

1. That the Board had no jurisdiction to presently approve a municipal consent to operate auto buses over a highway which has not yet been completed and accepted by the proper local authorities.

2. That the Board is without jurisdiction because the petitioner has not obtained the consent to the surrender of five bus permits from all the municipalities of the Newark-New Brunswick Route No. 134.

3. That the consent annexed to the application is invalid and insufficient because on its face it is not granted pursuant to resolution of the City of Newark.

This motion was taken to conference and the hearing proceeded on its merits. The present decision will dispose of the motion as well as the main application.

As to the first point raised by the objectors, the application specifically sets forth a route actually in existence and over which the applicant can presently operate. It does contain the following words:

> "When State Highway No. 21 is completed, buses will operate on that highway from Newark-Belleville City Line to Raymond Boulevard, and from Mulberry Street to the Newark-Belleville City Line."

Objectors question the power of this Board to approve the operation over a route not in existence. Inasmuch as it is the intention of the Board to consider the question of operation over

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presently existing streets, leaving to the applicant the right to renew its application to operate over that portion of State Highway Route No. 21 which is not now completed, if and when the same is completed, this objection must fail.

Taking up the second point of the objectors as to the necessity of securing the consent to the surrender of the five bus permits mentioned from all the municipalities on the Newark-New Brunswick Route, the objectors cite a previous decision of this Board as a precedent wherein an application was made "to combine and reroute five auto buses on the South Orange-Newark Route No. 172." Objectors misconstrue the purpose of this application. No attempt was made to change the nature or the route of the New Brunswick-Newark operation. No change in the type or amount of service now being rendered is proposed. It is inconceivable that the objectors are or can be adversely affected by any change in the New Brunswick-Newark service and the record shows no such contention. If public convenience and necessity were adversely affected, so far as this application applies to service on the New Brunswick-Newark Route, this Board would promptly act on its own initiative to protect the traveling public. Such not being the case, this objection must also fail.

Taking up the third objection, the Board considers this to be a collateral attack upon the consent itself and, therefore, will not consider it. The consent in question is signed by Meyer C. Ellenstein, Director of the Department of Public Affairs, and recites that such Department has jurisdiction over buses and control of the public streets in the City of Newark. The Board considers such a consent sufficient in the absence of any judicial determination. Any objections to its legality or legal insufficiency should be raised in a court of competent jurisdiction.

The motion to dismiss is, therefore, denied.

Objectors further contend that the proofs submitted are not sufficient to establish public convenience and necessity and that the proposed operation will be directly competitive with the objectors' route and will tend to diminish their revenues.

The objectors operate on the North Newark Bus Route No. 18, operating from the Newark-Belleville City Line on Broadway and Broad Street to Broad Street south of Clinton Avenue. These buses do not operate to the Pennsylvania Station. The route as presently proposed will run over the same route as the objectors on Broadway between Harvey Street and Herbert Place.

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Mount Pleasant Cemetery is bounded by Passaic Street, Harvey Street, Broadway and Herbert Place. It is at this location that State Highway Route No. 21 has not been completed. The line as proposed will operate on Broadway between Herbert Place and Harvey Street and on the latter street between Broadway and Broad Street, a distance of 1,200 feet and, as above stated, within that distance the two lines will compete unless proper restrictions are imposed upon the applicant. Along all other parts of the respective routes, in the opinion of the Board, competition will not result from the granting of the application.

According to the applicant's testimony there are a large number of manufacturing plants along or in close proximity to the proposed line. It is estimated that these plants employ more than 3,000 employees, including those who work in the factories between Harvey and Orange Streets, adjacent to McCarter Highway, which latter section may be termed, for the purpose of this decision, the southern portion of the proposed route.

The entire route, one way, is 3.8 miles.

Objectors contend that the proof of convenience and necessity is "hearsay and conjecture and that such evidence cannot support a valid order of the Commission."

The Board further disagrees in this respect. The competency of the Traffic Engineer offered by the applicant was satisfactorily established. The traffic engineer surveyed the locus upon numerous occasions; observed workmen from various factories leaving the industrial plants in the direction of the Broadway and Summer Avenue bus lines; he examined and obtained information as to the number of employees in the various plants from the Industrial Directory of New Jersey, a recognized source of reliable data on this subject. We think this information is evidential.

From the proofs submitted the Board concludes that public convenience and necessity require service on that portion of the proposed route which is actually in existence, and therefore, approves the municipal consent of the City of Newark for the operation over the route herein described, subject to the following restrictions:

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ROUTE:

"From Newark-Belleville City Line, via State Highway No. 21, Riverside Avenue, Chester Avenue, Herbert Place, Broadway, Harvey Street, Ogden Street to the McCarter Highway, Raymond Boulevard, Raymond Plaza, west to the Pennsylvania Station; returning via Raymond Plaza, east to Raymond Boulevard, Mulberry Street, McCarter Highway, thence via the same route to the Newark-Belleville City Line."

RESTRICTION:

That no passengers shall be accepted or discharged on this route between Broadway and Herbert Place and Harvey Street and North Broad Street.

If and when State Highway Route No. 21 is completed, the applicant may renew its application if it desires to operate over the new portion of said route, and on such application the question of convenience and necessity over that portion of the route at that time can be determined upon hearing after due notice to all parties in interest.

Dated, August 15, 1939.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

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NEW JERSEY SUPREME COURT

No. 278. October Term, 1939.

Abraham Gershkowitz, John A. Policastro & Co., Inc., Patsy Palangio, Timothy J. Ryan, Irving Transit Co., and Van Buren Bus Co., a corporation,

Prosecutors,

vs.

Board of Public Utility Commissioners of the State of New Jersey,

Respondents.

Argued October 16, 1939. Decided January 16, 1940.

On certiorari.

Before *Justices Parker, Bodine* and *Perskie.*

For prosecutors, *Israel B. Greene.*

For Board of Public Utility Commissioners, *John A. Bernhard.*

For Public Service Coordinated Transport, *William H. Speer.*

BODINE, J. The writ of certiorari in this case brings up for review an order of the Board of Public Utility Commissioners approving a permit for the operation of five buses on a line hereafter mentioned. The permit not granted in its entirety was for the operation of buses over the following streets in the City of Newark: "From Newark-Belleville City Line, via State Highway No. 21, Riverside Avenue, Chester Avenue, Herbert Place, Broadway, Harvey Street, Ogden Street to the McCarter Highway, Raymond Boulevard, Raymond Plaza, west to the Pennsylvania Station; returning via Raymond Plaza, east to Raymond Boulevard, Mulberry Street, McCarter Highway, thence via the same route to the Newark-Belleville City Line. When said highway is completed, buses will operate on that highway from the Newark-Belleville Line to Raymond Boulevard, and from Mulberry Street to the Newark-Belleville City Line."

The Board found: "The proposed operation will provide a direct service to the Pennsylvania Railroad Station from the area adjacent to the Passaic River north of Mount Pleasant Cemetery between Broadway and McCarter Highway not now served by any other facility in the immediate area. The nearest available

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service is that by the buses operated on Broad Street and on Broadway passing the intersections of Herbert Place, Chester Avenue, Grafton Avenue and Verona Avenue with McCarter Highway. The distance to Broadway from McCarter Highway is 1,200 feet and from that highway to Summer Avenue is 2,000 feet. The nearest available direct service to the Pennsylvania Station from McCarter Highway at the intersection of the streets just indicated is on Summer Avenue, approximately two-fifths of a mile from the proposed route. This service is now being furnished by the applicant."

It approved a route as follows: "From Newark-Belleville City Line, via State Highway No. 21, Riverside Avenue, Chester Avenue, Herbert Place, Broadway, Harvey Street, Ogden Street to the McCarter Highway, Raymond Boulevard, Raymond Plaza, west to the Pennsylvania Station; returning via Raymond Plaza, east to Raymond Boulevard, Mulberry Street, McCarter Highway, thence via the same route to the Newark-Belleville City Line," subject to the following restrictions "That no passengers shall be accepted or discharged on this route between Broadway and Herbert Place and Harvey Street and North Broad Street. If and when State Highway Route No. 21 is completed, the applicant may renew its application if it desires to operate over the new portion of said route, and on such application the question of convenience and necessity over that portion of the route at that time can be determined upon hearing after due notice to all parties in interest."

It is argued that the Board was without jurisdiction to approve the consent because the same was granted by the Director of Public Affairs of the city of Newark and not by the "Board or body having control of the Public streets in the municipality" affected. R. S. 48:4–3. The Utility Board's approval is after hearing and a determination that the privilege or franchise is necessary and proper for the public convenience and interest. R. S. 48:2–14. We do not think we need pass upon the point because Newark is governed by a City Commission. The officer signing the consent had, by express grant, control of the public streets. The consent granted was: "subject to the terms or conditions now imposed or hereafter to be imposed by an ordinance or regulation of the City of Newark, N. J., or any law of the State of New Jersey." The consent appeared regular upon its face and being expressly subject to the control of the city government it

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should not be questioned by the prosecutors in the present action. The Board of Utility Commissioners had only to pass upon the question as to whether it was necessary and proper for the public convenience and interest. It still has control of the operation of the buses. *Whitehead* vs. *Board of Public Utility Commissioners,* 108 N. J. L. 258. The proofs sustain the action taken.

It seems captious to challenge the form of municipal consent when full power over the same is expressly reserved to the governing body. By ordinance, if necessary, the whole matter can be controlled. It is, therefore, quite unnecessary to pass upon the decision in *Trenton & Mercer Traction Company* vs. *City of Trenton,* 97 N. J. L. 84, affirmed 98 Id. 297. Clearly, the consent granted in this case differs in scope and formality from those condemned in certain Public Utility Board decisions.

There is no statute of this State or decision of this Court cited which indicates that the Board of Public Utility Commissioners may not deny part of the application or modify the same. Their power is to determine how much of the privilege and franchise is necessary and proper for the public convenience and interest. If all, they can so express themselves. If the proofs show that some part is not necessary for the public convenience and interest, they are bound so to determine.

The consent and permit are also challenged because McCarter Highway is not entirely completed at present, dead ending at Mount Pleasant Cemetery. Perhaps the point is that the grant is premature. It is highly probable that it may be, but we do not regard the point as significant. In times when transportation facilities are much needed, lack or preparation for the proper handling of traffic should not await the completion of every road improvement.

The prosecutors are not concerned with rights of the other municipalities to protest the surrender of the operation of bus permits in the City of Newark. Any municipality affected by a lack of service within its bounds may proceed in the interest of its own inhabitants.

The evidence examined with care supports the findings of the Commissioners and they have, we think, properly disposed of all questions raised.

The writ will be dismissed with costs.

Filed, January 16, 1940

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No. 2203

In the Matter of the Complaint of Public Service Coordinated Transport vs. Abraham Gershkowitz et al., In re Rerouting of buses on the North Newark Line, in a Southbound Direction, Without Approval of Board of Public Utility Commissioners.

Charles S. Straw, for Public Service Coordinated Transport; *Israel B. Greene,* for Respondents.

BY THE COMMISSION:

It is stipulated on the record in this case that by reason of a police direction of the City of Newark, both the complainant and the respondent were obliged to change the course of their approved route by detour in a southbound direction from Broadway and Harvey Street, by way of Broadway, Oriental Street to Broad Street, and thence over the regular established route. The detour involves one block.

Public Service Coordinated Transport complains that such rerouting is in direct competition with existing facilities of the Public Service Coordinated Transport and prays that this Board restrict the respondent from picking up any passengers while on the detour route.

Counsel for the respondent has raised the question before the Board, of the right of the municipality to affect the franchise rights of the respondent by mere police regulation without the formality of action by the governing body having jurisdiction over the streets of the City of Newark. With respect to this question the Board takes the position that since both parties to this proceeding admit that they are off their regular route for only a distance of one block, and that, not being the result of a voluntary action of either of the parties, this Board reserves for a court of competent jurisdiction the answer to the question affecting the right of the municipal authorities to order such detour. So long as the Board is satisfied that such detour is temporary in character, for a short duration of time, and created in good faith, and for public convenience, with notice to the Board, the Board will honor the wish of the municipal officials for a short space of time in order to afford them the opportunity of determining whatever they may want to determine by reason of the enforced detour. If, after a reasonable period of time (dependent upon the circumstances of the case), the municipality

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intends to make such detour a permanent arrangement, both the complainant and the respondent will be required to obtain, and the municipality obliged to give its municipal consent to such changed route if the same is to be continued.

Since the operator complained against, as well as the complainant, were obliged to make the detour in question, the only other purpose of the complaint is the portion alleging undue competition. Considering the circumstances of the case, the area of the route involved, the nature of the circumstances requiring the detour, and the locality involved, we regard the filing of this complaint as frivolous and utterly without foundation or justification. Both the complainant and the respondent should note our views with respect to this character of complaint and realize that such matters tend to materially affect the progress of the Board's business with relation to matters of real import. This practice results in waste of the efforts of the Board's time as well as that of its staff.

Complaint dismissed.

Dated, October 26, 1939.

No. 2204

In the Matter of Formal Complaint of Arcola Swimming Pool vs. Public Service Coordinated Transport In re Discrimination of Fares from Rochelle Park Along Passaic Street to Hackensack.

J. P. Walden, for Arcola Swimming Pool; *Charles S. Straw,* for Public Service Coordinated Transport; *Maurice J. Cronin,* for Garden State Lines, Inc.

BY THE COMMISSION:

The complaint alleges that:

> "The Arcola Swimming Pool formally complains against the discrimination of the Public Service Transport in charging 10 cents fare from the border line of Rochelle Park and Paramus along Passaic Street into the Hackensack terminal, in view of the fact that from the New York, Susquehanna and Western Railroad crossing at Rochelle Avenue, Rochelle Park, into Hackensack, the Public Service bus fare is only 5 cents.
>
> "This is certainly a discrimination in that the two points are equidistant from the Hackensack terminal and the Passaic Street route is paying double the fare that the Rochelle Avenue route is being charged for similar transportation."

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Complainant is the owner of "Arcola Pool" situated on Passaic Street near the border line of Paramus and Rochelle Park, Bergen County. Passaic-Lodi Bus No. 44 passes "Arcola Pool" on its route from Hackensack terminal to Harrison Street, Clifton.

The first fare zone from Hackensack terminal is at the intersection of Rochelle Avenue and Passaic Street. This point is about .9 of a mile from the pool.

Complainant requests an extension of the fare zone to the border line of Rochelle Park and Paramus for the same 5c rate of fare. The pool is within the proposed extension. Complainant's purpose in having the zone extended is to attract the residents of Hackensack who now pay 10c to reach the pool.

It is claimed that the existing fare is discriminatory because for an equal distance on route No. 1, the fare is 5c. Complainant's contention, therefore, rests solely upon the distance factor.

That contention has been determined heretofore contrary to the complainant's contention. In *Richard Spitz* vs. *Public Service Coordinated Transport*, No. 2064, decision dated July 21, 1936, the Board decided as follows:

> "Distance traveled, standing alone and without consideration of other relevant factors, is not a legal criterion of a just and reasonable fare.
>
> "The burden of challenging existing fares is, under the law, upon the complainant (as it would have been upon the Board had it initiated this proceeding) who must prove by satisfactory evidence that such fares are unjust and unreasonable. All of the proofs produced by the complainant related to the distance traveled. There is no evidence that the rate of fare charged for the second zone is in itself unjust and unreasonable.
>
> "There is no proof of the cost of operation and maintenance or the number of passengers carried, all of which are essential factors in determining the justice and reasonableness of challenged fares."

Again in *Mildred K. Spitz* vs. *Public Service Coordinated Transport*, No. 2179, decided July 7, 1938, when the question was revived, the Board reiterated its finding in the former case. In another decision filed July 27, 1938, No. 2184, "In the matter of the formal complaint of the *Paterson Junior Chamber of Commerce* vs. *Public Service Coordinated Transport* in re: Change of Fare Zone on Routes Nos. 74, 54 and 16 between Paterson and Passaic," the Board dismissed the application for reasons, among others, that it could not "consider the difference in distance of the respective zones or a comparison with other routes" as the controlling issue.

The petition, therefore, will be dismissed.

Dated, November 16, 1939.

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No. 2205

Borough of Hawthorne Application for Elimination of Wagaraw Road and Washington Avenue Grade Crossings Over Tracks of Erie Railroad and New York, Susquehanna and Western Railroad.

MODIFICATION OF ORDER

The Board of Public Utility Commissioners on July 7, 1938, ordered the Erie Railroad Company, Charles E. Denney and John A. Hadden, Trustees under Section 77, Act of Congress Relating to Bankruptcy, and New York, Susquehanna and Western Railroad Company, Walter Kidde, Trustee under Section 77, Act of Congress Relating to Bankruptcy, to alter certain crossings known as Wagaraw Road and Washington Avenue, in the Borough of Hawthorne, County of Passaic, State of New Jersey, in accordance with a plan attached to said Order, which Order set the time for the beginning and completion of the work as September 1, 1938, and August 31, 1939, respectively.

The Trustees of the Erie Railroad Company and the New York, Susquehanna and Western Railroad Company have applied for an extension of time for beginning and completing the work and the Board, after public hearing, having considered the evidence in support of the applications, finds that the extension of time requested is reasonable and proper. Now, therefore, the Board

HEREBY ORDERS AND DIRECTS that its Order of July 7, 1938, shall be and the said Order is hereby modified so that the Erie Railroad Company, John A. Hadden and Robert E. Woodruff, Trustees under Section 77, Act of Congress Relating to Bankruptcy, and New York, Susquehanna and Western Railroad Company, Walter Kidde, Trustee under Section 77, Act of Congress Relating to Bankruptcy, shall begin the actual work of construction required in the performance and execution of said Order on or before the 1st day of June, 1940, and continuously carry on same thereafter and complete all of the work required to be done within twelve (12) months thereafter, or by the 31st day of May, 1941. The Order in all other respects to remain as previously determined.

Dated, November 30, 1939.

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FURTHER MODIFICATION OF ORDER

Robert E. Woodruff and John A. Hadden, Trustees in Bankruptcy of the property of the Erie Railroad Company, and Walter Kidde, Trustee in Bankruptcy of the property of the New York, Susquehanna and Western Railroad, petition the Board for dismissal or an indefinite postponement of the Board's Order of July 7, 1938, which directed the Erie Railroad Company, Charles E. Denney and John A. Hadden, Trustees; The Paterson and Ramapo Railroad Company; and the New York, Susquehanna and Western Railroad Company, Walter Kidde, Trustee, to alter certain crossings known as Wagaraw Road and Washington Avenue, in the Borough of Hawthorne, County of Passaic, State of New Jersey, in accordance with the plan attached to said Order.

A Modification of Order, dated November 30, 1939, directed that the actual work of construction begin on or before the first day of June, 1940, and that all of the work required to be done be completed by the thirty-first day of May, 1941.

At a public hearing on the petition of the Trustees, the attorney for the Trustees of the Erie Railroad Company stated that the Railroad Company did not desire a rescission of the Board's Order if an indefinite postponement for starting of work could be granted. No opposition was offered to this course and the attorney for the Borough of Hawthorne concurred in the request for indefinite postponement.

While the Board is entirely familiar with the financial status of the Erie Railroad Company, which is now in process of reorganization, it does not seem advisable to grant postponement in the form requested. The Board will, however, postpone the effective dates for the starting and completion of the work to May 1, 1942 and April 30, 1943, respectively.

The Order in all other respects will remain as previously determined.

Dated, February 27, 1941.

FURTHER MODIFICATION OF ORDER

The Board of Public Utility Commissioners, on July 7, 1938, ordered the Erie Railroad Company and the New York, Susquehanna and Western Railroad Company to alter certain crossings

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of the Railroad Companies at grade known as Wagaraw Road and Washington Avenue, in the Borough of Hawthorne, County of Passaic, State of New Jersey, in accordance with the plan attached to the said Order. Construction was ordered to start on September 1, 1938. Subsequent modifications of this Order were dated November 30, 1939, and February 27, 1941, which latter modification provided that the work be started May 1, 1942, and be completed April 30, 1943.

Applicants, Erie Railroad Company and Walter Kidde, Trustee of the property of the New York, Susquehanna and Western Railroad Company, now requests an extension of time for beginning the work to June 1, 1943 and the completion thereof to May 31, 1944.

At the hearing counsel for applicants represented to the Board that because of war priorities materials necessary for the project cannot be obtained. For that reason the application, which was not opposed, will be granted. The other reasons urged for the extension have not been and need not now be considered.

Because of war priorities, the Board

HEREBY ORDERS AND DIRECTS that its Order of July 7, 1938, shall be and the said Order is hereby modified so that the beginning date of the actual work of construction is set for June 1, 1943, and the date of completion May 31, 1944, unless in the meantime, for good cause shown, after hearing upon notice, said beginning date may be advanced. The Order in all other respects to remain as previously determined.

Dated, May 28, 1942.

FURTHER MODIFICATION OF ORDER

The Board of Public Utility Commissioners, by Order dated July 7, 1938, directed the Erie Railroad Company and the New York, Susquehanna and Western Railroad Company to alter certain crossings of the Railroad Companies at grade known as Wagaraw Road and Washington Avenue, in the Borough of Hawthorne, Passaic County, New Jersey, in accordance with the terms of said Order and plan attached thereto. This Order was subsequently modified on November 30, 1939, February 27, 1941, and May 28, 1942, which last modification directed the Railroad Companies to begin the actual work of construction on June 1, 1943, and to complete the work by May 31, 1944.

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The Erie Railroad Company, by petition dated April 16, 1943, and Henry K. Norton, Agent of the Court and Executive Officer of the New York, Susquehanna and Western Railroad Company, by petition dated April 17, 1943, request a further modification of the Board's Order to postpone the time for eliminating the above mentioned grade crossings.

In support of this request Counsel for the petitioners represented to the Board at the hearing that war time restrictions prevent the construction of any projects for elimination of grade crossings at the present time.

The Board of Public Utility Commissioners, therefore, recognizing that it is impossible to obtain labor and material for the elimination of these grade crossings,

HEREBY ORDERS AND DIRECTS that its Order of July 7, 1938, shall be and the said Order is hereby modified so that the Erie Railroad Company and the New York, Susquehanna and Western Railroad Company shall begin the actual work of construction in the performance and execution of said Order on or before July 1, 1945, and shall complete the work within twelve (12) months thereafter or by June 30, 1946, unless in the meantime, for good cause shown, after hearing upon notice, said beginning date may be advanced. The Order in all other respects to remain as previously determined.

Dated, May 26, 1943.

No. 2206

In the Matter of the Application of Century Transit Company to Vacate Board's Decision of September 26, 1934, Insofar as It Approves Transfer of Consents from Century Transit Company to Public Service Coordinated Transport.

Norman Heine, for Century Transit Company; *Charles S. Straw,* for Public Service Coordinated Transport.

BY THE COMMISSION:

As the title indicates, this is an application to vacate the Board's decision dated September 26, 1934, approving the transfer of municipal consents from the Century Transit Company to Public

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Service Coordinated Transport. The decision, which it is now sought to rescind, approved of municipal grants to Century Transit Company from the City of Camden and Township of Haddon for the operation of three (3) autobuses between Camden and Gloucester Heights over the following route:

> "Beginning at Market Street Ferries, Camden, thence via Federal Street, Broadway, Morgan Boulevard, to Yorkship Square, thence via Alabama Road, Black Horse Pike and Nicholson Road to East Gloucester Railroad Station; returning via same route to Broadway, and Market Street, thence via Market Street to Market Street Ferries, Camden."

On January 31, 1934, Gloucester Heights Bus Company, Inc., applied to the Board for transfer of the municipal consents to it from the Century Transit Company. The usual practice is that the company to which the permits were issued files the application for permission to transfer. After the hearing, the Board declined to grant the application and dismissed the petition on September 26, 1934, for reasons, among others:

> "The record shows that the Century Transit Company has applied for the transfer of municipal consents heretofore granted it to the Gloucester Heights Bus Company, Inc. It further appears that there is on record an unsatisfied judgment against the Century Transit Company for approximately $9,000 and that the said judgment may be a lien upon the equipment, as well as the franchises sought to be transferred in this proceeding.
>
> "The present application seems to be an attempt to evade the judgment. The petition is, therefore, dismissed."

It appeared at the hearing that the Gloucester Heights Bus Company, Inc. filed its certificate of incorporation (the certificate bears an acknowledgment of June 1, 1933) in the Clerk's office of Camden County, January 31, 1934, and in the office of the Secretary of State on February 2, 1934. It will be noted that at the time of the filing of the petition with the Board (January 31, 1934), the Gloucester Heights Bus Company, Inc. had not filed its certificate in the office of the Secretary of State. The testimony at that hearing disclosed that on January 4, 1934, twenty-seven days before the filing of the certificate of incorporation of the Gloucester Heights Bus Company, Inc., in the office of the County Clerk in Camden County, a judgment in the amount of Nine Thousand Dollars ($9,000) had been recovered in the Camden County Circuit Court against the Century Transit Company by Stanislaw Kasprzak, administrator ad pros of the Estate

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of John Kasprzak, deceased, as result of the negligent operation of a Century Transit Company autobus, causing the death of John Kasprzak.

The testimony disclosed further, that the judgment had not been paid by the Century Transit Company nor by the insurance company whose policy had been filed by this Board in accordance with the statute, because the insurance company, to quote the record, "folded up." It further appeared that the Century Transit Company owned four (4) buses; that one (1) of the buses had been condemned by the Board and that the other three (3) had been repossessed by the vendor because of the Century Transit Company's failure to make payments. Subsequently, the vendor leased three (3) buses to the Century Transit Company. Therefore, the latter company's sole interest in the equipment operated by it at that time was that of a lessee. On that record, the Board dismissed the petition of the Gloucester Heights Bus Company, Inc. for approval of the transfer to it of the local consents held by the Century Transit Company.

Shortly after the dismissal of the application, Gloucester Heights Bus Company, Inc. applied for a rehearing. That application was dismissed on March 22, 1934.

While the original application of the Gloucester Heights Bus Company, Inc. was before this Board, execution was issued on the judgment mentioned above and recovered against the Century Transit Company. On June 8, 1934, the local consents held by the Century Transit Company were sold under the execution by the Sheriff of Camden County and purchased by one Nathan Blank, who transferred his interest to Public Service Coordinated Transport, to which Company a sheriff's bill of sale was delivered on June 13, 1934. The writ of fieri facias directed the sheriff to sell, "all the right, title and interest, credits, moneys and effects, goods and chattels, lands and tenements, more particularly all the right, title and credits which the Century Transit Company may have on the franchise to operate buses between Camden and Gloucester Heights, now in the hands of the Century Transit Company, and the municipal consents of the City of Camden, and the Township of Haddon." * * * "Seized as the property of Century Transit Company taken in execution at the suit of Stanislaw Kasprzak, Administrator ad pros of Estate of John Kasprzak, deceased."

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The right, title and interest of the Century Transit Company was sold to the said Nathan Blank for the sum of Nine Thousand Five Hundred Dollars ($9,500) to satisfy an execution of Nine Thousand One Hundred Dollars and Fifty-two Cents ($9,100.52). In the regular course, the Sheriff of Camden County executed a bill of sale to the said Nathan Blank for all the right, title and interest of the Century Transit Company, which interest in fact, consisted only of the title to the municipal consents of the City of Camden and Township of Haddon. Upon receipt of the transfer from Nathan Blank the Public Service Coordinated Transport on the 11th day of June, 1934, applied to the Board for formal approval of the transfer of the municipal consents owned by the Century Transit Company and sold under execution by the Sheriff of Camden County. The Board, being satisfied that sufficient funds had been raised by the execution sale to pay the judgment and that the Public Service Coordinated Transport was financially responsible to continue the operation (of which fact the Board was not satisfied so far as the Gloucester Heights Bus Company, Inc. is concerned) approved the transfer of the local consents from the Century Transit Company to the said Public Service Coordinated Transport. This application was not opposed.

This recital describes the various proceedings before the Board which are necessary to understand the purport of the present application.

Within a short time after the Board's approval to the Public Service Coordinated Transport, the Century Transit Company filed a complaint in the Court of Chancery, 103/417, against Public Service Coordinated Transport, Nathan Blank, Stanislaw Kasprzak, Administrator ad pros of the Estate of John Kasprzak, deceased, to restrain the Public Service Coordinated Transport from "taking possession of its automobile bus line," until the further order of the Court and to set aside the Sheriff's sale. The parties to the litigation, by stipulation, "consented that a decree be entered in favor of the complainant, in such form as shall seem proper to the Court." Upon a consideration of the matter, the Court determined "for the reasons set forth in the bill of complaint, the said alleged or attempted sale by the Sheriff of Camden County of the said bus franchise was null and void," and directed "the defendant, Public Service Coordinated Transport, to forthwith deliver to the said Sheriff of Camden County, the said at-

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tempted bill of sale, upon the said Sheriff thereupon paying to the Public Service Coordinated Transport, or its solicitor therein, the sum of Nine Thousand Five Hundred Dollars ($9,500) paid by the Public Service Coordinated Transport to the said sheriff for the purchase price of the said property."

It appears that the Sheriff of Camden County repaid to the Public Service Coordinated Transport Company the sum of Nine Thousand Five Hundred Dollars ($9,500) and that the Public Service Coordinated Transport returned to the Sheriff of Camden County the Bill of Sale issued by him to it. In other words, the Court of Chancery set aside the sale.

Title to the said local consents, therefore, is now legally lodged in the Century Transit Company, although by virtue of the statute and the orders of the Board, the right to operate the buses is in the Public Service Coordinated Transport.

The application to re-transfer such consents to the Century Transit Company was not opposed. Century Transit Company is now in possession of and operates the line, having filed as required by law, an insurance policy issued by the American Fidelity and Casualty Company in Richmond, Virginia, expiring October 22, 1940. It would seem, therefore, that this application to transfer is a mere formality. That, however, is not the fact.

In *Hart* vs. *Seacoast Credit Corporation, et al.,* 169 Atl., 648; the Court held that a "consent" or franchise to operate autobuses under an act concerning autobuses and their operation, P. L. 1926, page 219 and amendments, may be levied upon and sold on execution but the sale is subject to approval by the Board of Public Utility Commissioners.

> "Prior to approval by the Commissioners, the purchaser has no title, legal or equitable, in the franchise, even though he has paid the purchase price and the seller has executed and delivered documents of title. The purchaser has only the right to apply for approval. If and when approval is granted, title then vests without further action by the parties. Application for approval should be promptly made and vigorously prosecuted, especially in the case of an execution sale, since after the sale and before the approval, the execution debtor has little incentive to serve the public, and the purchaser has no title which permits him to operate; meanwhile, the public must be inconvenienced."

The Board was not a party to the Chancery proceedings. The decree does not and could not order us to rescind our decision.

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In the course of the opinion filed January 25, 1935, 117 Eq., 520, the Court said:

> "Public Service Coordinated Transport filed an application with the Board of Public Utility Commissioners of the State of New Jersey, requesting approval of the sale, which, pending the proceedings in this case, has been approved by the Commissioners."

It is only fair to observe that as stated above, the Board was not a party to the Chancery action nor did it have notice of the pendency of the proceedings in the Court of Chancery. The Court said further:

> "The Board of Public Utility Commissioners did not have jurisdiction to pass upon the validity of the sheriff's sale."

The Board did not pass upon the validity of that sale but assumed that the "administrative act of the Sheriff was legal and valid." It is not to be assumed that a Sheriff would commit an illegal or invalid act.

A statement of the facts was deemed advisable as a basis for the Board's approval of the application which is hereby granted.

Dated, February 7, 1940.

No. 2207

In re Rules of All Railroads Governing the Issuance of 46-Trip Monthly School Tickets Between Points in New Jersey and Complaint of Banford Academy of Hair and Beauty Culture of Refusal Under Existing Rules to Sell Such Tickets to Students of Said School.

E. J. Harrington, Esq., for Trunk Line Association; *Homer Zink, Esq.,* for Banford Academy; *David M. Malovany, Esq.,* for Wilfred Academy; *Norman Potter, Esq.,* for Casey Jones School of Aeronautics.

BY THE COMMISSION:

The Banford Academy of Hair and Beauty Culture complained to the Board that certain of the railroads refused to sell 46-trip monthly school tickets to students at said school; that said tickets were sold to other similar schools with a like program of instruction; that there was a want of uniformity in practice of the railroads under said rules and that some schools were consequently given an advantage over others and that unjust and unreasonable preferences and discriminations result.

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The railroads, while this complaint was under investigation and pending, submitted for approval new rules of *all railroads* governing the issuance of 46-trip monthly school tickets between stations in New Jersey.

Hearing was had on the rules submitted and on the complaint of Banford Academy. The two matters are considered by the Board as merged. The existing rules are as follows:

> "Scholars' tickets are issued to pupils, without regard to age, who are in attendance at a public or private school or academy, upon presentation of a certificate, form ....., correctly filled in and signed by the principal or head of the school. They will not be sold to pupils attending dancing, swimming, riding, dressmaking, cutting or fitting, typewriting, stenographic or similar forms of schools, nor to pupils of music teachers, art studios or institutions of a like character for training in a single branch, mechanical, musical, or otherwise, nor to pupils attending business or commercial colleges, except on presentation of certificates setting forth specifically the fact that the holder is pursuing an ordinary English or academic course of study. This may be either an exclusive course, or pursued in connection with the business course. Scholars' tickets will not be sold to teachers or instructors."

The proposed revised rules are as follows:

> "46-trip monthly school tickets will be issued to pupils under 21 years of age, for intrastate trips, who attend a public or private school or academy and pursue a general educational course.
>
> "46-trip monthly school tickets will also be issued to pupils attending business schools, provided such pupils are pursuing a general educational course which may be either an exclusive course or pursued in connection with the business course.
>
> "46-trip monthly school tickets will be issued to students acting as subteachers under the supervision of State Normal Schools or State Teachers Colleges, as a part of their training course in connection with which they receive no compensation.
>
> "To obtain 46-trip monthly school tickets, certificate form ....., correctly filled in and signed by the principal or head of the school, certifying that the applicant whose name appears thereon is pursuing a general educational course, must be presented to ticket agents.
>
> "46-trip monthly school tickets *will not* be issued to pupils attending dancing, swimming, riding, dressmaking, cutting or fitting, stenographic, beauty culture, or similar forms of training schools, nor to pupils of music teachers, art studios, or institutions of a like character, mechanical, musical or otherwise."

The existing rules, with some variations not here important, are common to all the railroads except the Erie Railroad. The monthly school ticket, valid for 46 rides and good for the calendar month provided for by these rules has been issued for some forty or forty-five years. A mere reading of the rule indicates that it is ambiguous.

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What is a school of "similar form" to a "dancing, swimming, riding, dressmaking, cutting or fitting, typewriting, stenographic" school?

What are "business or commercial colleges"?

What is the ordinary "English or Academic" course, especially when it may be "either an exclusive course, or pursued in connection with the business course"?

What "institutions" are of "like character" to "music teachers (or) art studios" for "training in a single branch, mechanical, musical or otherwise"?

To what does the exception as to pursuing an ordinary English or Academic course apply?

It is not strange that this ambiguity in the rules resulted in one construction by some railroads and another construction by other railroads and in some instances apparently conflicting constructions by the same railroad.

Benjamin D. Branch, testifying for the railroads, said, referring to the existing rules: "It has been in effect for about forty years, but during this time it has been subjected to various interpretations, some railroads looking at it possibly differently than others. It has been handled by a number of agents, employees, etc. during that time and it has been interpreted differently by some of the railroads." (page 5).

He further testified: "Q. Then as time went on some railroads added institutions" (to their list of institutions whose pupils were entitled to this ticket) "of their own volition?" * * * "A. That is what I had in mind, Mr. Maybury, when I talked about the different interpretations that some railroads have put upon the one rule." * * * "Q. And we have the situation today of the Delaware, Lackawanna & Western Railroad recognizing schools and institutions that the Central Railroad and other railroads do not?"

"A. That is a fact."

The Pennsylvania Railroad refuses to recognize the Banford Academy as entitled to the privilege of the rule.

The Delaware, Lackawanna & Western Railroad, on the other hand, granted it the privilege.

The Academy is subject to regulation by the State. Regulation is exercised through the State Board of Beauty Control and *the State Department of Education.*

A course in English formulated and given by a duly qualified instructor is now a part of its program.

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Practice establishes that the word "college" in the present rules, is not restricted to an institution offering work only beyond the high school level. It shows that the word is used to extend to schools irrespective of the level of work offered by them.

The Board concludes that within these rules Banford Academy is a "business or commercial" college and that it includes an ordinary English or Academic course of study, as construed in practical applications of these rules.

The Board concludes that Banford Academy is not a "similar form of school" to a "dancing, swimming, riding" etc. school, and that it is not of like character to "music teachers or art studios."

The Board therefore concludes that the pupils at Banford Academy are entitled to "scholars' tickets" under the present rules.

The Board cannot approve the proposed revised rules.

Some of the ambiguities in the present rules are continued.

"Business Schools" are undefined. The reason for distinguishing between a business school and a vocational, industrial or agricultural school is not apparent. The State provides and has brought within the sphere of public education, vocational, industrial, and agricultural training.

It is true that under the proposed rules one body, the Trunk Line Association, will act in interpretation.

However, rules should be so framed as to reduce the need of interpretation to a minimum and remove as far as possible grounds of misunderstanding.

The rules submitted fail in this.

The Board therefore cannot approve, but must disapprove the Revised Rules as submitted.

In conclusion the Board notes that the Revised Rules are not offered on behalf of the Erie Railroad because that road now has "a 46-trip monthly commutation ticket between their stations, which may be purchased by any person and is not confined to scholars." (page 6).

While there is no evidence before the Board bearing upon the subject, the Board suggests that the railroad carriers are suffering a continuing loss of passenger traffic to other types of carriers and that the issuance of this type of ticket may instead of further decreasing passenger revenue, attract such business from other means of transportation to such an extent as to at least maintain passenger revenue.

Dated, February 7, 1940.

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No. 2208

In the Matter of the Application of De Luxe Coach Service, Inc. for Approval of a Lease Between It and the Shore Coach Lines, Inc.

James F. X. O'Brien, for the Petitioner; *Joseph S. Farrell,* for Rollo Transit Corporation.

BY THE COMMISSION:

This is an application by De Luxe Coach Service, Inc. for the approval by this Board of a certain lease between it and another company known as Shore Coach Lines, Inc. Application is brought pursuant to title R. S. 48:3-7.

The lease is dated May 13, 1936 and purports to expire on September 26, 1940, although under the terms of the lease Shore Lines is only obligated to operate "from the 15" day of May *in each year* until the 25th day of September, inclusive.

The approval of this Board under the statute was not sought until August 30, 1939, over three years after its execution. This is sought to be explained on the theory that "it was a matter of the hiring of equipment." Assuming this to be so, the lease itself provides that "subject to the approval of the Board of Public Utility Commissioners, the party of the first part does lease unto the party of the second part for and during the term of this agreement and lease the right of the party of the first part to so operate omnibuses."

The De Luxe Coach Service, Inc., is not possessed of any franchise rights along the route in question, viz., between Paterson and Asbury Park, hence it has to depend on the franchise rights of the Shore Coach Lines, Inc.

Under the statute a public utility is expressly prohibited from making a lease of its franchise right, privileges or rights without the approval of the Board.

The policy of leasing franchise rights is one which the Board zealously guards. Under such a lease as is here proposed, the lessee, while carrying insurance indemnification as required by the Board, nevertheless is not the owner of the most valuable right, namely, the right to engage in such operation.

Aside from this, the testimony in this case clearly shows that the operation of De Luxe did not render adequate or proper service to the public. So true is this that the owner of the term-

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inal at Asbury Park, through his agent, stated "that the same operation will not be tolerated in our terminal next year."

Although the lease is supposed to be for a period of years, by its very terms it is evident that the service to be rendered was purely a seasonal service.

Under all the circumstances of this case as adduced by the evidence, the Board does not believe nor can it find that the lease in question is in the public interest. Therefore, the application for approval is denied. The lessor must take notice of this determination and terminate the use of its franchises by the lessee.

Dated, February 15, 1940.

No. 2209

In the Matter of the Application of Jersey Central Power and Light Company for Approval of the Execution of a New Indenture of Mortgage and the Issuance Thereunder of Thirty-Eight Million Dollars ($38,000,000) Principal Amount of Bonds and Five Million Three Hundred Thousand Dollars ($5,300,000) Principal Amount of Notes for Refunding Purposes.

Joseph F. Autenrieth, for the Applicant; *John A. Bernhard,* for the Board.

BY THE COMMISSION:

Jersey Central Power and Light Company (herein called Jersey Central), an operating utility subject to the jurisdiction of the Board, filed an application dated October 27, 1939, for authority (1) to make, execute and deliver an indenture of mortgage and deed of trust to City Bank Farmers Trust Company, as Trustee, (2) to issue thereunder thirty-nine million dollars ($39,000,000) principal amount of first mortgage bonds, four (4) per cent series due 1964, and (3) to issue three million two hundred twenty-five thousand dollars ($3,225,000) principal amount of serial notes with interest at about three and one-half (3½) per cent, and (4) to call for redemption its presently outstanding first mortgage gold bonds in the aggregate amount of forty-two million two hundred twenty-five thousand dollars ($42,225,000).

On March 18, 1940 Jersey Central filed an amended application by which (1) the principal amount of the proposed bonds was reduced from thirty-nine million dollars ($39,000,000)

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to thirty-eight million dollars ($38,000,000) and the coupon rate was lowered from four (4) per cent to three and three-quarter (3¾) per cent, and (2) wherein the proposed principal amount of serial notes was increased from three million two hundred twenty-five thousand dollars ($3,225,000) to four million eight hundred fifty thousand dollars ($4,850,000). Various other modifications were made as a result of negotiations between Jersey Central and the First Boston Corporation as the managing underwriter, both prior and subsequent to the date of the amended application, in the proposed principal amount of the bonds and notes, in the rates of interest to be paid and in the prices tentatively fixed for sale of the securities. Tentative "plans" setting forth these matters were filed informally with the Board.

A public hearing on the application as amended was held by the Board after appropriate notice on March 28, 1940, at which time the applicant submitted "Plan 6." (Exh. P-1) Under this latest plan, Jersey Central asks the approval of this Board and authority:

(1) To make, execute and deliver an Indenture of Mortgage or Deed of Trust, together with a First Supplemental Indenture, to City Bank Farmers Trust Company, as Trustee, to secure the First Mortgage Bonds proposed to be issued in the principal amount of thirty-eight million dollars ($38,000,000), Series 1965.

(2) To issue thereunder said First Mortgage Bonds in the principal amount of thirty-eight million dollars ($38,000,000), to be sold at not less than one hundred and one-half (100½) net to the issuer and to bear an interest coupon rate of three and one-half (3½) per cent.

(3) To execute and deliver a promissory note or notes in the total sum of five million three hundred thousand dollars ($5,300,000), payable as to principal in equal annual installments over a period of ten (10) years, at an interest rate of three and one-eighth (3⅛) per cent annually, and to be sold at not less than par.

(4) To call for redemption the outstanding First Mortgage Gold Bonds of applicant, known as Series B and Series C, in the aggregate principal amount of forty-two million two hundred twenty-five thousand dollars ($42,225,000), plus redemption premium and accrued interest.

The exact amount of notes proposed to be issued depends upon the cash requirements in connection with the transaction, and, therefore, upon the price to be received for the bonds. According to applicant's proposal the principal amount of notes will be reduced by one hundred ninety thousand dollars ($190,000) for each increase of one-half point in the price of the bonds over one hundred and one-half (100½) as the minimum price to applicant.

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The net proceeds from the sale of the said thirty-eight million dollars ($38,000,000) principal amount of first mortgage bonds and five million three hundred thousand dollars ($5,300,000) principal amount of serial notes are to be applied toward the redemption of all the presently outstanding First Mortgage Gold Bonds of the applicant, comprising Series B, five (5) per cent bonds and Series C, four and one-half (4½) per cent bonds, in the aggregate principal amount of forty-two million two hundred twenty-five thousand dollars ($42,225,000). The proofs disclose that the estimated receipts and disbursements incident to the proposed transaction are as follows:

	Estimated Receipts	*Estimated Disbursements*
Proceeds from sale of bonds (par)	$38,000,000	
Premium on bonds of ½ point	190,000	
Proceeds from sale of serial notes (par)	5,300,000	
Funds required to retire outstanding 4½ per cent bonds (par)		$32,000,000
Premium payable of 4 points		1,280,000
Funds required to retire outstanding 5 per cent bonds (par)		10,225,000
Premium payable of 1¾ points		178,938
Duplicate interest		162,604
Other expenses		168,320
Total	$43,490,000	$44,014,862
Treasury cash required	524,862	
	$44,014,862	$44,014,862

The present application is filed under R. S. 48:3-9 (1937), which provides that no public utility shall issue any bonds or other evidences of indebtedness until it shall have first obtained authority from the Board. The Board is required by statute to give its permission if it finds that the proposed issue is in accordance with the law and if it approves its purposes. The word "purpose" in this connection "must be accorded a meaning which will enable the Board to investigate not only the object of the proposed bond issue but the conditions under which it is to be made, and the entire environment of the company with its antecedents, and the prospective opportunities it may encounter in view of its past history, to meet the financial demands that the proposed burden is likely to impose upon it." A duty is thus imposed upon this Board to investigate "not only the legality but

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practically the public policy and equity of a proposed bond issue, which in its far-reaching effects concerns not alone this prosecutor and its bond holders, but the welfare of the investing community, and the public conscience of the State, upon the approval of whose delegated agency the bonds will be offered for sale." *Interstate Telephone and Telegraph Company* vs. *Board of Public Utility Commissioners,* 86 Atl. 363, 84 N. J. L. 184 (1913).

The application now before the Board presents the following questions for consideration:

1. Whether or not the purposes of the proposed issuance of bonds and notes and their terms and conditions are appropriate in the public interest in view of the effect on the capitalization represented by outstanding securities, the annual return required for support of the debt capital, and the cost of additional capital which may be required in the future for extensions and improvements.

2. Whether or not the prices at which the bonds and notes are tentatively proposed to be sold are reasonable.

3. Whether or not the underwriting commission and other estimated expenses expected to be incurred by the Company are reasonable.

I. THE APPLICANT AND ITS BUSINESS

Jersey Central Power and Light Company, a New Jersey corporation, organized on March 27, 1925, is engaged in the business of manufacturing and distributing electricity and gas in various municipalities of New Jersey. It was formed by means of the merger of seven predecessor electric and gas companies, four of which predecessors were themselves the result of mergers or acquisitions of twelve other underlying companies. Since its formation, Jersey Central has acquired six municipal electric properties and two private companies, including Eastern New Jersey Power Company. Eastern New Jersey Power Company, acquired as of April 30, 1931, has been formed by the merger of two and the acquisition of seven underlying companies.

During 1939, Jersey Central supplied electric service to approximately 108,000 customers (monthly average) in 129 communities with an aggregate population of about 337,000 as of 1930. It supplies gas service to approximately 50,000 customers (monthly average) in 84 communities, with an aggregate population of about 201,000 as of 1930. For the calendar year 1939 about 81.9 per cent of the revenue from utility operations was derived from electric operations and 18.1 per cent from gas operations. Revenue from electric sales is tending to increase, while revenue

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from gas sales is stable or shows a long run tendency toward decline.

Jersey Central disclaims the exercise of any effective control over it by any other company. It has outstanding 1,053,700 shares of common stock, which is the only class of stock of the company which has voting rights. The New York Trust Company holds 712,411 shares of this common stock, as trustee of the bankrupt National Public Service Corporation, as the only present security for the debentures of National Public Service Corporation. The largest proportion of such debentures, or certificates of deposit representing such debentures, are owned by companies in the Associated Gas and Electric Company System. The remaining 341,350 shares (exclusive of directors' qualifying shares) of the company's common stock were acquired in 1935 by N. Y. PA. N. J. Utilities Company and were transferred in 1938 to New Jersey Power and Light Company, a subsidiary of N. Y. PA. N. J. Utilities Company in the Associated System.

Jersey Central has filed an application with the Securities and Exchange Commission, originally in November 1935, pursuant to Section 2 (a) (8) of the Public Utility Holding Company Act, seeking an order of the Commission to the effect that it is not subject to the jurisdiction of that Commission as a subsidiary of any company or group of companies in the Associated System. The hearings on this exemption application were held in August and September, 1939, the report of the trial examiner was filed on November 29, 1939, oral arguments were heard on January 3, 1940, and on February 20, stipulations were agreed upon that entered into the record additional information in regard to the changed status of the Associated Gas and Electric Company. The Securities and Exchange Commission has not as yet issued its opinion and order. For this reason, Jersey Central is not yet informed as to whether an application to the Securities and Exchange Commission under Section 6 (b) of the Holding Company Act is required. Jersey Central has filed with the Securities and Exchange Commission the Registration Statement required under the Securities Act of 1933 but has advised the Commission that no securities will be offered to the public under that registration until the status of the company under the Holding Company Act has been determined. Therefore, the proceeding before this Board and the testimony as to the prices at which the securities might be sold are based upon the expectation that the opinion and

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order of the Securities and Exchange Commission on the exemption application shortly will be available.

II. UTILITY PLANT

The utility plant accounts of Jersey Central, segregated between the Electric and Gas Departments, together with the related depreciation reserves, are summarized below from the balance sheet as at December 31, 1939:

	Electric Department	*Gas Department*	*Total*
Utility plant book cost	$59,964,464	$17,341,972	$77,306,436
Depreciation reserve	2,827,110	1,843,973	4,671,083
Net utility	$57,137,354	$15,497,999	$72,635,353
Percentage relation of reserve to gross utility plant	4.7	10.6	6.0

The uniform system of accounts prescribed by the Board's Order dated November 10, 1937, requires that all electric utility companies in New Jersey reclassify their utility plant and determine original cost to the person first devoting the property to public service. This original cost study is under way but no tentative or preliminary figures as to Jersey Central are at present available to the Board.

It is beyond question, however, that the present book cost of the utility plant is substantially in excess of its original cost. There is reason to believe that the appreciation due to revaluations of utility plant recorded on the books of Jersey Central and its predecessors since 1922 aggregates at least $13,000,000. The indentification of "write-ups" in approximately this amount does not create, however, a supposition that the restatements of book cost were illegitimate, improper or unreasonable at the time when made. In fact, the past recognition of appreciated values for accounting purposes is implied by the decision of the Supreme Court of New Jersey in *Passaic Consolidated Water Company* vs. *Board of Public Utility Commissioners,* 139 Atl. 324, 5 N. J. Misc. R. 1078, (Aff. 141 Atl. 921, 104 N. J. L. 666), to the effect that in 1925 a utility had the right to record on its books "the full value of its property." The aggregate amount of "write-up" represents a variety of accounting transactions, including write-up to acquisition cost of property acquired in the process of

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integration and write-up to engineering appraisals or to "present fair value." Further, the mere fact of the existence of so-called "write-ups" is not in itself an indication of a lack of value at the present time.

It is unnecessary for the Board in the present proceeding to determine the exact original cost, acquisition appreciation, or "write-up" of the utility plant of the applicant or to consider whether or not all amounts now recorded on the books of Jersey Central represent assets of continuing value. The bonds and notes proposed to be issued by the applicant are solely for the purpose of refunding outstanding higher interest bearing bonds and paying expenses necessarily incurred in connection with such a transaction. The effect on applicant's capital structure and the reduction in annual requirements of fixed income securities will be considered subsequently. Applicant's bonds in the principal amount of $42,225,000 are now outstanding in the hands of the public and denial of the application on the ground of existing over-capitalization merely would deny to Jersey Central the available savings in annual interest requirements and the opportunity over a period of time to bring its debt capitalization into a better relationship with its utility plant.

If the outstanding common stock of Jersey Central represents an insufficient equity, such a deficiency will not be increased and ultimately may be partially corrected as a result of issuance of the refunding bonds under the terms proposed and the conditions which will be imposed by the Board in its certificate of approval. The advantages of redemption of the present bonds and refunding at lower interest rates are the same regardless of who holds the common or preferred stock or the investment represented. Any inadequacy of investment support for any of the outstanding securities of Jersey Central will not be considered by the Board to warrant disapproval of the application, because any such inadequacy already exists and will be affected only beneficially by the proposed refunding.

This conclusion is reached by the Board after careful consideration of the public interest involved in this application. The Electric Department of Jersey Central is a growing utility and will find it necessary to make expenditures in the near future for extensions and improvements. The Board believes that the interest of both consumers and investors require that it adopt a policy which will protect in reasonable degree the credit position of the

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Company so that in the future it will be able to obtain at reasonable costs the additional investment capital which it will require.

III. PROVISION FOR DEPRECIATION AND MAINTENANCE

The company's practice since 1931 in providing for depreciation has been to compute the amount to be charged against income by taking 15 per cent of annual operating revenues (exclusive of rents from electric property and inter-company revenues) and deducting therefrom the expense charged to maintenance. The company's practice has been in accordance with the formula contained in the old mortgage. Since January 1, 1938, certain replacements, which would have been charged to maintenance accounts under the accounting procedure followed by the company prior to that date, are now charged to the depreciation reserve, with the result that maintenance expense shows a tendency to decrease and the annual provision for depreciation to correspondingly increase. The increase in total provision for maintenance and depreciation shown by the following table results from the increase in operating revenues.

	1937	*1938*	*1939*
Maintenance	$1,028,034	$808,681	$761,251
Provision for depreciation	653,022	927,371	1,064,077
Total	$1,681,056	$1,736,052	$1,825,328
Balance of depreciation reserve at end of year	$3,847,506	$4,306,100	$4,671,083

In addition to the provisions for depreciation charged against income, the company made appropriations from earned surplus to the depreciation (retirement) reserve amounting to $750,000 in 1936 and $250,000 in 1937, in order to offset in part charges to the reserve occasioned by the abandonment of plants.

The net balance in the depreciation reserve has increased but slowly. Expressed as a percentage of book cost as at December 31, 1939, the reserve is 4.7 per cent for the Electric Department and 6.0 per cent for the combined utility plant and, on its face, is an inadequate provision to maintain the integrity of the investment or does not correspond to the depreciation materialized in the property.

Only since January 1, 1938, however, has Jersey Central been subject to the Board's requirement that it establish and maintain

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a depreciation reserve rather than a reserve to equalize retirements of its utility plant. The inadequacy of the depreciation reserve cannot be charged to any imprudent financial policies or practices of the present management of the applicant. During the period of control by National Public Service Corporation (prior to 1933) inadequate provision was made for retirements. Since the collapse of the holding company, the present management has restored the damage caused by failure of the holding company management adequately to provide for retirements. Since 1932 the company has retired numerous and important items of utility plant which were worn out in service or which were obsolete. Since practically no such property now remains on the books, the reserve for depreciation may be expected to increase in size much more rapidly than in the past. No common dividends have been paid since March, 1932 and the earnings available for dividends have been invested in large part in the development of applicant's property. The entire present balance of earned surplus is regarded by the Board as available to increase the adequacy of the depreciation reserve to the extent that prudence permits depletion of the surplus margin.

IV. EXISTING AND PROPOSED CAPITALIZATION

The capitalization (including surplus) of the applicant as at December 31, 1939, before and after giving effect to the proposed financing, is shown by Table 1, which assumes that the bonds are sold to net the company a price of 102.

The presently outstanding bonds in the total principal amount of $42,225,000 were issued under and secured by an Indenture of Mortgage dated February 2, 1925 and supplemental indentures thereto and pursuant to the certificates of approval of this Board heretofore granted as follows:

September 15, 1927, Series B	$2,500,000
September 6, 1928, Series B	225,000
September 11, 1929, Series B	3,200,000
April 9, 1930, Series B	600,000
March 18, 1931, Series B	3,700,000
June 17, 1931, Series C	32,000,000
	$42,225,000

The Series B bonds, maturing August 1, 1947, bear interest at 5 per cent per annum payable semi-annually on February 1, and August 1, and are subject to redemption call at any time upon 30

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days notice at 101 ¾, with accrued interest to the date of redemption. The Series C bonds, maturing on June 1, 1961, bear interest at 4½ per cent per annum payable semi-annually on June 1, and December 1, and are subject to redemption at any time upon 30 days' notice at 104, with accrued interest to the date of redemption.

It will be noted that the principal amount of bonds will be reduced from $42,225,000 to $38,000,000, and after giving effect to unamortized debt discount and expense the net bond capitalization will be decreased from $39,615,266 to $34,360,404 as of December 31, 1939 on the basis of sale at 102. The principal amount of total debt will be increased from $42,225,000 to $42,730,000, if the bonds are sold at 102, or to $43,300,000 if the bonds are sold at the minimum price of 100½ to the issuer. The net capitalization represented by debt securities will be decreased slightly, however, from $39,615,266 to $39,090,404, regardless of whether the sale is at 100½ or at 102 to the Company. This results from the fact that the amount of notes proposed to be sold at par will be decreased by $190,000 for each one-half point increase in the price paid by investors for the bonds.

No other change in the capitalization will result from the proposed financing. Therefore, the changes in the proportions of capital represented by debt securities, preferred stock and common stock are not significant.

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TABLE 1

JERSEY CENTRAL POWER AND LIGHT COMPANY

CAPITALIZATION AND CAPITAL STRUCTURE AS AT DECEMBER 31, 1939, BEFORE AND AFTER PROPOSED REFUNDING

	Actual		*Pro Forma (Sale at 102) (b)*	
Capitalization	*Amount*	*Per Cent of Total*	*Amount*	*Per Cent of Total*
Funded Debt				
First Mortgage, Series B, 5 per cent, due 8/1/47	$10,225,000	....	.....	....
First Mortgage, Series C, 4½ per cent, due 6/1/61..	32,000,000	....	.....	....
First Mortgage (New) 3½ per cent, due 3/1/65	.....	....	$38,000,000	50.2
Total Bond Capitalization	$42,225,000	55.4	$38,000,000	50.2
Less: Net Unamortized Debt Discount and Expense (a)	2,609,734	3.42	3,639,596	....
Net Bond Capitalization	$39,615,266	52.0	$34,360,404	45.4
Serial Notes, 3⅛ per cent..	.....	....	4,730,000	6.2
Net Debt Capitalization	$39,615,266	52.0	$39,090,404	51.6
Cumulative Preferred Stock (at par value) (c):				
7 per cent Series (70,845 shares)	$7,084,500	....	$7,084,500	....
6 per cent Series (69,623 shares)	6,962,300	....	6,962,300	....
5½ per cent Series (78,621 shares)	7,862,100	....	7,862,100	....
Total	$21,908,900	28.7	$21,908,900	28.9

(a) The amount of net unamortized debt discount and expense is deducted from total bond liability because it does not represent investment capital available as at the date of this *pro forma* statement.

(b) If the sale were at the minimum price of 100½, the face amount of serial notes would be increased to $5,300,000 and the net amount of unamortized debt discount and expense would be increased to $4,141,276. Therefore, the net book investment represented by bonds would be $33,858,724, or 44.7 per cent of total capitalization, and there would be no other change in the *pro forma* statement.

(c) After deducting par value of preferred stock reacquired.

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TABLE 1 (continued)

Capitalization	Actual		Pro Forma (Sale at 102) (b)	
	Amount	Per Cent of Total	Amount	Per Cent of Total
Common Stock Equity				
Common Stock, No Par Value (Stated Value of 1,053,770 shares)	$10,537,700	13.8	$10,537,700	14.0
Capital Surplus	757,924	1.0	757,924	1.0
Earned Surplus	3,436,948	4.5	3,436,948	4.5
Total	$14,732,572	19.3	$14,732,572	19.5
Total Capitalization ...	$76,256,738	100.0	$75,731,876	100.0

Several other balance sheet changes may be noted at this point. Cash as at December 31, 1939 would be reduced by $789,563, from $1,452,011 to $662,448, regardless of the price at which the bonds are sold by the Company. Unamortized debt discount and expense on the new bonds would be $1,789,862, in addition to $2,609,734 remaining from the bonds presently outstanding, and unamortized premium on debt would be $190,000 if the sale is at 100½, and $760,000 if the sale is at 102.

The Company proposes to account for unamortized debt discount and expense by amortizing in equal annual amounts over the unexpired life of the old bonds the amounts remaining on the books at the time of refunding, and amortizing the new debt discount and expense in equal annual amounts over the life of the refunding bonds. The Board approves this accounting treatment as reasonable and proper in the circumstances of this case.

V. REDUCTION OF DEBT CAPITALIZATION

The applicant proposes to issue and sell 3⅛ per cent promissory notes in the total sum of $5,300,000 principal amount, less $190,000 for each one-half point by which the mortgage bonds are sold at a price in excess of 100½ net, bearing the date March 1, 1940 and due as to principal in equal annual installments over a period of ten years from the date of issue. The annual payment of principal will be $530,000, and this amount will need to be available from income. This proposed reduction of principal amount of debt capitalization by $4,225,000 at the end of ten years

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is healthy and sound, will improve the capital structure of Jersey Central, and will bring the amount of debt capital into a more appropriate relationship with the earning capacity of the utility plant under accepted principles of rate making.

VI. REDUCTION OF ANNUAL DEBT CAPITAL REQUIREMENTS

Table 2 is the annual income statement for the year ended December 31, 1939, compared *pro forma* with the income statement which would have existed at the end of the year if the refunding had been effective. The interest savings amount to $435,863 on the basis of sale of the bonds at 100½ net, or $473,437 on the basis of sale at 102 net. This is a significant reduction from the present interest requirement of $1,951,250.

After adjustment for the effect on taxes, net income will be increased by about $354,700 if the bonds are sold at 100½, and by about $391,200 if 102 is realized and the amount of notes correspondingly reduced. If the principal amount of notes issued should be $5,300,000, the interest to be paid on the notes will be reduced annually by $16,562.50 as the result of retirement of note principal. With reference to the cash basis, including the requirement for payment of note principal, if the bonds are sold at 102 net the aggregate cash requirements of the Company for debt service will be practically the same as prior to the refunding transaction. On the basis of sale at 100½, the cash requirement for the first year will be greater by $74,375 and will decrease from this amount by $16,562.50 annually for ten years. Regardless of the price obtained for the bonds or the principal amount of the promissory note issue, the annual cash requirement after the tenth year will be $621,250 less than for 1939.

On the basis of sale of the 3½ per cent Mortgage Bonds at a price of 100½ to the Company, the effective cost rate to maturity would be 4.22 per cent and the effective cost rate for the total capital contributed by the bond and note holders would be 4.07 per cent. This represents a substantial decrease from the effective cost rate to maturity of 5.37 per cent experienced for the Series B and C Bonds now outstanding.

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TABLE 2

JERSEY CENTRAL POWER AND LIGHT COMPANY

COMPARATIVE INCOME STATEMENT BEFORE AND AFTER PROPOSED REFINANCING

YEAR ENDED DECEMBER 31, 1939

		Pro Forma (*Sale at 102*)	
	Actual	*Adjustments*	*Amounts*
Operating Revenue	$12,253,846	.....	$12,253,846
Operating Revenue Deductions:			
Expenses	$5,119,660	.....	$5,119,660
Depreciation	1,064,077	.....	1,064,077
Taxes	1,656,264	$82,559 (a)	1,738,823
Total	$7,840,001	.....	$7,922,560
Operating Income	$4,413,845	.....	$4,331,286
Other Income	(20,537)	.....	(20,537)
Gross Income	$4,393,308	.....	$4,310,749
Income Deductions:			
Interest on Long Term Debt	$1,951,250	($621,250)	$1,330,000
Interest on Serial Notes	.....	147,813	147,813
Amort. of Debt Discount and Expense	142,534	71,594	214,129
Amort. of Premium on Debt	.....	(30,400)	(30,400)
Taxes Accrued on Interest	41,500	(41,500)	.....
Other Interest Charges	18,019	.....	18,019
Interest Charge to Construction	(9,026)	.....	(9,026)
Misc. Income Deductions	13,187	.....	13,187
Total	$2,157,464	($473,742)	$1,683,722
Net Income	$2,235,844	$391,183	$2,627,027

(a) Increase in tax estimated as equivalent to 18 per cent of decrease in total amount of Income Deductions.

( ) Credit.

VIII. PROVISIONS OF THE PROPOSED INDENTURE OF MORTGAGE

The proposed bonds will be issued under and secured by a new Indenture of Mortgage to be executed by the Company to City Bank Farmers Trust Company, as Trustee, to be dated March 1, 1940. The indenture is to constitute a first mortgage lien upon substantially all real and fixed property presently owned by the

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applicant and is further to constitute a direct mortgage lien upon all after acquired property. Also, all outstanding securities of Lakewood Water Company will be pledged.

The new indenture provides for an initial issue of $38,000,000 principal amount of first mortgage bonds and permits additional bonds secured thereby to be issued from time to time subject to the approval of regulatory authority as required by law. These additional bonds may be issued in principal amount equal to (1) 70 per cent of net bondable value of property additions after July 31, 1939 (provided that if such additions are subject to a prior lien, the amount of prior liens is to be deducted from bonds otherwise issuable); (2) bonds or prior lien bonds retired or to be retired; (3) cash deposited with the trustee; but in (1) and (3) above, only if net earnings as defined for twelve consecutive months within fifteen calendar months preceding equal 2½ times annual interest on all outstanding debt of equal or prior rank, including the additional issue.

The draft of the First Supplemental Indenture dated March 1, 1940, provides that so long as any bonds of the 1965 series are outstanding, the Company will make expenditures for maintenance plus expenditures for renewals in an amount at least equal to the greater of (1) 16½ per cent of gross electric operating revenue plus 15 per cent of all other gross operating revenue as provided, or (2) $2,000,000; which percentages and amounts are subject to adjustments as provided.

The tentative Supplemental Indenture further provides that beginning March 1, 1951, there shall be set aside annually in an improvement fund one per cent of the aggregate principal amount of all bonds of the 1965 series outstanding at any one time during the year. It was testified at the hearing before the Board that consideration is being given to substitution of a sinking fund for the improvement fund. The representative of the principal underwriter expressed the opinion that a sinking fund which would actively reduce the amount of mortgage bonds from the eleventh to the twenty-fifth year of their life would be viewed by prospective purchasers of the bonds as advantageous.

The Company has agreed in the supplemental indenture that it will not, after December 31, 1939, pay dividends on common stock (other than in shares of common) or make any other distribution on capital stock or purchase or redeem capital stock in an amount in excess of 66⅔ per cent of earned surplus until there

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has been added to earned surplus as of December 31, 1939 an amount equal to all appropriations from earned surplus to depreciation or retirement reserve during the year ended December 31, 1940, and none thereafter if, as a result thereof, the accumulated aggregate amount of such dividends, disbursements and redemptions since December 31, 1939, exceeds the earned surplus accumulated subsequent to December 31, 1939, as provided.

VII. REASONABLENESS OF THE SECURITY PRICES

The applicant conformed to the Board's procedural requirement that it furnish affirmative proof of the reasonableness of the prices at which the securities are proposed to be sold and of the commissions proposed to be paid and that presentation of merely opinion testimony unsupported by objective data and without establishing the basis for such subjective opinion should not be regarded as affirmative proof.

The 3½ per cent bonds are proposed to be sold publicly at a minimum price of 102½, representing a yield to maturity of 3.35 per cent or at a more probable price of 104, representing a yield of 3.26 per cent. The minimum price to the public of 102½ was fixed in the application in view of the length of time likely to be required for the proceeding and the uncertainty as to the fluctuations of the bond market in the meanwhile.

Mr. George D. Woods, Vice President and Director of The First Boston Corporation, the principal underwriter, testified on behalf of the Company that the tentative price of 100½ net is "an absolute minimum" which the applicant might expect to realize on the basis of market conditions then existing, when it is in a position actually to sell the bonds. The witness further testified that, in his opinion, if the applicant could complete the transaction within a very few days the bonds would sell to yield 102 to the Company.

Mr. Woods testified in regard to yield at current market prices, call prices, times interest requirements earned, the provisions for maintenance and depreciation, the capital structures and other factors influencing investor appraisals of 20 public utility operating Company bonds which he considered comparable to the proposed first mortgage bonds of Jersey Central.

Mr. William C. Gilman, financial consultant and partner in the firm of Gilman and Hickey, also testified on behalf of the appli-

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cant as to the reasonableness of the proposed price. This witness said that neither he nor his firm has any affiliation or business connection with The First Boston Corporation. Mr. Gilman was of the opinion that a price of 102½ is the price which the public would be willing to pay for the proposed bonds and that 100½ net to the Company is a fair price.

In support of this opinion Mr. Gilman stated that he had studied the applicant's annual reports, Registration Statement and prospectus submitted to the Securities and Exchange Commission, and the proposed indenture of mortgage; that he had collected data of a financial and statistical nature bearing on the credit position of the applicant, had obtained the opinions of rating agencies, had analyzed the present holdings of the bonds and had obtained by personal inspection and from other sources information as to the business, property and operations of the Company. He presented testimony in regard to the general trend of the yields on utility Company bonds during recent years and submitted a tabulation, similar to that submitted by Mr. Woods, showing yield to maturity at current market prices of 22 recently issued utility operating Company bonds which the witness considered comparable to the proposed Jersey Central bond. It is of interest that twelve particular bonds appear in each of these two studies by different witnesses.

As a continuation of the study, the witness made an analysis of the indenture provisions for each of the 22 bonds, particularly the provisions governing sinking funds, maintenance and retirements, issuance of additional bonds and dividend restrictions.

The Board finds this testimony as to the price which the public probably would be willing to pay currently for the proposed mortgage bonds to be reasonably convincing.

It appears that while Mr. Gilman indicated that he did not rely on ratings in formulating his opinion, he used ratings as a "sort of mechanical sieve" to select those bonds which he considered as comparable with the proposed Jersey Central bonds, which carry a provisional "A" rating. All his 22 comparable bonds are rated "A" by Moody's except six, which are rated "Baa." It is possible that the "A" rating is not a precise measure of investor appraisal of the Jersey Central bonds, as indicated by the fact that from 1931 to 1935 yield at market prices of the outstanding Jersey Central bonds fluctuated intermediately between Moody's indices of yields on "A" and "AA" bonds. In 1935 the market prices

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of each of the two series of Jersey Central bonds went above the call prices and ceased to be a measure of investor opinion of the investment quality of these bonds.

Mr. Gilman expressed the opinion that times interest requirements earned is one of the most significant factors in influencing investor appraisal. On the basis of 1939 operating results, the interest requirement of the proposed 3½ per cent bonds was earned 3.3 times after depreciation and the witness considered this earnings position in arriving at his opinion as to reasonableness of the tentative price. He did not, apparently, attach any particular importance to the proceeding now in progress in regard to the reasonableness of the Jersey Central electric rates and the effect of possible rate reductions on times requirements earned.

The study presented by Mr. Woods shows that for 1938 the average revenue per kilowatt hour for residential electric sales was 6.34 cents in the case of Jersey Central and that the next highest average among the twenty comparable companies was 5.48 cents. Although the presence of a considerable proportion of seasonal business partially explains the relatively high charges for residential service in the Jersey Central territory, such a rate comparison commonly is regarded by investors as disadvantageous rather than favorable. The Board is of the opinion that the market for residential electric service in the territory of this Company is of such a character that decreases in net operating income, resulting from possible rate reductions will be recovered within a brief period of time. It probably is correct to conclude that such rate reductions would not have an adverse effect on the price which investors would be willing to pay for the bonds.

The 3⅛ per cent promissory notes are proposed to be sold to Central Hanover Bank and Trust Company at a price of 100 to the issuer. Mr. Gilman testified in regard to the prices to the public or to commercial banks, and the net prices realized, from the issuance during the recent past of short term securities by public utilities generally comparable to Jersey Central. The rates of cost to the issuers were found to vary substantially, from a minimum of 2.65 per cent to a maximum of 4.06 per cent. The witness was of the opinion that the negotiated rate of 3⅛ per cent is fair and reasonable.

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IX REASONABLENESS OF THE UNDERWRITER'S FEE AND THE EXPENSES

The Board also required evidence as to the reasonableness of the proposed spread of two per cent between the price to the Company and the price at which the bonds are to be sold to the public. The testimony in regard to this question was merely to the effect that a commission equivalent to two per cent has been customary in the case of bonds of this general quality.

The Board concludes that under the specific circumstances presented by the evidence in this case the proposed spread of two per cent is reasonable. In arriving at this conclusion, the Board recognizes various considerations, including continuation of the negotiations over a considerable period of time, the frequent revision of the refinancing proposal, the fact that the principal underwriter has been of material assistance to the Company in developing the present relatively desirable plan and the remaining uncertainty as to when the bonds actually may be sold. In the case of 173 bond financing transactions involving public sale during the five years ended with 1939, for which the prices to the underwriter and to the public are available to the Board, the spread was two per cent in a majority of instances. In fifteen instances the commission was less than two per cent, but in these instances the bonds had been assigned a higher rating as to quality and in thirteen of the fifteen instances the issuing company was a New England public utility.

The First Boston Corporation is the principal underwriter and representative of the 56 investment banking firms who have indicated their interest in participating in the underwriting. The spread of two per cent covers the commissions to be received by the bond dealers, compensation for the managers of the selling group and the underwriting group, reimbursement for the advertising and miscellaneous expenses incurred, and compensation for the commitment and risk involved in assuming the underwriting function.

The applicant estimates at $168,320 the expenses which it will incur in connection with the refinancing transaction, of which amount $68,320 had been expended up to March 1, 1940. It is understood that this amount of expense includes some accounting and legal expense which is in the nature of joint cost and might

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be allocated in part to other proceedings or general corporate purposes if a basis could be found for such allocation. The record does not indicate that the estimated expense amounting to $168,320 is unreasonable.

X CONCLUSIONS

The proposed issuance of 3½ per cent First Mortgage Bonds in the principal amount of $38,000,000 and the execution and delivery of a 3⅛ per cent promissory note or notes in the total sum of $5,300,000 or less, payable as to principal in equal annual installments over a period of 10 years, is found to be in accordance with law, and the purposes of such issuance of securities by Jersey Central are approved by the Board. The Board therefore finds and determines that the refunding of the applicant's outstanding First Mortgage Gold Bonds should be approved and authorized for the reasons that:

1. The redemption and refunding of the old bonds and the terms and conditions of the securities proposed to be issued are appropriate in the public interest in view of the effect upon (a) the capitalization represented by outstanding securities, (b) the annual return required for support of the debt capital, and (c) the cost of additional capital which may be required for future extensions and improvements.

2. The price of 102 net to the applicant, which it was testified could be realized if the applicant had the necessary approvals of this Board and the Securities and Exchange Commission, and the bonds could be sold within a few days from the hearing date hereof, is found to be reasonable and fair to the company with reference to the prices of comparable securities in the current bond market. The price at which the 3⅛ per cent promissory notes are proposed to be sold is fair to the company.

3. The Board also finds that the underwriting commission and the estimated expenses expected to be incurred by the company are reasonable.

The testimony shows that applicant has filed a registration statement with the Securities and Exchange Commission, as required by law, to enable it to issue the proposed new financing for the same purposes as herein stated, and that the applicant also is awaiting decision by the Securities and Exchange Commission of its application before that Commission for exemption under the Holding Company Act of 1935. In view of the pendency of such proceedings and the uncertainty as to the definite date upon which the proposed securities can be issued and sold, and the uncertainties as to the exact price which the applicant will be able to obtain for its securities at such time as they can be sold, the Board will retain jurisdiction in the matter and will withhold its formal cer-

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tificate of approval in this proceeding until such time as the applicant has completed its proceedings before the Securities and Exchange Commission and is in a position to determine a date for the offering to the public of the hereinabove described securities.

Upon the fixing of such a date, if within six (6) months from the date hereof, the applicant may, upon short notice apply to this Board for its certificate of approval and this Board will issue its certificate of approval of the application as amended, based upon the record already presented, provided that the applicant shall supplement this record by written evidence which in the opinion of the Board shall establish that the price to be received for the bonds and the face amount and terms of the notes to be issued are fair and reasonable as of such offering date.

The Board finds it necessary and appropriate in the public interest that its certificate of approval, if issued as hereinbefore provided, be subject to the followiing conditions:

1. That this Board retains jurisdiction over the question of the adequacy of applicant's reserve for depreciation, and, upon completion of the studies and filing of the report required by the Board's order dated November 10, 1937, will take such action in the matter as the facts and circumstances may require.
2. That the applicant shall not resume the payment of dividends upon its common stock, except upon application to and approval of this Board.
3. That the certificate of approval to be issued by this Board shall not be construed as fixing for any purposes whatsoever, directly or indirectly, any value of the tangible or intangible property owned by the applicant, nor as approving for any purpose whatsoever the books and accounts of the applicant, nor as approving the accounting methods or expenditures represented by such books and accounts.
4. That the certificate of approval to be issued by this Board shall not be construed as a certification that securities of the applicant which may be issued hereunder will be represented by tangible or intangible assets of commensurate value or investment cost.

Dated, April 25, 1940.

SUPPLEMENTAL CERTIFICATE

Jersey Central Power & Light Company, a New Jersey corporation, by application dated January 20, 1944, as amended at the hearing on January 27, 1944, requests permission to amortize debt discount and expense of certain bond issues heretofore redeemed, in a manner proposed and more fully described in said application filed with the Board. The application in effect seeks

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an amendment of the manner of amortization of the said debt discount and expense as heretofore approved by the Board in its decision of April 25, 1940, wherein the Board said:

> "The Company proposes to account for unamortized debt discount and expense by amortizing in equal annual amounts over the unexpired life of the old bonds the amounts remaining on the books at the time of refunding, and amortizing the new debt discount and expense in equal annual amounts over the life of the refunding bonds. The Board approves this accounting treatment as reasonable and proper in the circumstances of this case."

By the present application, as amended at the hearing, the Company now proposes to modify the accounting treatment as approved by the Board, applying the proposed plan to the $3,856,-264.91, being the balance remaining in its Unamortized Debt Discount and Expense Account as at January 1, 1943.

The Company proposes to treat the said balance in the following manner:

A. By debiting Account 271 Earned Surplus with $1,000,000 of Unamortized Debt Discount and Expense applicable to Series "A" and Series "B" bonds, as concerns which there remained unamortized at January 1, 1943, an amount of $2,182,131.40, comprised of:

Series "B" bonds	$146,734.45
Series "C" bonds	2,035,396.95
Total	$2,182,131.40

B. By amortizing the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to Series "B" and Series "C" bonds of $1,182,131.40 and the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to the 1940 refunding of applicant's bonds of:

(1) Call premium on Series "C" bonds of	$1,150,270.39
(2) Duplicate Interest on Series "C" bonds of	115,027.03
(3) Call premium on Series "B" bonds of	137,830.24
(4) Duplicate Interest on Series "B" bonds of:	43,391.02
in the total amount of	$2,628,650.08

over the twelve-year period, January 1, 1943, to December 31, 1954, inclusive, by equal annual charges to Account No. 531 Amortization of Debt Discount and Expense in the amount of $219,054.17.

C. By amortizing the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to the issuance of the 3½ per cent Series bonds due 1965 in the total

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amount of $227,614.83 over the remaining term of said bonds by equal annual charges to Account No. 531 Amortization of Debt Discount and Expense in the amount of $10,268.65.

as is more fully set forth in said application, as amended, which by reference thereto is made part hereof.

The said Board being satisfied after investigation and hearing that the applicant's proposed accounting is in accordance with the requirements of the Board's Uniform System of Accounts prescribed for electric corporations, and the purposes of said accounting being approved by the Board, the said Board

HEREBY GRANTS said application, as amended and approves:

A. The debiting to Account 271, Earned Surplus, of $1,000,000 of Unamortized Debt Discount and Expense applicable to Series "A" and Series "B" bonds, as concerns which there remained unamortized at January 1, 1943, an amount of $2,182,131.40, comprised of:

Series "B" bonds	$146,734.45
Series "C" bonds	2,035,396.95
Total	$2,182,131.40

B. The amortization of the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to Series "B" and Series "C" bonds of $1,182,131.40
and the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to the 1940 refunding of applicant's bonds of:

(1) Call premium on Series "C" bonds of	$1,150,270.39
(2) Duplicate Interest on Series "C" bonds of	115,027.03
(3) Call premium on Series "B" bonds of	137,830.24
(4) Duplicate Interest on Series "B" bonds of:	43,391.02
in the total amount of	$2,628,650.08

over the twelve-year period, January 1, 1943, to December 31, 1954, inclusive, by equal annual charges to Account No. 531 Amortization of Debt Discount and Expense in the amount of $219,054.17.

C. The amortization of the remaining balance as at January 1, 1943, of Unamortized Debt Discount and Expense applicable to the issuance of the 3½ per cent Series bonds due 1965 in the total amount of $227,614.83 over the remaining term of said bonds by equal annual charges to Account No. 531 Amortization of Debt Discount and Expense in the amount of $10,268.65.

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This certificate is issued subject to the following conditions:

1. That all accounting entries to be made on the books of the applicant as concerns the debit to Earned Surplus in the amount of $1,000,000 (which may be made as at December 31, 1943) in order to reflect the transactions herein approvied shall be submitted to the Board for approval, prior to being recorded on said books.

The applicant shall file with the Board within ten (10) days of the date hereof a verified acceptance of this certificate and its provisions and conditions.

Dated, February 28, 1944.

No. 2210

City of Bayonne Application for an Order Compelling the Owners of Buses Operating on the Hudson County Boulevard to Provide Safe, Proper and Adequate Service by Erection of a Bus Shelter.

William Rubin, for the City of Bayonne; *Theodore C. Baer,* for sixty-seven Respondents.

BY THE COMMISSION:

The Director of Public Affairs of the City of Bayonne filed a petition pursuant to a resolution of the Board of Commissioners, which petition prays that this Board issue an Order "compelling the erection of a bus shelter at the Bayonne-Jersey City boundary line on the Hudson County Boulevard." The respondents are 67 individual bus operators, all of whom are affiliated under the name, South Hudson County Boulevard Bus Owners Association.

The respondents have filed a motion to dismiss the petition on the ground that the Board is without jurisdiction to make such Order in respect to respondents' operation. Both petitioner and respondents have filed briefs on the question of jurisdiction. The facts are not in issue at present because of the attack on the jurisdiction of the Board, and, therefore, we are not passing upon the desirability or non-desirability of the bus shelter as such.

It is argued by petitioner that the words "safe, adequate and proper service" in the statute are a grant of power to the Board to order the erection of a bus shelter. This contention overlooks the context of the section which further provides "and to main-

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tain its property and equipment in such condition as to enable it to do so." Obviously this section does not relate to property not in possession of a utility, nor used by it pursuant to its function as a utility. The provision referred to was enacted in the original statute creating the Board in 1911 in substantially the same form as it is today and this at a time when auto buses were non-existent. This section was re-enacted in 1921 and again in 1926 without any change.

An examination of the cases cited by the petitioner discloses that in every instance there was already existing facilities of the kind sought to be affected by the Order of the Board or that at least some part existed which the Board's Order was sought to extend or amplify. Such is not the case in this instance. Furthermore, express statutory authority existed in all but one case and in that instance the Board's Order was set aside as unreasonable.

This brings us to the general legislative intention with respect to the broad powers of the Board under the statutory language "safe, adequate and proper service."

Railroads operate upon private rights-of-way.

Street railways may not be constructed without not only the consent of the municipality but also the consent of the owners of at least one-half in lineal feet of property fronting on the streets or other public places in which permission to construct, operate and maintain a street railway is asked.

Auto buses merely use the public highways under municipal consents approved by this Board, but they may not construct upon, nor may they usurp power over such highways unless there be express statutory authority. It must be noted that in the case of railroads and railways the Legislature in order to carry out the scheme provided in the statute expressly conferred upon these classes of utilities the power to condemn lands under the statute of Eminent Domain in order to effectuate their purpose. No such grant of power is contained in the statute regulating auto buses.

Hence if the respondents were ordered to erect a bus shelter at a given location and were not the owners or lessees of the land the Board's Order could be vitiated because of the lack of power in the respondents to perform such Order. It is no answer to say that in a given instance arrangements could be effected. We must not order anything that is impossible of performance as a matter of right so that a refusal to obey the Board's Order could result in said Order being effected through the medium of the Courts.

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Aside from this, however, it is clear to the Board that it does not possess either the express or implied power under the statute to order the respondents to erect a bus shelter, and therefore the Board finds and determines that it is without authority to grant the relief sought by the petitioner. The motion addressed to the Board's jurisdiction is granted and the petition denied and dismissed.

Dated, May 29, 1940.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 278. October Term, 1940.

The City of Bayonne,
Applicant,
vs.
The Board of Public Utility Commissioners, et als.,
Respondents.

Submitted October Term, 1940. Decided

On application for writ of certiorari.

Before *Justices Case, Donges* and *Heher.*

For applicant, *Maurice A. Cohen.*

For respondent Board of Public Utility Commissioners, *John A. Bernhard.*

For sixty-seven other respondents, *John R. Kelly, Theodore C. Baer.*

The opinion of the court was delivered by

CASE, J.

The question is whether the Board of Public Utility Commissioners was right in deciding that it had no authority to direct 67 individual bus owners to unite in constructing and maintaining a bus shelter wherein patrons of the various buses may be housed while waiting for transportation. The proposed site is along

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Hudson County Boulevard at the Bayonne-Jersey City boundary line, on lands of the Hudson County Park Commission. Applicant represents that it has obtained permission from the Park Commission for such erection. Although the owners of the buses have, for their own purposes, effected an organization known as the South Hudson Boulevard Bus Owners Association, nevertheless it is the individuals, either corporate or natural, who own and operate and it is against them that the Order is sought.

If there is authority in the Board it must be found in R. S. 48:2–23, which has both the form and the substance of sec. 17 (b) of the original act concerning public utilities, ch. 195, P. L. 1911, passed at a time which antedated the auto bus and when public utilities were defined (section 15) to include any "steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by the State of New Jersey or by any political subdivision thereof." R. S. 48:2–23 provides: "The Board may, after hearing, upon notice, by Order in writing, require any public utility to furnish safe, adequate and proper service and to maintain its property and equipment in such condition as to enable it to do so."

Applicant relies upon that statutory provision and upon the following decisions of either Court or Board: *In re Station at Passaic Park,* 40 N. J. L. J. 238; *Erie R. R. Co.* vs. *Public Utility Commissioners,* 85 N. J. L. 420; *Delaware, Lackawanna & Western R. R. Co.* vs. *Board of Public Utility Commissioners,* 83 N. J. L. 212; *Erie R. R. Co.* vs. *Board of Public Utility Commissioners,* 89 N. J. L. 57 at 78; *Township Committee* vs. *Central Railroad Co.,* 47 N. J. L. J. 169; *In re Public Service Coordinated Transport,* Volume XIV of the Reports of the Board of Public Utility Commissioners, p. 34 (July 12, 1928—April 8, 1930).

In re Station at Passaic Park, supra, was a matter heard and decided by the commission and had to do with the rebuilding by the Erie Railroad Company of one of its existing railroad stations. The decision of the Supreme Court in *Erie R. R. Co.* vs. *Public Utility Board, supra,* reported in 85 Law, concerned the furnishing of drinking water on railroad trains and reversed an Order which had been made by the Board and which required the Company to provide a supply. The cited *Delaware, Lackawanna*

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and Western R. R. Company case affirmed a commission Order which directed a railroad Company, if it supplied drinking water, to do so with individual cups or a sanitary glass. The reference to page 78 of the *Erie Railroad Company* case reported in 89 Law concerns a dictum to the effect that the Board of Public Utility Commissioners would have power, under section 17 (b) of the statute, to order a relocation of a railroad station. *Township Committee* vs. *Central Railroad, supra,* related to the extension of existing railroad stational facilities. The case printed at page 34 of Volume XIV of the Board's Reports was a dismissal of a complaint regarding the crowding of a sidewalk by prospective patrons of the cars of the Public Service Coordinated Transport and held that the question of relieving undue congestion was for the police. None of the cited decisions goes even remotely to the question of shelter or waiting rooms for buses, much less to the forcing of nearly seventy individual owners and operators into a compulsory co-operative building and maintenance project.

The auto bus first entered our statutory system by separate legislation, e.g. ch. 136, P. L. 1916, and later was included in the utility act, ch. 149, P. L. 1921; and while it is now an integral part of the utility statute and is affected by all pertinent provisions thereof, nevertheless intelligent construction of that statute must have regard for the attributes of the bus system and the respects in which it differs from those other and older forms of passenger transportation for which the legislation was originally framed. Railroads operate upon private rights of way. They do not render a "pick-up" service. From their inception they have had fixed stopping points and have maintained station facilities at those points. They have the right of eminent domain and may, by the strong arm of the law, take lands that are necessary for their operation. Street railways operate by virtue of statutory authority, municipal franchise and consents of adjoining property owners; they have certain rights of construction and installation in the public highways; they, too, have the power to condemn; and the nature of their trackage and motive power tends to make them monopolistic. But the auto bus, moving with greater freedom, without physical restriction and under its own power, merely uses the public highways under municipal consents approved by the Board of Public Utility Commissioners. It has not the authority to construct in the highways and has not the power of eminent domain. Its rights are more transient and personal.

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Whether the Board of Public Utility Commissioners has no authority, under any circumstances, to direct a bus owner to erect a shelter need not be now decided. It has not, in our opinion, the authority to compel, as in this instance it is asked to do, a large number of owners and operators to engage in a mass enterprise to that end. The confusion incident to planning, construction and operation by the nearly seventy individual interests which would here be subject to the Order indicates the impracticability of the scheme and the unlikelihood that the legislature meant to authorize such a proceeding.

The question presented is one of law. We find adversely thereon and see no reason for allowing a writ.

The application will be denied, without costs.

No. 2211

Proceeding to Determine Whether Existing Schedules of Rates for Electric Current of the Jersey Central Power and Light Company Are Just and Reasonable.

The Board, for reasons herein set forth, exercising the authority vested in it by law (R. S. 48:2–21.1), has determined to suspend, and hereby does suspend final action and decision in this proceeding.

Formal acceptance by the Company of the conditions hereby prescribed is, however, a condition precedent to the going into effect of such suspension.

The Conditions.

1. The Company shall forthwith submit to the Board schedules of rates satisfactory to the Board effecting an aggregate annual reduction of at least $472,000 in electric rates. This reduction shall be in addition to the reductions effected during the progress of this proceeding, thus making a total of $730,000 in reductions, during the progress, and as the result of this proceeding initiated by the Board.

2. The Board retains complete jurisdiction of, and in, this proceeding to ascertain the effect of such reduction upon the Company's electric revenue and for the purpose of taking such further action in the proceeding and without proceeding anew, as may, in the judgment of the Board, be required in the future.

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3. That all statutory limitations affecting retention by the Board of jurisdiction as aforesaid shall be expressly waived by the Company and that by such waiver the Company estop itself from raising before the Board or in any Court any question of the effectiveness of such retained jurisdiction because of any statutory limitations.

4. That the reduction be made effective with bills rendered on and after July 1, 1940.

5. That the Company file with the Board monthly reports showing the effect of such reduction on its operating revenues and expenses, beginning one month after the effective date of the rate reduction hereby prescribed.

6. The classification of customers and the available schedules of rates have become complicated over the years. The Company is required to join with the experts of the Board's staff in further study to achieve simplification of these rate schedules.

7. That the Company file within ten days of the date hereof schedules of rates satisfactory to the Board effecting such reduction and an acceptance in writing of each and every of the terms and conditions herein set forth and as well written consent to retention of jurisdiction by the Board and waiver of objection because of any statutory limitations on jurisdiction.

The amount of the reduction hereby fixed has been reached by a series of negotiations with the Company under the statute above cited and the Company has agreed to reduction in the prescribed amount, at this time and under presently existing conditions.

The Board has taken the indicated course, because it is apparent that any conclusion now reached by the Board as to value of property, operating expenses and rate of return can have no assured stability for any reasonable period in the future. World conditions already have affected the financial markets and price levels; the continuation of the war and preparedness activities of the Federal Government, if past experience counts, will further affect such markets and price levels; the immediate future in its effect upon factors entering into rate-making by order is highly uncertain. This uncertainty is indicated by the probability of increased Federal income and other taxes to finance national defense. Last World War conditions, even before our entry into the conflict, brought with them changing price levels to such an extent as to make the determining of fair value, operating costs and fair rates impracticable through the process of formal pro-

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ceedings, and the employing of such process had to be delayed until abnormal fluctuating economic conditions had again been replaced by conditions of some degree of stability.

The unsettling effect of the conditions which have arisen while hearings were conducted in the proceeding and since the close of the taking of testimony is apparent in a record made before the Board affecting the Company. In recent months the Company applied to the Board for approval of a plan for refunding its bonds. The effect of the plan would have been to reduce the Company's funded debt. The Board, April 25, 1940, approved, with conditions and restrictions, the proposed refunding operation. It is now apparent, because of changed conditions affecting the financial markets, that the refunding operation cannot now be carried out on as advantageous terms as when originally proposed.

The Board also has taken into account the fact that the record of testimony and exhibits in the proceeding is extensive and that complete and detailed study and consideration of the record and the reaching of conclusions thereon and drafting such conclusions, will consume a not inconsiderable length of time and that conclusions when reached may be subject to litigation.

The Board is satisfied, that the adjustment herein proposed respecting rate reduction and the course to be taken hereunder is in the public interest, all factors considered, and that the conditions hereby prescribed protect that interest.

Dated, June 4, 1940.

No. 2212

In the Matter of the Formal Complaint of Annello Bus Lines vs. Frank Sidone, Owner of the Blue and White Taxi, In re Alleged Illegal Operation.

Arthur L. Joseph, for Annello Bus Lines; *Frank Sidone* appeared on his own behalf; *Charles S. Straw,* for Public Service Interstate Transportation Company.

BY THE COMMISSION:

Annello Bus Lines complains that Frank Sidone from October 9, 1939 to April 15, 1940, conducted an "illegal operation" between Landisville, Cumberland County, and Vineland, Cumber-

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land County, over a regular route for which the complainant holds approval of this Board of municipal consents for the transportation of passengers for hire.

The term "illegal operation" as used in the complaint under the testimony adduced is apparently intended to mean that the respondent was operating an auto bus as defined in Section 48:4–1 R. S., which operation it is contended is in violation of Section 48:4–3 R. S., as follows:

> "48:4–3. Necessity of municipal consent. No autobus shall be operated or run while carrying passengers for hire wholly or partly along any street in any municipality, whether such operation is over a route wholly or partly within the territorial limits of the municipality, except as set forth in section 48:4–10 of this title, until the person owning or possessing the right to use the same shall obtain the consent of the board or body having control of the public streets in the municipality for such operation and the use of any street or streets in such municipality."

The respondent at the hearing denied that he was conducting an auto bus operation in violation of law and asserted that he was lawfully operating a "taxi" service for which permit had been granted to him by Buena Vista Township, in which Landisville is located. Respondent admitted that taxi license had not been granted to him by Vineland, about seven miles distant from Landisville. Respondent further admitted that his "stand" in Vineland was in front of the Baker House Hotel.

The evidence satisfactorily proves that on the dates indicated in the record the respondent carried passengers over a regular route between Vineland and Landisville. The evidence further shows that these passengers were carried in a seven-passenger sedan automobile on daily round trips at a fixed rate of fare per day or $1.38 for a weekly ticket.

The respondent contends that he is conducting a taxi business and, therefore, is exempt under the section of the statute defining the word "autobuses."

It is clear, however, that respondent is conducting an auto bus operation without "the consent of the Board or body having control of the public streets in the municipality for such operation" as required by statute.

The facts of the case do not sustain the respondent's contention. On the contrary they demonstrate their application to the formula set up in the definition of the word autobus. The Legislature has ordained certain safeguards with respect to the character of equip-

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ment, operation of buses, insurance for indemnification of the public against loss by reason of injury, all of which as revealed through various enactments, negatives the idea that such an operation as conducted by the respondent was to be excluded from the provisions of the statute above cited, regardless of any license plates or municipal license which is utilized for an operation of this character.

Under all the evidence in this case we find that the respondent's service by seven-passenger automobile is an operation of an auto bus within the intent and meaning of the statute and that such auto bus is being operated without the proper municipal consent as required by statute. Therefore, an Order will issue requiring the respondent to cease and desist said operation.

Dated, June 27, 1940.

ORDER

This matter having been duly heard by the Board of Public Utility Commissioners, and the Board having filed its decision on the date hereof, which decision is made part hereof, and the Board having concluded and determined that the operation by the said Frank Sidone between Landisville and Vineland without the approval of this Board of municipal consents for said operation, is unlawful; and that the equipment is not in compliance with the Board's requirements;

The Board HEREBY ORDERS AND DIRECTS the said Frank Sidone to cease operating auto buses for the transportation of passengers between points in the State of New Jersey.

This Order shall become effective July 10, 1940.

Dated, June 27, 1940.

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No. 2213

In the Matter of the Failure of Salem Gas Light Company to File Application with Board for Approval of Issuance of Evidences of Indebtedness.

George B. Pidot, for Salem Gas Light Company.

BY THE COMMISSION:

This matter was heard by the Board on January 25, 1940, in accordance with an Order issued by the Board to the Salem Gas Light Company to afford the Commission an opportunity to investigate and determine whether the Company had violated Section 48:3–9 R. S. in the issuance of any of the following notes:

Payee	*Date*	*Interest Rate*	*Amount*
Consolidated Elec. and Gas Co.	5/24/28	6%	$30,000
Consolidated Elec. and Gas Co.	10/10/28	6%	5,000
Consolidated Elec. and Gas Co.	10/22/29	6%	5,900
Consolidated Elec. and Gas Co.	5/30/30	6%	2,100
Consolidated Elec. and Gas Co.	11/ 1/32	6%	3,000
Consolidated Elec. and Gas Co.	9/ 1/33	6%	18,000
Consolidated Elec. and Gas Co.	12/30/33	6%	500
Consolidated Elec. and Gas Co.	12/29/36	6%	6,184
			$70,684

The respondent admits that all of the notes were issued without the Board's approval. The notes are payable "on demand." The explanation for such issuance without the Board's approval was that as "demand" notes they were not payable "in more than one year from the date thereof" and, therefore, did not require the Board's authorization. In our judgment a "demand" note falls within the statute. Its maturity depends upon the holder. Demand may not be made until more than one year. If we are in error in this judgment still it appears that the first note for $30,000 was not paid within one year—nor has since been paid. The Company must have known that payment of the notes subsequently issued would not be demanded and that they could not be paid within one year. Clearly the intent and purpose of the Statute cannot be avoided by resort, under such circumstances, to the device of "demand" notes. In fairness it perhaps should be noted that the first five notes were not executed by the officers of the present Company. However, the officials now in charge

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of the Company are responsible for execution of the three notes of $18,000, $500, and $6,184, without first obtaining the Board's approval. All of these notes are held by the Consolidated Electric and Gas Company, the owner of all of the stock of the respondent.

Consolidated has agreed to return to Salem and Salem has agreed to cancel notes dated September 1, 1933 for $18,000; December 30, 1933 for $500.00 and December 29, 1936 for $6,184.00, aggregating $26,684. Consolidated has further agreed to surrender the remainder of said notes and accrued interest thereon as of January 1, 1940, and to accept in lieu thereof a promissory note of the Salem Gas Light Company, dated January 1, 1940, in like aggregate principal sum of $46,000, bearing interest at the rate of 1 per cent per annum and maturing January 1, 1940, subject, however, to proper authority from the Securities and Exchange Commission and this Board for the approval of such transactions and subject likewise to required action by the trustees of the indenture of Consolidated Electric and Gas Company under which the notes for $30,000, $5,000, $5,900, $2,100 and $3,000, respectively, are pledged.

The note dated November 1, 1932, for $3,000 is pledged under a lease of indenture securing similar outstanding securities of the Consolidated Company. These securities are held by the public and, therefore, that note cannot be canceled.

Turning now to the notes for $30,000, $5,000, $5,900 and $2,100, issued prior to 1932, and bearing interest at 6 per cent, respondent has agreed to arrange with the owner to have the rate of interest reduced to one or two per cent, or to have the interest waived.

Attention is further directed to the fact that records of the respondent showed that the two notes dated December 30, 1930, and December 29, 1936, for $500.00 and $6,184, respectively, aggregating $6,184, were issued to secure cash for payment of dividends to the stockholders. That, of course, is irregular, particularly when such payment was to the holding Company and the transaction is criticized not only for that reason alone but because of the further fact that there were outstanding and unpaid, notes in the sum of $43,000 at the time of the declaration of dividends. It is further noted in this connection that at the time of the dividend payment the net return to the Company for the year was only $1,100.86. The total amount of dividends paid from August 1, 1933, to and including December 31, 1939, aggregated

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$24,684, although no dividends have been paid since December 1936.

Our statute provides that "No public utility as herein defined shall * * * Hereafter issue any stocks, stock certificates, bonds *or other evidences of indebtedness* payable in more than one year from the date thereof until it shall have *first* obtained authority from the Board for such proposed issue."

It is clear from this provision that the Board is not empowered to authorize an issue of securities after the issue has purportedly been effected. It is equally clear that this Board is charged with the administration of the act according to the terms thereof. Such a determination requires its consideration and determination of the legal propriety of the issue of evidences of indebtedness vis., notes. To grant the present application in effect would be to authorize the issuance of new securities in exchange for the illegally issued notes, thereby indirectly ratifying what we have no power under the act to directly authorize. Evidences of indebtedness so issued in violation of the statute without the Board's approval are of no effect as legal obligations. For the reasons stated, all said notes now outstanding must and are hereby ordered to be canceled and proof of such cancellation filed with the Secretary of the Board by affidavit of the President of Salem Gas Light Company within ninety (90) days from the date hereof.

Since the hearing in this case the Company has agreed to cancel all of said notes upon the condition above set out, and upon condition that the Board approve the issuance of a new note for $46,000.

The Board, of course, could not agree in advance to approval of the issuance of such note. However, formal application for such approval has been filed and hearing held on the application and decision will in due course be made upon the record made at said hearing.

Dated, July 17, 1940.

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No. 2214

In the Matter of the Application of Public Service Interstate Transportation Company for Approval of Municipal Consents of the Borough of Bogota, City of Hackensack, Borough of Maywood and Borough of Paramus for a Change in Route and for Extension of the Hackensack-New York Bus Route No. 82 So As to Operate a Service Between Paramus and New York City, and for permission to Abandon operation of Route within Bogota (P. U. C. Route—File No. 149-504).

Charles S. Straw, for Public Service Interstate Transportation Company; *Maurice J. Cronin,* for Garden State Lines, Inc.; *George M. Eichler,* for Westwood Transportation Company and Westwood Transportation Lines, Inc.

BY THE COMMISSION:

Applicant presently holds the Board's approval of municipal consents of Paterson, East Paterson, Saddle River Township, Midland Township, Borough of Lodi, Maywood, Hackensack, Bogota, Teaneck, Leonia and Fort Lee, for the operation of ten (10) buses, subject to restrictions, between Paterson, Hackensack and Fort Lee, New Jersey, and New York, now designated as Route No. 82, over the highways described in decision of the Board, dated October 2, 1933, as follows:

> "Beginning at Market Street Garage, Paterson, thence via Market Street, Essex Street, State Street, Public Service Terminal, Hackensack, Mercer Street, Moore Street, Court Street, Fort Lee Road, Central Avenue, Main Street, Lemoine Avenue and George Washington Bridge Plaza, to New York City, returning via same route."

It is proposed to extend a portion of this service to Paramus, by diverting ten (10) of the authorized buses at the corner of State and Mercer Streets in Hackensack, through Hackensack, Maywood, Bogota and Paramus to Bergen Pines Isolation Hospital, Paramus over the route described in schedule "A" attached hereto.

The application also includes permission to abandon service in Bogota on Fort Lee Road between River Road and Palisades Avenue, and in Hackensack, Court Street, between Bridge Street and Moore Street, Moore Street between Court Street and Mercer Street.

The proposed abandonment within Bogota is required because of the construction of an overpass in Bogota for the elimination of the Bogota crossing. The application for abandonment within Bogota is granted.

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The portion of the route proposed to be eliminated in Hackensack is predicated upon the approval of the application to extend the route from the corner of State and Mercer Streets to Paramus. The object of the application to extend is to provide service between Paramus and New York City.

The application was opposed by Garden State Lines. This objection, however, was limited to a challenge of the validity of the purported Maywood consent attached to the application. Based upon this objection, counsel for Garden State moved to dismiss the application. That motion is denied. The consent, however, is invalid, and we have so determined for reasons which will presently appear. The other consents are proper, and the Board has jurisdiction to determine whether the application in whole or in part should be approved or denied.

It is conceded that on December 19, 1939, and the proofs so show, the Borough of Maywood granted a municipal consent to the Public Service Interstate Transportation Company "to operate ten auto buses on the Hackensack-New York Bus Route No. 82, over the following streets:

> "Entering on Central Avenue from Hackensack, thence via Central Avenue and Maywood Avenue to the Maywood-Paramus Borough Line; returning via same route."

It is further admitted that the Borough of Maywood advised the Board as follows:

> "Kindly be advised that under date of December 19, 1939, the Mayor and Council of the Borough of Maywood gave consent to the Public Service Interstate Transportation Company to operate ten auto buses on the Hackensack-New York Bus Route No. 82 within the Borough of Maywood.
>
> "At a meeting of the Mayor and Council held on December 30, 1939, this consent was rescinded and wish you would kindly note your records accordingly."

Nevertheless, as heretofore stated, the Maywood consent was attached to the application filed on January 13, 1940.

Garden State Lines objected to consideration by the Board of the consent to Public Service because such consent had been rescinded and revoked by Maywood before the date of the filing of application for approval thereof and before hearing of such application. Public Service countered with the contention that the Maywood rescission and revocation was without notice to Public Service to revoke, and also, that the purported revocation

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was ineffective for the further reason that the statute provides revocations shall not become effective until approved by the Board and that the Board had not so approved.

For the grantee of the municipal consent, reliance as to validity is upon the following section, R. S. 48:4–7:

> "* * * Any such consent, heretofore or hereafter granted, may be revoked by the board or body of the municipality granting the same after notice and hearing whenever it shall appear that the holder of such consent has failed to furnish and keep in force the insurance and the power of attorney herein required, or to comply with any lawful regulation imposed by the board or body granting such consent and approved by the Board of Public Utility Commissioners or any law of the State of New Jersey, but no such revocation shall become effective until the Board of Public Utility Commissioners, after hearing, shall approve same. * * *"

It is admitted that prerequisites as to insurance and power of attorney have been complied with. Stress is laid upon the argument that assuming but not admitting the municipal consent has been rescinded, such rescission is ineffective until "such revocation is approved, after hearing by the Board." Our attention has been directed to Hudson County Bus Owners Association, et al vs. Board, 143 Atl. 754, as authority for the validity of the Maywood consent.

For the objector, it is contended that jurisdiction does not lodge in the Board until application for the approval of the municipal consent has actually been filed with the Board and is a corallary that if the municipal consent has been rescinded or revoked before such filing, the purpose and intent of R. S. 48:4–7 does not validize the Board's jurisdiction.

In reply it is urged that the rescission was a nullity of which the Board should take judicial notice because the rescission was without notice and hearing to the grantee and also that the revocation could not legally become effective until approved after notice and hearing, by the Board. However, the statute, as we read it, does not require the Board's approval of revocation until the municipal consent has in fact and law become a validly approved consent.

With reference to *Hudson County Bus Owners Association, et al.* vs. *Board,* we realize that if applicable, we would be obliged to decide accordingly, but we are satisfied from the facts before us in this case that the decision in that case does not apply.

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The Board in this case has been formally notified by the municipal clerk of the passage of the resolution rescinding the resolution granting the municipal consent of December 19, 1939. Counsel for the applicant asserted on the record that such rescission was recorded without notice and hearing, as required by statute, but such assertion, however true in fact, does not possess the requisite evidentiary value, but even if we treated it as of being of sufficient evidentiary value, this Board is without power to set aside as invalid the action of the municipality in passing the resolution of rescission. The applicant's remedy is in an appropriate tribunal which is vested with the power under the law to set aside such resolution. While this Board may find as a fact, if there were sufficient evidence to do so, that the resolution was passed without notice and hearing, it still lacks judicial power to declare the resolution invalid. In view of the communication from the municipal clerk that such resolution was passed, this Board must assume that its passage was in accordance with law. In so concluding we have considered applicant's contention that the revocation was a nullity because it was without notice of hearing to the grantee. But the statute, as we have already stated, does not require revocation to be approved by the Board until the municipal consent has in fact and in law become a validly approved consent.

As aptly stated by Vice Chancellor Backes in a decision dated March 18, 1924, in *Board* vs. *Sheldon, et al.*, 95 N. J. Eq., 408, where a somewhat similar question was at issue, the Vice Chancellor stated:

> "The municipal grant is inchoate and ripens into a right only upon the Board's approval."

Treating this point more fully, the Vice Chancellor said:

> "A municipal license to operate a public utility jitney is not valid until approved by the Board, and such approval may be conditional under section 24 of the Utility Act of 1911. The privilege to approve the municipal license implies the power to revoke the approval for breach of condition or for any other lawful cause. The right to operate a public utility jitney depends upon the coincidence of the municipal license and the approval of the Board, and no rights are acquired by the license without the approval, and none are invaded by the lawful revocation of the approval. The municipal grant is inchoate and ripens into a right only upon the Board's approval; consequently, there can be no 'confiscation' of property rights by the Board withholding its approval of a municipal license to operate a public utility jitney, and none when such approval is lawfully withdrawn."

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Accordingly, as to this issue we find and determine that such revocation as referred to in the letter of the municipal clerk must be regarded by this Board as having been "duly" passed and hence there is no consent from the Borough.

The only other matter for our consideration is whether public necessity and convenience justify the approval of the municipal consents of the Borough of Bogota, City of Hackensack and Borough of Paramus for the operation of ten (10) buses over the routes described in such consents. The proofs satisfy us that necessity and convenience require that the application should be, and therefore, it is granted.

The Board further approves the abandonment of the present service within Bogota and Hackensack for the reasons stated herein. The rate of fare is to be that now charged except on the extension in the Borough of Paramus for which a five cent fare will be charged.

This approval is subject to all existing restrictions where applicable.

Dated, August 28, 1940.

SCHEDULE "A"

Entire Route to be Operated between Paramus and New York City:

Beginning at Bergen Pines Isolation Hospital and thence via Delford Avenue (Ridgewood Avenue), Forest Avenue, Midland Avenue, Spring Valley Road, Forest Avenue (Maywood Avenue), Paramus, Maywood Avenue, Central Avenue, Maywood, Central Avenue, State Street, Mercer Street, River Street, Hackensack Municipal Bus Terminal, River Street, Bridge Street, Court Street, Court Street Bridge, Hackensack, Fort Lee Road, River Road, Main Street, Palisade Avenue, Fort Lee Road, Bogota, Fort Lee Road, Teaneck, Central Avenue, Leonia, Main Street, Lemoine Avenue, George Washington Bridge Plaza, George Washington Bridge, Fort Lee and thence to New York City.

Returning via the same route.

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 245. January Term, 1941.

Public Service Interstate Transportation Company,
Prosecutor,
vs.
Board of Public Utility Commissioners of the State of New Jersey, Garden State Lines, Inc., et als.,
Defendants.

Argued January 23, 1941. Decided July 25, 1941.

On certiorari.

Before *Justices Case, Donges* and *Heher.*

For the prosecutor, *William H. Speer.*

For the defendant Board of Public Utility Commissioners, *John A. Bernhard.*

For the defendant Garden State Lines, Inc., *Maurice J. Cronin.*

PER CURIAM:

On December 19, 1939, the Borough of Maywood granted to prosecutor a "consent" to operate ten auto buses on the Hackensack-New York Bus Route No. 82 over certain streets of the Borough. On December 30, 1939, the local governing body "rescinded" the consent.

On January 13, 1940, prosecutor made application to the Board of Public Utility Commissioners for "approval" of the consent thus given; and on January 18, ensuing, the Borough Clerk advised the Utility Board of the rescission of the consent.

The Utility Board concluded that, since it had been "formally notified" of the revocation of the consent, it "must assume that its passage was in accordance with law;" and that the revocation is not a nullity for failure of a hearing on notice to prosecutor, nor for failure of approval by the Utility Board, because "the statute * * * does not require revocation to be approved by the

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Board until the municipal consent has in fact and in law become a validly approved consent;" and so the rescission was effective, and there was a lack of the statutory prerequisite of municipal consent. This writ was thereupon sued out.

It is the insistence of prosecutor that, under R. S. 1937, 48:4–7, such a consent "in effect" continued "in effect until revoked as therein provided," and "no such revocation" becomes "effective until" the Utility Board, "after hearing, shall approve the same."

The defendants invoke the case of *Board of Public Utility Commissioners,* vs. *Sheldon,* 95 N. J. Eq. 408, holding that such consent "is inchoate and ripens into a right only upon the * * * approval" of the Utility Board; and the argument is made that R. S. 1937, 48:4–7 refers only to a consent made effective by the approval of the Utility Board, and that until then the municipal governing body has full power to revoke the consent. But the case is controlled in this respect by *Hudson County Bus Owners' Association,* vs. *Board of Public Utility Commissioners,* 6 N. J. Misc. 1070, 143 Atl. 755. In our view, it is not a distinguishing circumstance that there the attempted withdrawal of the local consent was made while the application for its approval was pending before the Utility Board, while the converse of that is the case here. Since that is so, we are not called upon to discuss the statutory interpretations advanced by defendants.

The judgment is accordingly reversed, with costs.

Filed, July 25, 1941.

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An appeal was taken to the Court of Errors and Appeals. The decision of the said Court follows:

COURT OF ERRORS AND APPEALS

No. 53. May Term, 1942.

Public Service Interstate Transportation Company,
Prosecutor-Respondent.

vs.

Board of Public Utility Commissioners (appellant), et al.,
Defendants.

Submitted May 29, 1942. Decided

The Board of Public Utility Commissioners, having judicially passed on the legal sufficiency vel non of certain municipal action purporting to revoke consent to operate a bus line, has no status to appeal from a judgment of the Supreme Court on certiorari, holding that the decision of said Board was erroneous in law.

Appeal from Supreme Court, whose opinion is reported in 127 N. J. Law 29.

For the appellant Board, *Frank H. Sommer* and *John A. Bernhard.*

For the respondent, *William H. Speer.*

The opinion of the court was delivered by

PARKER, J.

This appeal presents the anomalous situation of a special statutory tribunal which has rendered a judicial decision pursuant to powers conferred on it by statute, undertaking to prosecute an appeal from adjudgment of the Supreme Court on certiorari, holding that such decision was erroneous.

The facts sufficiently appear in the per curiam opinion of the Supreme Court, *ubi supra.* The question of law was whether the "revocation" of a bus line permit by the Borough of Maywood was invalid because it had not been approved by the Board, as provided by statute R. S. 48:4–7. The Board held that it was valid, distinguishing the case of Hudson County Bus Owners' Association vs. Board, 8 Misc. 1070, 143 Atl. 735. The Supreme Court said that the decision of the Board was erroneous in law,

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and ordered it set aside. Only the Board has appealed. The successful party below is before us as respondent, but Garden State Lines, its opponent below, has not appealed or filed any brief, and so as has just been said, the Board itself is the only appellant. We are clear that it has no status as such. It is in no sense a party whose interests are adversely affected, but obviously a subordinate statutory tribunal which made a legal decision reviewable by certiorari like those of other special statutory tribunals.

The appeal will be dismissed.

Filed, September 18, 1942.

ON PETITION FOR RE-HEARING

William H. Blake and *J. H. Mulhern,* for Public Service Interstate Transportation Company; *Thomas E. Lynch,* for Inter-City Transportation Company, Inc.

BY THE COMMISSION:

This comes on a petition of the Public Service Interstate Transportation Company for re-hearing in the above matter as a result of a decision of our Supreme Court entered in the January term of 1941, reversing and setting aside a decision of this Board under date of August 28, 1940, by which decision this Board denied approval of municipal consent of the Borough of Maywood originally granted to the Public Service Interstate Transportation Company which had been subsequently "rescinded" by a resolution of the said Borough of Maywood. This Board in its decision of August 28, 1940, had held that the rescission by resolution of the said municipal consent by the Borough of Maywood was effective and that, therefore, as of the time of the application there was no valid municipal consent before the Board for its approval. Said decision of the Board was reversed, as stated, by the Supreme Court and the decision of the Supreme Court remains unchanged.

The present application of the Public Service Interstate Transportation Company for re-hearing is opposed by Inter-City Transportation Company for alleged lack of convenience and necessity. The Inter-City Transportation Company, objector, is a successor to Garden State Lines, and operates bus service in part over the same route as that now in question.

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In the original hearing in this matter the applications of the Public Service Interstate Transportation Company and of the Garden State Lines, predecessor of the Inter-City Transportation Company, Inc., were heard together. Evidence of convenience and necessity was introduced and was conceded by each of the parties to the other. The Garden State Lines opposed the approval of the municipal consent of the Borough of Maywood which had been granted to the Public Service Interstate Transportation Company solely upon the ground of the purported rescission. It is obvious from an examination of that record that had the Board determined that the consent granted to the Public Service was valid it must necessarily have found the element of convenience and necessity applying to both applicants and, therefore, granted both applications. It was solely upon the finding that the consent of the Borough of Maywood was invalid that the Board denied the Public Service application. It follows then that the purpose of the present petition for re-hearing is to remedy a legal error which this Board, according to the decision of the Supreme Court, made in sustaining the effectiveness of the rescission of the municipal consent.

The objector's position is that its present operation is sufficient to satify the convenience and necessity of the situation and that it is incumbent upon the Public Service to establish convenience and necessity as of this time, rather than as of the time of the original application. With this contention the Board cannot agree. This is an application for a re-hearing upon a record resulting in the decision of the Board of August 28, 1940. The Supreme Court has held the legal conclusion reached by the Board in that instance was incorrect. The applicant is, therefore, entitled to be put in the position it would have been in had the Board ruled in accordance with the legal principles laid down by the Supreme Court.

The Board, after due notice and hearing held on the present application for re-hearing on June 6, 1944, now finds and determines that approval of the municipal consent of the Borough of Maywood is necessary and proper for the public convenience and HEREBY APPROVES of the same for the operation of ten (10) auto buses over the route, for the fares and subject to the restrictions outlined in Schedule "A" attached hereto.

Dated, October 10, 1944.

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Schedule "A"

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY

Hackensack Bus Route No. 82, File No. 149-504.

Has approval for the operation of not more than ten (10) buses in Paterson, East Paterson, Saddle River, Lodi, Rochelle Park, Maywood; Westwood, Emerson, Oradell, Paramus; Hackensack, Bogota, Teaneck, Leonia and Fort Lee on the following routes:

A. Westwood Service: Beginning at the Madison Avenue Bus Stand in Westwood, thence via Madison Avenue, Third Avenue, Fourth Avenue into Emerson (Forest Avenue) to Paramus; Forest Avenue, Midland Avenue, Spring Valley Road, Forest Avenue (Maywood Avenue) to Maywood; Maywood Avenue, Central Avenue into Hackensack; State Street, Mercer Street, River Street, Hackensack Municipal Bus Terminal, River Street, Bridge Street, Court Street, Court Street Bridge into Bogota; Fort Lee Road, River Road, Main Street, Palisade Avenue, Fort Lee Road through Teaneck to Leonia; Central Avenue to Fort Lee; Main Street, Lemoine Avenue, George Washington Bridge Plaza, George Washington Bridge and thence into New York City in New York State. Returning via the same route in the reverse direction to Forest Avenue at Delford Avenue (Ridgewood Avenue) in Paramus; thence by way of Forest Avenue through Oradell to Emerson; Fourth Avenue (Forest Avenue) into Westwood; Third Avenue, Park Avenue and Madison Avenue to the place of beginning.

This service is 17.2 miles long; schedule running time, 60 minutes each way.

B. Paramus Service: Beginning at Bergen Pines Isolation Hospital in Paramus, thence by way of (Private Road), Delford Avenue (Ridgewood Avenue) to Forest Avenue and thence same as the A service route to New York City. Returning same as the A service returning route to Forest Avenue at Delford Avenue (Ridgewood Avenue) in Paramus; thence on Delford Avenue (Ridgewood Avenue) (through Oradell) into Paramus (Private Road) to the place of beginning.

This service is 14.5 miles long; schedule running time, 50 minutes each way.

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C. Hackensack Service: Beginning at the Hackensack Garage Bus Terminal in Hackensack, thence on Mercer Street and same as the A service route to New York City. Returning same as the A service returning route to Mercer Street at State Street in Hackensack, thence on State Street, Gamewell Street to the place of beginning.

D. Paterson (No. 120) *Service:* Beginning at the Market Street Garage Bus Terminal in Paterson, thence by way of Market Street through East Paterson and Saddle River to Lodi; Essex Street into Hackensack; State Street, Mercer Street and same as the A service route to New York City. Returning same as the A service returning route to Mercer Street at State Street in Hackensack, thence by way of State Street, Essex Street through Maywood and Rochelle Park to Saddle River; Market Street through Saddle River and East Paterson into Paterson and to the place of beginning.

This service is 14.5 miles long; schedule running time, 50 minutes each way.

The fares for these services are:

Zone No.	*Zone Area, between*	*Approx. Zone Miles*
3	New Jersey Plaza and Bergen Boulevard	1.3
4	Bergen Boulevard and Overpeck Creek	1.2
5	Overpeck Creek and Palisade Avenue	1.7
6	Palisade Avenue and Hackensack River Bridge	1.1
7A	Hackensack River Bridge and State Street at Central Avenue in Hackensack	0.7
7D	Hackensack River (Bridge) and Mercer Street at State Street in Hackensack	0.6
8A	State Street at Central Avenue in Hackensack and Hackensack-Maywood Municipal Boundary	1.0
8D	Hackensack Municipal Bus Terminal and Westminster Place in Saddle River	3.5
9A	Hackensack-Maywood Municipal Boundary and Maywood Avenue at Spring Valley Avenue in Maywood	1.1
9D	Rochelle Avenue and Passaic River Bridge	3.0
10A	Maywood Avenue at Spring Valley Avenue in Maywood and Delford Avenue (Ridgewood Road) in Paramus	3.4
10B	Maywood Avenue at Spring Valley Avenue in Maywood and Bergen Pines Terminal	4.1
10D	River Road in East Paterson and the Paterson Terminal	2.8
11	Delford Avenue (Ridgewood Road) in Paramus and Soldier Hill Road in Emerson	0.7
12	Soldier Hill Road and the Westwood Terminal	2.0

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Between Zone No.: and Zone No.	3 c	4 c	5 c	6 c	7A & D c	8A & D c	9A c	9D c	10A & B c	10D c	11 c	12 c
3	R	5	10	15	15	20	20	25	25	30	25	25
4		5	10	15	15	20	20	25	25	30	25	25
5			5	10	10	15	15	20	20	25	20	20
6				5	5	10	10	15	15	20	15	15
7A & D					5	5	5	10	10	15	10	10
8A & D						5	5	10	10	15	10	10
9A							5	..	10	..	10	10
9D								5	..	10	..	..
10A & B									5	..	10	10
10D										5	..	..
11											5	10
12												5

R — Restricted; — No direct service.

Subject to the following restrictions:

1. No passengers shall be accepted who begin and end their trips along that portion of the route which is within Fort Lee.

2. No passengers shall be accepted who begin and end their trips between Essex Street at State Street in Hackensack and Fort Lee Road at Grand Avenue in Leonia, except that passengers may be accepted on this portion of the route for transportation between and including Hackensack and Teaneck.

3. No passengers shall be accepted on any portion of the route within Westwood for discharge within Fort Lee, and no passengers shall be accepted on any portion of the route within Fort Lee for discharge within Westwood.

No. 2215

In the Matter of the Application of State Highway Commissioner for Approval of Establishment of Crossing at Grade on Route 29 Over the Tracks of the Rahway Valley Railroad Company (Rahway Valley Company) Lessee, in the Township of Union.

William O'Brien, Esq., for E. Donald Sterner, State Highway Commissioner; *H. C. Gilson, Esq.,* for Rahway Valley Railroad Company.

BY THE COMMISSION:

The State Highway Commissioner, E. Donald Sterner, acting for and in the name of the State of New Jersey, filed a petition

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with the Board to authorize the construction of State Highway Route No. 29 at grade over the right-of-way and tracks of the Rahway Valley Railroad Company (Rahway Valley Company, lessee) in the Township of Union, Union County, New Jersey.

The petition recites that the legislature by virtue of Title 27, Revised Statutes, 1937, provided for the establishment of a highway system including State Highway Route No. 29, described as follows:

> "By the said Title 27 the Legislature provided for the establishment of a State Highway System, including State Highway Route 29, as follows: Newark, Lambertville, Trenton. Beginning on Route No. 25 in the vicinity of its crossing with Peddie Ditch, thence crossing the Pennsylvania Railroad and Frelinghuysen Avenue to Hillside, passing in the vicinity of the junction of Elizabeth Avenue and the Lehigh Valley Railroad thence through the Township of Union, Springfield, Mountainside, and passing in the vicinity of North Plainfield and Bound Brook, Ringoes, Lambertville, Washington Crossing and Trenton."

The petition further recites that:

> "Petitioner has taken over, laid out and established Route No. 29 including the crossing of the tracks of the Rahway Valley Railroad Company (Rahway Valley Company, Lessee) in the Township of Union, Union County, New Jersey, and in so establishing said route as prescribed by law it becomes necessary to cross the right-of-way and tracks of said railroad, as shown on the attached map.
>
> "Your petitioner cannot undertake its construction work on State Highway Route No. 29 and said highway cannot be used as required by law, and cannot be opened to public travel until the crossing of the said highway and said railroad is established at the point hereinabove indicated."

In support of the petition, Mr. Edward T. Osborne, Engineer of Grade-crossings of the State Highway Commission, in his testimony, described the proposed plan (Exhibit P-1) of crossing as follows:

> "It is proposed under the present plans to construct an additional width, making a dual highway from Morris Avenue to the Rahway River, and at the particular point in question, the westbound traffic will be approximately 180 feet north of the existing Route No. 29. Throughout the section it is proposed to construct cross-overs for the interchange of traffic from the east to the west or west to the east, and they will be approximately 1,000 feet apart. At the proposed crossing, the provision for the interchange of traffic will be more or less in the nature of a circle, insofar as it affects the railroad. The crossing that is proposed would be 54 feet, that is, 44 feet between curb lines, with a shoulder extending out beyond that 5 feet on each side. The paving, as I stated on the cross-overs, will be 24 feet between curbs. The type of crossing as submitted to the railroad is a concrete type, which I understand is satisfactory, that is, from the construction standpoint."

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More specifically Ex. P-1 is a plan for a dual highway with two grade crossings about 180 feet apart, with a traffic circle across the railroad, between Chestnut Avenue and Michigan Avenue.

Chestnut Avenue provides the most direct access to the westerly section of Union and to Maplewood, Milburn and the Oranges; Michigan Avenue affords the most direct access to Aldene, Cranford and Highway No. 25. Chestnut Avenue runs into, but not across, Route No. 29 on the northerly side, about 600 feet east of the railroad; and Michigan Avenue runs into, but not across, Route No. 29 on the southerly side, about 200 feet west of the railroad.

The application was opposed by Rahway Valley Railroad Company (Rahway Valley Company, Lessee) which operates a one track freight service extending "from Aldene and Roselle Park as one terminus to Summit, a total main line distance of slightly in excess of seven miles. Just north of the existing route No. 29 crossing the Rahway Valley line has three miles of track which extends through Union and terminates at Maplewood."

The railroad is primarily engaged in the transfer of Central Railroad and Lehigh Valley Railroad freight cars at Aldene and Roselle Park respectively to the Lackawanna Railroad at Summit and vice versa, and secondarily in serving a number of manufacturing plants on respondent's line between the termini. Trains are operated daily except Sundays and holidays.

According to the testimony of Mr. George A. Clark, General Manager of the Rahway Valley Railroad,

> "We average in road operation about four crossings daily over existing Route No. 29. In addition to that we might possibly cross Route No. 29 two additional times in switching operations." * * *

Operations are now protected at all crossings at which

> "our engines stop clear of the crossing, depending on what direction they are traveling, either north or south, they stop clear of the crossing, then the brakeman and conductor go ahead with their red flags in daytime and red lanterns in the darkness, wait for a lull in the traffic, flag it down, and then proceed over the crossing." * * *

Usually, two men are sent "ahead of the engine to flag the motor traffic."

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The basis of the objections are:

"1. The proposed westbound crossing of Route 29 would just clear the existing switch of the Rahway Valley Line for approximately 40 or 50 feet. That means we would have a great deal more crossings over the proposed 29 than what we have over the existing 29. Ten per cent of the switching is still done in the near vicinity of Route No. 29. What I mean by that, that switch at a point where the Rahway Valley Line connects with the Rahway Valley Railroad allows us almost 300 feet of room to switch between existing Route No. 29 and the switch point of the Rahway Valley Line, so while 10 per cent is done there, we do not recross Route No. 29 all the time, for the simple reason we can still clear an engine and around four to five freight cars to drill without blocking the existing Route No. 29.

"2. The increased drilling operations over the Route No. 29 crossing would require the conductor and brakeman to divert from their usual work to flag the additional operations.

"3. The increased crossings would 'slow down our operations considerably,' and also 'motor traffic will be tied down far more with two crossings than today with one crossing.'

"4. One other thing I might say that in the winter months when we get any appreciable fall of snow—we are only a little company with limited facilities—we generally throw a snow plough in front of one of our engines and plough out the road and we generally have a crew of about eleven working men with us. We go to Route 29, we clean that off, which is a job of about forty-five minutes, we then go to Summit, and we are back there in an hour's time again, and our crossing is completely covered over, due to the fact that the State ploughs come down, and while we clear the complete crossing, it is all covered over again with snowdrifts and we have to go through the same process. If this proposed 29 goes through, then we are going to have double that job."

We will now consider the equities of the two contentions in the light of the statute:

"48:2-28. New grade crossings; approval of board. No highway shall be constructed across the tracks of any railroad company at grade, nor shall any track over which locomotives, railroad or street railway cars are to pass be laid across any highway, so as to make a new crossing at grade, nor shall the tracks of any railroad, street railway or traction company be laid across the tracks of any other such company without first obtaining permission from the Board.

"This section shall not apply to the replacement of lawfully existing tracks."

The Board's decision dated April 22, 1929, to which counsel for respondent has directed attention, wherein the Board concluded under the conditions then existing that in view of the policy relative to the elimination of grade crossings and the limiting of the creation of additional crossings, "the Board is of the opinion that the highway situation should be limited to a single crossing of the railroad right-of-way."

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In construing this statute from time to time it is true as respondent insists, that

> "The policy of the State is expressed in legislation looking to the elimination of existing grade crossings and the avoidance of additional grade crossings, unless they are required by public necessity. The Board has uniformly declined to grant approval for the creation of additional grade crossings unless it appears that the development of the community will be retarded by such refusal and that such crossing is required by public necessity."

The present case, however, comes within the exception of the rule. Public necessity requires approval.

It is common knowledge that traffic on all State highways has increased many fold since 1929, including Route No. 29. It not only serves as an arterial highway from Newark to Trenton via Bound Brook and Lambertville, but also as a connecting highway to points in eastern Pennsylvania and thence westward.

Petitioner, in performance of the duty imposed upon him by the legislature to provide adequate State highways is now extending the width of Route No. 29 and constructing overpasses at locations required in his judgment; laying center aisles between the eastbound and westbound traffic lanes to facilitate traffic and to protect life, at a substantial cost to the taxpayers of the State from which the respondent obtained its franchise to operate. A refusal by the Board to exercise its statutory authority for all practical purposes would nullify the declared purpose of the legislature as aforesaid and result in a converging of the east and westbound traffic lanes at the point of the railroad crossing (which was suggested as an alternative by respondent) and thus create a "bottle neck" with the resulting delay and danger, all of which the legislature by its enactment sought to avoid.

Upon consideration of all the proofs the application is granted.

We realize that this approval of the application will impose some inconvenience and expense upon respondent, but it must be evident that our permission is unavoidable by the compelling force of public necessity for the dual highway crossing.

Upon completion of the dual highway the railroad is ordered and directed to

1. Have all trains stop before crossing and protection be afforded by member or members of the crew stationed at the crossing before train moves thereover.

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2. Limit speed of operation over the crossing to six miles per hour.

3. Install standard crossing signs and the stationary reflector signals recently approved by the Board.

Dated, September 17, 1940.

MOTION FOR REARGUMENT

William A. O'Brien, for State Highway Commissioner; *H. C. Gilson,* for Rahway Valley Railroad Company; *Charles S. Straw,* for Public Service Electric and Gas Company.

BY THE COMMISSION:

This matter comes before the Board on argument for a rehearing. The argument was directed to a clarification of a proposed plan submitted by the railroad company in substitution of the State Highway plan presented at the hearing of the application.

Counsel for respondent seemed to be under the impression that the purported merits of respondent's plan had not been adequately described. Its merits and demerits were fully disclosed and considered by the Board.

For reasons stated in the Board's decision of September 17, 1940, it did not satisfactorily meet safety requirements. For the same reason the application for rehearing is denied.

To avoid any misunderstanding, the direction to the respondent in the decision of September 17, 1940—

> "3. Install standard crossing signs and the stationary reflector signals recently approved by the Board."

means that the crossbuck signs on the present highway at the crossing are to be removed and standard crossing signs and stationary reflector signals are to be installed at the point of crossing of east and westbound highway lanes.

Dated, October 17, 1940

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 239. January Term, 1941.

Rahway Valley Railroad Company, a body corporate,
Prosecutor,

vs.

The Board of Public Utility Commissioners and E. Donald Sterner, State Highway Commissioner,
Defendants.

Submitted January Term, 1941. Decided July 25, 1941.

On certiorari.

Before *Justices Case, Donges* and *Heher.*

For the prosecutor, *McKirgan & Gilson.*

For the defendant Board of Public Utility Commissioners, *John A Bernhard.*

For the defendant E. Donald Sterner, State Highway Commissioner, *David T. Wilentz, Attorney-General; William A. O'Brien* and *William J. McCormick,* of counsel.

The opinion of the court was delivered by

HEHER, J.

The question at issue is the propriety of the action of the Board of Public Utility Commissioners granting leave to the State Highway Commissioner, under R. S. 1937, 48:2–28, to construct an additional width to State Highway Route No. 29 at grade over prosecutor's right of way and tracks in the Township and County of Union, in this State.

Route 29 is now a three-lane single highway 29 feet wide, crossing prosecutor's railroad at grade under a permit granted by the Utility Commissioners on April 22, 1929; and the plan now under attack provides for a dual highway, the existing highway to be devoted exclusively to eastbound traffic and a new roadway of approximately the same width to be constructed 180 feet to the north thereof, and to be used for westbound traffic. Chestnut

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Avenue extends into but not across Route 29 on the northerly side thereof, about 600 feet east of the railroad; and Michigan Avenue also runs into but not across Route 29 on its southerly side, about 200 feet west of the railroad. Chestnut Avenue affords the "most direct access" to the westerly section of Union, and to Maplewood, Millburn and the Oranges. Michigan Avenue is the most accessible to Aldene, Cranford and Highway Route 25. "Cross-overs" are to be constructed, 1,000 feet apart, for the "interchange of traffic from the east to the west or west to the east." This will constitute a "traffic circle across the railroad between Chestnut Avenue and Michigan Avenue." The railroad comprises "a one track freight service extending from Aldene and Roselle Park as one terminus to Summit, a total main line distance of slightly in excess of seven miles," and "just north of the existing Route No. 29 crossing the Rahway Valley line" it "has three miles of track which extends through Union and terminates at Maplewood." It is engaged, as the Utility Board found, "primarily in the transfer of Central Railroad and Lehigh Valley Railroad freight cars at Aldene and Roselle Park respectively to the Lackawanna Railroad at Summit and vice versa, and secondarily in serving a number of manufacturing plants" on its "line between the termini. Trains are operated daily except Sundays and holidays."

The rationale of the findings of the Utility Board was that, while the consumation of the proposal "will impose some inconvenience and expense upon" prosecutor, its approval was "unavoidable by the compelling force of public necessity for the dual-highway crossing."

It is the insistence of prosecutor that this approving action should be vacated for these reasons: (1) the proposed construction "will create an extremely and unnecessarily dangerous condition to traffic on Route No. 29;" (2) "it permits unreasonable interference with operations of the railroad; " and (3) "it imposes unreasonable obligations upon the railroad."

We conclude that the plan thus approved is designed to serve public traffic needs with due regard to the element of safety. It is a modification of the ordinary "traffic circle" that, in sound engineering judgment, will promote the free flow of traffic, with a minimum of hazard, in an area where traffic has increased in such volume as to create congestion and extraordinary danger. It will eliminate the danger incident to the left turns now made

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from Michigan Avenue into the highway, and from the highway into Michigan Avenue, and the like with respect to Chestnut Avenue. The traffic from these streets will merge with other highway traffic until safely reversed through a cross-over. We do not share the view that the consummation of this plan will seriously interfere with prosecutor's switching operations. And the incidental cost of guarding and maintaining the new grade crossing thereunder is not such as to warrant its rejection. Indeed, much if not all of this would result from the adoption of prosecutor's alternate plan for a converging of the traffic lanes into one crossing over prosecutor's right of way. Aside from other traffic problems, it would entail such hazards to safety as to render it unfeasible. At all events, the circumstances afford no basis for the conclusion that the action under review is arbitrary; and this is the touchstone of the validity of such determinations.

The inquiry is whether the action taken "is purely arbitrary, whether or not it has a reasonable basis to rest upon, whether or not it is supported to any extent by the facts submitted to the Board for its consideration; and if it shall be made to appear to the Court that such action is purely arbitrary, or that it has no reasonable basis upon which to rest, or is unsupported by the facts laid before the Board, the Court may declare it null and void, and order it to be set aside." *W. J. & S. R. R. Co.* vs. *Public Utility Board,* 87 N. J. L. 170; *Erie Railroad Co.* vs. *Public Utility Board* 89 N. J. L. 57, affirmed 90 N. J. L. 672; *Fornarotto* vs. *Board of Public Utility Commissioners,* 105 N. J. L. 28; *West Jersey & Seashore R. R. Co.* vs. *Board of Public Utility Commissioners,* 8 N. J. Misc. 212, affirmed sub. non. *Atlantic City R. R. Co.* vs. *Board of Public Utility Commissioners,* 109 N. J. L. 260; *West Shore Railroad Co.* vs. *Board of Public Utility Commissioners,* 11 N. J. Misc. 149, affirmed 112, N. J. L. 83; *Pennsylvania R. R. Co.* vs. *Board of Public Utility Commissioners,* 13 N. J. Misc. 766. Vide R. S. 1937, 48:2–43 and 48:2–46. The Legislature has committed the resolution of such questions to the experienced judgment of the Utility Board; and if the determination of that tribunal has a reasonable basis in the evidence, and is free of the vice of arbitrariness ,this Court cannot substitute its judgment therefor. *Perth Amboy* vs. *Board of Public Utility Commissioners,* 98 N. J. L. 106.

The Utility Board was not concluded by the opinion expressed in 1929 that "the highway situation" at this point "should be

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limited to a single crossing of the railroad right-of-way." The great increase of traffic since then demands new measures to meet the public need.

The judgment is accordingly affirmed, with costs.

Filed, July 25, 1941.

No. 2216

In the Matter of the Application of Central Avenue Bus Company, Inc., for Approval of Municipal Consent of the City of Jersey City to Consolidate and Merge Present Western Slope Route With the Present Main Line Route and to Extend Said Consolidated and Co-ordinated Routes Within the City of Jersey City. Central Avenue Bus Route File 081-074; Central Avenue Loop Bus Route File 203-074.

Thomas J. Armstrong and *Pitney, Hardin & Skinner* (by *Mahlon Pitney*), for individual owners on Lafayette and Greenville Bus Line and Bergen Avenue Bus Line; *Theodore C. Baer,* for Central Avenue Bus Company, Inc.; *Charles S. Straw,* for Public Service Coordinated Transport; *Jacob J. Singer,* for the City of Jersey City.

BY THE COMMISSION:

This is a petition filed by Armstrong and Mullen on behalf of the motor bus owners and operators on what is known as the Lafayette and Greenville Bus Route and Bergen Avenue Bus Route in the City of Jersey City.

A petition was filed November 22, 1940, and was made returnable by the notice on November 28, 1940.

Pursuant to the rules of the Board, hearing was had on said application, which application requested the Board to issue its subpœna duces tecum, requiring the production of the following records as set forth in said petition:

> (a) The records of the Building Department of the City of Jersey City for five years last past setting forth and showing the permits for new construction, residential or industrial in that sector of Jersey City bounded on the north by Communipaw Avenue; on the east by New York Bay; on the south by Merritt Street; and on the west by Ocean Avenue.
>
> (b) The records of the Medical Center of the City of Jersey City setting forth the names and addresses of all persons in said Medical Center for five years last past, resident in that sector of the City of Jersey City, bounded on the north by Communipaw Avenue; on the east by New York Bay; on the South by Merritt Street; and on the west by Ocean Avenue.

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(c) The records of the Public Service Coordinated Transport setting forth the passenger revenue per bus mile for five years last past on Public Service Coordinated Transport Routes Nos. 13 and 14 in the City of Jersey City, and the cost of operation per bus mile for five years last past on said bus routes Nos. 13 and 14 in the City of Jersey City.

(d) The ordinance, resolution or other evidence of authority of the City of Jersey City, wherein and whereby trucking is prohibited on Garfield Avenue in Jersey City, from a point at or near Bayview Avenue, southerly to the City Line.

(e) The corporate minute book, the stock ledger, the books of account, the Certificate of Approval of the Board of Public Utility Commissioners approving of the stock, and the certificates of approval of the Board of Public Utility Commissioners permitting the assessment against the stock, all of which books, records, papers, etc., are the property of the applicant herein, to wit: Central Avenue Bus Company, Inc.

The Board has considered the argument of counsel on behalf of the petitioners, as well as the argument of counsel representing the Central Avenue Bus Company, Inc., and Public Service Coordinated Transport, and after giving due weight to the same hereby determines that the Secretary of the Board shall issue a subpœna duces tecum in the above entitled cause returnable Friday, November 29, 1940, at 10:00 A. M., at the Board's rooms, 1060 Broad Street, Newark, New Jersey, which subpœna shall be issued and directed as follows:

(1) To the Superintendent of buildings of the City of Jersey City or to the head of such Building Department requiring the production of the records of the Building Department of the City of Jersey City for five years last past, showing the permits issued for new construction, residential or industrial, in that portion of the City of Jersey City bounded on the north by Communipaw Avenue; on the east by New York Bay; on the south by Merritt Street, and on the west by Ocean Avenue.

(2) To the City Clerk of the City of Jersey City to produce any ordinance or resolution or other evidence of authority of the City of Jersey City wherein or whereby trucking is prohibited on Garfield Avenue, Jersey City, from a point at or near Bayview Avenue southerly to the municipal boundary line of Jersey City and Bayonne on Garfield Avenue.

The Board does not consider the other requests set forth in said petition to be the proper subject matter of a subpœna duces tecum in the character of proceeding initiated in the above entitled cause.

Dated, November 28, 1940.

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 238. May Term, 1941.

Greenville Bus Company,
Prosecutor,
vs.
Board of Public Utility Commissioners,
Defendant.

Argued May 7, 1941. Decided

On rule to show cause why writ of certiorari should not issue.

Before *Justices Parker, Donges* and *Colie.*

For the prosecutor, *Pitney, Hardin & Skinner, Esqs.*

For the Board of Public Utility Commissioners, *John A. Bernhard, Esq.*

For the City of Jersey City, *Charles A. Rooney, Esq.,* and *Samuel Pesin, Esq.*

For the Central Avenue Bus Company, Inc., *Theodore C. Baer, Esq.,* and *John R. Kelly, Esq.*

For Public Service Coordinated Transport, *William H. Speer, Esq.*

PER CURIAM:

This is the return of a rule to show cause why a certiorari should not issue to review an Order of the Board of Public Utility Commissioners, dated, November 28, 1940, on application on behalf of prosecutor, Greenville Bus Company, and others, for a subpœna duces tecum. The petition was filed in a cause pending before the Commission in the matter of the application of Central Avenue Bus Company, Inc., for approval of a municipal consent to said Central Avenue Bus Company. Prior to the date fixed for hearing, application for a subpœna duces tecum was filed, petitioning for the production of:

> (a) The records of the Building Department of the City of Jersey City for five years last past setting forth and showing the permits for new construction, residential or industrial, in that sector of Jersey City bounded on the north by Communipaw Avenue; on the east by New York Bay; on the south by Merritt Street; and on the west by Ocean Avenue.

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(b) The records of the Medical Center of the City of Jersey City setting forth the names and addresses of all persons in said Medical Center for five years last past, resident in that sector of the City of Jersey City, bounded on the north by Communipaw Avenue; on the east by New York Bay; on the south by Merritt Street; and on the west by Ocean Avenue.

(c) The records of the Public Service Coordinated Transport setting forth the passenger revenue per bus mile for five years last past on Public Service Coordinated Transport Routes Nos. 13 and 14 in the City of Jersey City, and the cost of the operation per bus mile for five years last past on said Bus Routes Nos. 13 and 14 in the City of Jersey City.

(d) The ordinance, resolution or other evidence of authority of the City of Jersey City, wherein and whereby trucking is prohibited on Garfield Avenue in Jersey City, from a point at or near Bayview Avenue, southerly to the City Line.

(e) The corporate minute book, the stock ledger, the books of account, the Certificate of Approval of the Board of Public Utility Commissioners, approving of the stock, and the certificates of approval of the Board of Public Utility Commissioners permitting the assessment against the stock, all of which books, records, papers, etc., are the property of the applicant herein, to wit: Central Avenue Bus Company.

The Board fixed November 28, 1940, for hearing of the application and conducted a public hearing and concluded that requests (a) and (d) should be granted and that (b), (c) and (e) should be denied, and so ordered.

We conclude that the Order of the Board was fully warranted by the record made.

As to the request for the records of the Medical Center, it appears that, during the five year period involved, more than a million one hundred thousand patient records are involved: that the production of the records would avail nothing; that great expense would be involved; that what prosecutors really desire is to take the records and summarize certain data therein. This last proposal is beyond the competence of the Board and is not within the limits of the application. Further, it is doubtful if any of the information would be useful in the determination of the main question before the Board.

As to request (c), involving records of Public Service Coordinated Transport, it clearly appears that the records sought would not disclose the desired information. The records are not kept so as to discover the cost of operation of designated routes, but by divisions of operation. Hence, these records, as is clearly shown, would not be pertinent to the inquiry.

As to request (e), involving the books and records of Central Avenue Bus Company, it is not made to appear that these are

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proper or helpful in the disposition of the matter pending before the Board.

The application, therefore, is denied, with costs.

This disposition of the matter makes it unnecessary for the Court to pass upon the question raised as to the availability of certiorari to review an interlocutory Order of the Board, such as is here involved.

No. 2217

In the Matter of the Application of Robert E. Woodruff and John A. Hadden, Trustees of the Property of the Erie Railroad Company, for Approval of the Discontinuance of the Services of an Agent, and the Abandonment and permanent Retirement and Removal of the Station Building at Northvale, Bergen County, New Jersey, on the Northern Railroad of New Jersey.

Grover R. James, for Robert E. Woodruff and John A. Hadden, Trustees of the property of the Erie Railroad Company; *Conover English,* for Trustees of Northern Railroad of New Jersey; *Lawrence A. Cavinato,* for Borough of Northvale.

BY THE COMMISSION:

Robert E. Woodruff and John A. Hadden, Trustees of the property of the Erie Railroad Company, petition the Board for permission to abandon and permanently retire the station building, and discontinue the sale of tickets and the services of an agent at Northvale, Bergen County, New Jersey.

Notice of the hearing was posted at the station in accordance with the rules of the Board.

The application was opposed by counsel for the municipality and counsel for the trustees of the Northern Railroad of New Jersey.

Northvale is located on the Northern Railroad of New Jersey 2 miles south of Sparkill, New York, and 2.6 miles north of Closter, New Jersey, the nearest agency stations.

Passenger service at Northvale consists of three passenger trains to Jersey City in the morning and three passenger trains from Jersey City in the afternoon and evening. This service will be continued. No United States mail, express or car load freight is now handled at the station.

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Statements of business for the year 1937 to and including the month of August, 1940, show diminishing revenues from passenger and freight business from $5,665.55 in 1937 to $1,350.16 for the eight months of 1940. On the other side of the ledger the testimony shows that the annual cost of operating the station is $1,396.09, including clerk's wages, payroll, taxes, heat, light, insurance, stationery and miscellaneous supplies. It will not be necessary to disburse the major portion of this amount if the application is approved. That is the reason permission is sought for approval of the application. Both the Erie and the Northern Railroads are under process of reorganization because operating expenses have for years exceeded operating revenues.

The Trustees of the Northern Railroad, claiming ownership, objected to the removal of the station building.

Counsel for the Borough of Northvale objected to the removal of the station and contended that it was a necessary facility for the accommodation of the patrons of the railroad for that community. Northvale officials expressed willingness, however, to negotiate with the companies in an effort to arrange for the maintenance and care of the station by the employees of and at the sole expense of the Borough.

This is one of three applications on this line now pending determination—the other two being Demarest and Norwood—all for the purpose of reducing operating expenses.

Reductions in operating costs, however small, when spread over an entire system, represent a substantial amount. If this operating loss can be reduced, such reduction may tend to perpetuate the operation of the system. This case is typical of many others throughout the State which the Board has been obliged to consider with increased frequency during the past five years.

Under the statute the Board has the power to require safe, adequate and proper service, including necessary and convenient facilities to patrons of the railroad. Here it appears that because of improved highways, auto bus service or for some other reason the patronage has gradually declined.

We have considered the application in relation to the requirements of the statute and have concluded that public necessity and convenience will not be materially affected by approving the request for the discontinuance of the services of the agent at Northvale.

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The application to remove the station building is denied without prejudice to renewal in the event that the proposed negotiations between the applicant, representatives of the Northern Railroad, and the Northvale officials are not satisfactorily concluded.

This Order shall become effective December 14, 1940.

The applicant is directed to post appropriate notice of this Order ten (10) days prior to the effective date thereof.

Dated, December 2, 1940.

No. 2218

In the Matter of the Formal Complaint of Public Service Coordinated Transport vs. Benigno Cauz, In re Unauthorized Operation Between Woodbridge and Perth Amboy, New Jersey.

Charles S. Straw, for Public Service Coordinated Transport; *Strong & Strong* (by *Stephen V. R. Strong*), for Benigno Cauz.

BY THE COMMISSION:

Public Service Coordinated Transport complains that the respondent, Benigno Cauz, residing at 135 Remsen Avenue, New Brunswick, New Jersey, conducts an unauthorized operation between Woodbridge and Perth Amboy, New Jersey.

> "* * * in that the said Benigno Cauz did carry passengers for hire between Woodbridge and Perth Amboy without first obtaining the consent of the Board or Body having control of public streets in said municipalities for said operation and use of public streets in the said municipalities and the approval of such consents by the Board of Public Utility Commissioners of the State of New Jersey."

Specifically, the complaint alleges that on Tuesday, June 25, 1940, Wednesday, June 26, 1940, Tuesday, August 13, 1940, and Thursday, August 15, 1940, the respondent "picked up" passengers at Hoy Avenue and Mary Street in Woodbridge Township. "The motor vehicle then proceeded to New Brunswick Avenue and Lewis Street in the said township where other passengers were picked up." Continuing, the complaint alleges "the motor vehicle then proceeded to Crows Mill Road and William Street," where other passengers were picked up. These passengers were transported via New Brunswick Avenue and Washington Street

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to Graboski Brothers Cigar plant, at the corner of Washington and Remsen Streets, Perth Amboy, where the passengers were discharged.

In brief, the proofs show that the respondent owned and operated on the dates indicated a Ford station wagon with a seating capacity for nine persons. The respondent admitted the operations and that he received from the persons whom he transported "what they gave." Respondent, however, denied that "I never asked them for a penny."

We find from the testimony that the passengers paid "ten cents a ride." The same passengers are carried daily by respondent, who works at the plant. Trips began at 7:25 A. M., and ended at 7:40 A. M. The operation on June 26, was over the same route.

The complaint is that "the operation of a motor vehicle as complained of is in competition with the Perth Amboy-New Brunswick Bus Route No. 4–6" and "such operation is unauthorized."

Complainant operates, with the Board's approval, an auto bus service between Fords, Woodbridge Township and Perth Amboy.

Respondent moved to strike out the formal complaint "on the ground it does not allege facts sufficient to support the formal complaint within the jurisdiction of this Board; that nowhere is set up in the complaint an allegation that this vehicle was used to accept and discharge passengers for hire indiscriminately. That is a requisite allegation under the statute from which this Board derives its jurisdiction."

At the close of the applicant's case the motion was renewed in the form of a motion to

> "dismiss this entire proceeding, on the ground that nowhere does it appear that this respondent operated any automobile or motor bus carrying passengers for hire held out and advertised to operate or run or operated or run over any streets or public places in any municipality in this State indiscriminately accepting and discharging passengers, but on the contrary it appears positively in the complainant's case that such passengers as he did carry were persons who worked with him at the same place of employment, were persons whose hours of employment started precisely the same time as his and ended the same time as his and that no other persons were accepted for transportation whatsoever, and that in fact the passengers that he did transport were positively discriminately chosen because of their place of employment, their hours of employment, and also as well the places in which they lived. Therefore I submit that the proof now in has not brought this matter within the jurisdiction of this Board, and move to dismiss for that reason."

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These motions are overruled.

Prior to January 1, 1940, respondent operated in the same service a five passenger Dodge sedan in which he had carried five passengers for many months. Three other employees just prior to the first of this year solicited the applicant to carry them from Fords to the plant. Respondent apparently agreed because he purchased the Ford station wagon to accommodate eight passengers. When he applied for a license he was advised by the commissioner of Motor Vehicles that because he had obtained a local permit from the City of New Brunswick for a taxi permit he would be obliged to apply for an omnibus registration which was issued to him. Under that registration, in order to legally operate, he was obliged to file an insurance policy in the sum of $10,000.00. Therefore, it seems to us that the respondent "held out, announced and advertised to operate or run" an omnibus.

Since the station wagon does not comply with the Board's specifications and respondent has not obtained municipal consents or the Board's approval, the operation is unauthorized and illegal.

The proofs show that reasonable transportation facilities are available to the passengers carried by respondent by Perth Amboy-New Brunswick Bus Route No. 4–6, owned and operated by complainant.

On the facts and Nutley-Times Square Service vs. Board, 109 L. 289, we conclude that the operation is illegal. Therefore, the respondent, Benigno Cauz is directed to cease the operation.

An Order will issue to that effect.

Dated, January 9, 1941.

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No. 2219

Jersey Central Power and Light Company, Petitioner, vs. Tri-County Rural Electric Company, Inc., Respondent.

Joseph F. Autenrieth, for Jersey Central Power and Light Company; *Herman H. Anekstein, Marvin F. Hartung* and *Edith Hertz,* for Tri-County Rural Electric Company, Inc.

BY THE COMMISSION:

PRELIMINARY

The Jersey Central Power & Light Company, hereafter referred to as the Jersey Central Company, is a public utility of this State as defined by the statutes of this State (R. S. 48:2–13). Incorporated under the laws of this State, it is a corporation operating, managing and controlling within this State an electric light plant for public use, under privileges granted by this State. It is subject to, recognizes and acts under the regulatory jurisdiction of the Board.

The Jersey Central Company filed its petition with this Board invoking as against Tri-County Rural Electric Company, Inc., hereafter referred to as Tri-County Company, the power vested in this Board by R. S. 48:7–5.

The statutory provision so invoked is as follows:

> *"Determination of disputes as to territories served.* The Board of Public Utility Commissioners shall have power, after hearing upon notice, to determine *between public utilities* supplying light, heat or power, questions in dispute as to territories to be served. Pending the hearing the Board may enjoin the construction of facilities for such supply.
>
> "Upon finding and determination that the construction *is not necessary for the public convenience and will not properly conserve the public interest,* the Board may issue orders prohibiting it."

The petition of the Jersey Central Company among other things, alleged the Tri-County Company, to be a public utility as defined by R. S. 48:2–13; that Jersey Central was and for many years had been serving consumers resident in "Browns Mills;" that it was preparing on applications made to it to furnish service to residences on Hydranga Street and Laurel Avenue in Browns Mills and that Tri-County Company was "invading" this territory.

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The petition prayed that an Order be made "fixing a day for hearing, and, requiring the Tri-County Rural Electric Company, Inc., to show cause * * * why it should not be enjoined and restrained from entering the territory of Browns Mills * * * and that its territorial rights as to service and distribution to the public of the supply of light, heat and power in the Township of Pemberton in which Browns Mills is located be fixed and determined as between it and the Tri-County Rural Electric Company, Inc.".

The petition prayed a stay of construction of facilities by Tri-County Company pending hearing and determination.

This Board, on the filing of the petition, issued an Order to show cause and a temporary stay. The Tri-County Company filed a special appearance and a motion to vacate the Board's Order and to dismiss the petition of the Jersey Central Company for lack of jurisdiction over the subject matter of the petition and over the Tri-County Company and filed an answer reserving such special appearance.

Testimony was taken. The motion of the Tri-County Company to dismiss the petition of the Jersey Central Company for want of jurisdiction and the issue on the merits were taken into conference by this Board.

I.

This Board proceeds first to consider the Tri-County Company's special appearance and its motion to dismiss the petition of the Jersey Central Company for want of jurisdiction.

The special appearance and motion of the Tri-County Company are based upon the ground—

(a) That the jurisdiction of the Board extends only to (R. S. 48:2–13) a corporation "that now or hereafter may own, operate, manage or control within this State any * * * electric light, heat (or) power system, plant or equipment *for public use,* under privileges granted or hereafter to be granted by this State, or by any political subdivision thereof, and that while the Tri-County Company is incorporated under the laws of this State and owns, operates, manages and controls within this State an electric light, etc., system, plant or equipment under privileges granted by the State or political subdivisions thereof," it does not own or operate the same *"for public use"* and is therefore not subject to the jurisdiction of this Board, and

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(b) That (R. S. 48:7–5) the section of the Public Utility Act on which the petition of the Jersey Central Company rests only confers upon this Board jurisdiction to settle territorial disputes *between public utilities;* and that since the Tri-County Company is not a public utility because it does not operate for "public use", this Board is without jurisdiction over the Tri-County Company, and over the subject of the petition and this Board therefore is without jurisdiction to entertain the petition and to grant the relief thereby prayed.

This Board has considered the record and the comprehensive briefs filed by the parties. On such consideration this Board has reached the conclusion that the Tri-County Company is a "public utility" under the jurisdiction of this Board and that the Board has jurisdiction to entertain and act upon the petition herein and the issues raised thereby. The reasons for this conclusion may be briefly stated.

The Tri-County Company is a corporation of this State and operates, manages and controls an electric light, heat and power system, plant and equipment. In such operation it exercises special privileges in and over the public highways. So much is admitted by the Tri-County Company. The company nevertheless insists that it is not a "public utility," subject to the jurisdiction of this Board because its plant, system and equipment is not owned, operated, managed or controlled *"for public use."*

The question raised is one of statutory construction—of the legislative intent with which the words "for public use" were used. In such construction the consequences of adopting the construction for which the Tri-County Company contends must be taken into account.

The Tri-County Company claims that because its capital stock is not offered to the public generally and the issue and holding thereof is limited to members, there is no "public interest" in the issuance thereof and that therefore it does not fall within the regulatory policy declared by the Public Utility Act.

This claim overlooks the fact that the Company is, under the act under which it is organized, empowered to borrow money and issue bonds, and other evidences of indebtedness and that neither the act under which it is organized, nor its certificate of incorporation, nor its by-laws restrict it to borrowing from members or to the issuance of its bonds and other evidences of indebtedness to members. This power of public borrowing and public issuance of evidences of indebtedness, involves a "public interest."

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The Public Utility Act (R. S. 48:3–9) not only prohibits the issue of any stocks or stock certificates without first obtaining the authority of this Board but imposes like requirements of authorization upon issuance of bonds or other evidences of indebtedness payable in more than one year from the date thereof. The authorization by this Board is made to depend upon its determination that the proposed issue is in accordance with law and its approval of the purpose.

If the contention of the Tri-County Company is sustained, that Company escapes the application of this provision. Further, there is a "public interest" in the financial stability of a utility that enters upon and gains privileges in the public highways as such stability relates to its ability to maintain its structures thereon and thereover in safe and proper condition; yet if the Company's position is sustained, the administrative rules to which a public utility is subject requiring a proper relation between its capital stock and bonds and the statutory requirement of maintenance of an adequate depreciation reserve, would be wholly inapplicable.

The Tri-County Company claims that because the service rendered by it is limited to, and its rates are fixed by, its "members" there is no public interest in its service or its rates and therefore reason for State regulation does not exist.

This claim overlooks the fact that the Company holds itself out to render service, and does render service, to bodies politic that by the constitution of this State are prohibited from becoming members of the corporation through, directly or indirectly, owning or holding stock therein,—a matter hereafter specifically commented upon. The by-laws of the Company provide contrary to such constitution, that any firm, corporation or body politic may become a member in the Company by becoming the owner of one share of the capital stock of the Company.

There is a public interest in the rates exacted from and paid by the bodies politic of this State.

The claim also overlooks the fact that the Company is by its certificate of incorporation empowered "to exercise any of its powers anywhere" and to conduct "its business in all its branches" in any State, territory or colony of the United States, and in any foreign country and place" and that R. S. 40:173–1–3 relating to "Cities Generally," provides that under the conditions there laid down it shall be unlawful for any person, real or artificial, engaged in the business of furnishing electricity for light, heat

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or power purposes to refuse to supply electric current for such purposes provided that no corporation, firm or individual supplying electrical energy shall be compelled to extend its lines or wires more than 250 feet to connect such building unless this Board orders such extension; and provided further, that no corporation, firm or individual shall be obliged to supply service to any person, persons or corporation at the time indebted to the corporation, firm or individual from which such service connection is sought. This statute recognizes a public interest in the supply of electric energy by any "corporation, firm or individual." The Tri-County enters upon public highways and places and erects poles and other structures thereon. This involves the acquirement of special privileges in these highways and places. There is a public interest in the grant and acquirement of such public privileges.

If the position of the Company is sustained the provision of the Public Utility Act requiring the approval of this Board to the effectiveness and validity of any grant of a privilege or franchise is not applicable to it.

The Public Utility Act requires every one coming within its provisions to furnish safe, adequate and proper service and to maintain its property and equipment in condition to perform such service.

In safe service and in the maintenance of property and equipment in condition to perform safe service there is a public interest. Especially is this so where property and equipment occupy public highways and public places.

If the position of the Company is sustained, it wholly escapes the application of these provisions as to safe service and the maintenance of property and equipment to perform such service.

The Company claims the right to carry its wires over and across the wires of the Jersey Central Company on public highways and public places. Although the Company's equipment so located may in its construction or maintenance place the equipment of the Jersey Central Company in jeopardy, and although that latter Company is under statutory mandate to maintain its equipment in condition to furnish safe service and this Board is under duty to enforce that mandate, it is nevertheless the claim of the Tri-County Company that this Board is without power to protect the property and equipment of the Jersey Central Company against such construction by the Tri-County Company though it

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endangers the construction of the Jersey Central Company and puts in jeopardy its ability to furnish safe service and to maintain its property and equipment in condition to render such service.

The Tri-County Company claims that it has the power, though disclaiming its exercise, arbitrarily and at the will of its directors and members to grant its service to one and deny its service to another similarly situated and circumstanced through the grant of membership to the one and its denial to the other.

The general policy of the State is clear. The Public Utility Act prohibits unjust or unreasonable discrimination. Clearly, this prohibition rests upon public interest. If the claim of the Tri-County Company is sustained this fundamental prohibition is inapplicable to it.

Grants of gratuities, preferences and discriminations to public officials are prohibited by the Public Utility Act. This prohibition voices a public interest. If the claim of the Tri-County Company is sustained it is not subject to this prohibition.

The claim of the Tri-County Company is that it is empowered to render its service anywhere within the State without obtaining the approval of this Board. This claim serves to indicate, if granted, to what extent the fixed policy of the State would be undermined.

Even a municipality under the Statutes, owning and operating a plant for supplying light, heat and power may not enter into a contract with an adjoining municipality to furnish such supply for "public or private use" without the approval of this Board; and may not furnish such service to the inhabitants of such adjoining municipality for public or private use, though such adjoining municipality assents, without this Board's approval. A municipality so serving an adjoining municipality is as to such service declared to be a public utility subject in full to the jurisdiction of this Board. Such approval of this Board depends upon a determination that such adjoining municipality is not "adequately and properly served by an existing Company." These provisions extend to service beyond the municipality's limits to a county in which it is situate.

It is far-fetched in the extreme in the light of these statutory provisions to claim, as Tri-County Company claims, that a corporation organized as it is, may enter upon service anywhere irrespective of whether the area to be served is "adequately" and properly served by an existing Company, and that the regulatory body

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set up by the State is wholly without jurisdiction or regulatory control. (R. S. 40:62–12–25).

The Tri-County Company claims that it may without the restraint of requirement of approval by this Board, enter any area within this State in the conduct of its business irrespective of whether or not such area is adequately and properly served by an existing Company and that so entering it may arbitrarily serve one and deny service to another like circumstanced at will, and may arbitrarily deny extensions of service within such area.

This claim sounds strange when it is borne in mind that a municipality entering an adjoining municipality with the consent of such municipality must obtain the approval of this Board and entering must render its service without unjust or unreasonable discrimination and must when reasonably required extend its service facilities.

So, too, the Tri-County Company claims not to be subject to the requirements of accounting and report imposed by the Public Utility Act. Yet that requirement has in view comprehensive comparative statistics. The requirement is specifically imposed upon municipalities. If a Company organized as Tri-County is, is not subject to these requirements, the statistics of operation in supplying electric energy will not be comprehensive and the basis of comparison will be incomplete.

The act upon which the petition here is based, above quoted, gives effect to the rule that where a public utility is serving an area, or is ready and willing to serve an adjoining area, with safe, adequate and proper service at just and reasonable rates another public utility should not be permitted to enter such area.

Yet the claim of the Tri-County Company is that while the statute affords such protection to the one regulated public utility as against the other regulated public utility, the one is not afforded such protection as against a corporation organized as Tri-County Company is though furnishing a like competing utility service.

If protection is required as against a regulated public utility it is the more required as against unregulated utility service. This Board therefore concludes that the Public Utility Act was designed by the Legislature to set up a broad and inclusive scheme of regulation and that the words for "public use" were employed to exclude only operations that were wholly private; operations in which no public interest was involved as where a corporation engaged in business generated electricity for its own use and supplied such energy to its tenants.

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Any other construction of the words "for public use" would open an easy way to wholly destroy the regulatory purpose of the Public Utility Act. The Public Utility Act is a remedial act and should be liberally construed in protection of the public interest it was enacted to conserve, and to further the preventing of the evils which it was designed to end.

II.

Even though a narrower construction of the words "for public use" in the Public Utility Act, is adopted, the record establishes that the Tri-County Company operates "for public use."

In the organization of the Tri-County Company there was studied effort to acquire the powers and privileges of a "public utility" and at the same time avoid the prohibitions, restrictions and regulations to which a "public utility" is by legislative enactments subjected. The Company by its certificate of incorporation declares that "the business of this corporation shall not be operated for profit to this corporation or its shareholders."

Yet the incorporation was not effected under the act relating to "Corporations and Associations not for profit" (R. S. 15:1–3) under which a corporation may be formed "for any lawful purpose other than for pecuniary profit."

The reason for this course is clear. A corporation organized under that act would not be entitled to the privilege granted by R. S. 48:7–1 to erect poles upon public highways, streets and alleys since such privilege is confined to "any corporation organized or to be organized under R. S. Title 14, "Corporations, General."

The first of these acts is a membership corporation act; the latter a stock corporation act.

Corporations and Associations not for profit and *without capital stock* are limited to organization under the act providing for corporations and associations not for profit. Those who organized the Tri-County Company attempted to give to the corporation all the characteristics of a membership corporate and yet gain for it privileges in the public highways under the stock corporation (R. S. Title 14. "Corporations, General") by providing for "capital stock."

Examination of the certificate of incorporation evidences that the so-called "capital stock" and the "stock certificates" are in substance mere indicia and certificates of "membership."

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The by-laws recite: "The term 'member' as used in these by-laws shall have the same meaning as the term 'stockholder' as used in the act under which the Company is incorporated. The terms 'member,' membership and stockholder are used in these by-laws interchangeably, a membership necessarily being dependent on the ownership of a share of stock and each stockholder of necessity being a member."

The certificate of incorporation provides that "Any person may become a shareholder of the corporation by becoming the owner of *at least one share* of its capital stock and by: (1) paying in full the sum of $5 for each share purchased; (2) agreeing to purchase from the corporation the amount of electric energy hereinafter specified in subdivision (c) hereof; and agreeing to comply with and become bound by this Certificate of Incorporation and the by-laws of this corporation and any amendments thereto and such rules and regulations as may from time to time be adopted by the Board of Directors of this corporation."

It provides further that "No shareholder shall own more than one (1) share of stock, and each member shall be entitled to one vote and no more."

It further provides that no person, except the incorporators, or any person accepted for membership by the shareholders at any meeting thereof, shall become a member unless he has been accepted for membership by the affirmative vote of a majority of the members of the Board of Directors.

The position of a shareholder is exactly what it would have been as a member had no provision been made for the issue of stock.

The certificate of incorporation then proceeds to take from the shares the characteristics of property. It requires a shareholder desiring to sell his share to first offer the same to the corporation, the corporation reserving the *exclusive* right and option to purchase at $5 per share within 30 days after such offer. If the reserved right and option of the corporation is not exercised, the shareholder shall be free to make any other sale *"provided,* however, that no shares of the capital stock of this corporation shall be transferred to any person unless such person is eligible for membership *and becomes* a shareholder and member * * * pursuant and subject to the provisions of this Certificate of Incorporation and the by-laws of this corporation."

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The by-laws further take from the shares the characteristics of property by providing that "any member who knowingly, intentionally or repeatedly violates the provisions of the certificate of incorporation or the by-laws or any of the rules and regulations * * * may be required by the Board of Directors to *forfeit* his stock, in which case the Company shall refund to such member the purchase price of such share" and that from and after the declaration of such forfeiture all rights, privileges, and benefits of the member shall cease and terminate."

These considerations raise question, whether Tri-County Company is properly organized under "Corporations, General" and whether it has properly acquired under that act the right to erect poles, etc., upon the public highways and places.

We do not conceive it to be our function to determine this question. It is a purely judicial question.

We call attention to it, however, because of a suggestion hereafter made as to enactment of legislation specially providing for the organization of Rural Electrification Companies.

The certificate of incorporation of the Tri-County Company provides that "this corporation shall render no service to or for the public," and among the objects of the corporation sets out that it is formed "to generate, manufacture, purchase, acquire and accumulate electric energy *for its shareholders* and to transmit, furnish, sell and dispose of such electric energy *to its shareholders only.*"

The claim is that by force of these restrictive words the Tri-County Company does not own, operate or control "for public use"; that it is therefore not a "public utility" and is not subject to the jurisdiction of this Board.

If, however, the Tri-County Company in fact operates "for public use," it is a public utility within the definition of the Public Utility Act, and is subject to the jurisdiction of this Board.

The facts of operation, not mere words, determine whether operation is or is not for public use.

The Tri-County Company according to the record holds itself out as ready to serve *all* in the area of its service on compliance with the conditions of stockholding and membership before discussed.

While it claims the *power* to deny service at the will of its members to anyone within the area of service ready to comply with the stockholding and membership requirements, that power has at no time been exercised.

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The testimony of the President of Tri-County was to the following effect:

"Q. Now before prospective members are voted in what considerations would come up before the proposed member would be taken in? * * *

"A. That he was within 1,000 feet of our existing line; that he was a party using electricity, making no difference whether he was the owner or the tenant; the man using the electricity was to pay for the share and be the stockholder, and as long as he was willing to wire the house, or the house was to be wired, and take energy and comply with our rules and regulations, *it was just a routine matter of taking him in as one of the members.*" (198)

And again on page 199:

"Q. Would you refuse membership to anyone because you didn't, for example, like his looks or his hair or his manner of walking or any such point?

"A. None whatever. That is no reason; *as long as he meets the requirements of the Company he should get service.*"

And again (217):

"Q. You say that it wasn't your policy to turn down anybody who wasn't within 1,000 feet of an existing line; is that correct?

"A. Of our existing line.

"Q. Of your existing line?

"A. Yes sir. * * *

(220) "Q. So that that is your purpose to serve *everybody* in Brown's Mills who is more than 300 feet away from our Jersey Central's lines.

"A. Yes sir."

How informal and routine a matter taking one into membership is, is indicated further by the testimony (205): "Q. According to the minute book you did not have any meeting to elect any stockholders * * * between February 10, and June 9, 1939.

"A. There were several meetings in between there.

"Q. Yes, but your records show that no stockholders were elected at those meetings.

"A. No stock certificates were issued, but the boys had a policy of, when the superintendent would say he had so many new applications along the line, how about them; all right, here is the list, look at the list, and how about it, boys, it is O. K.; give them energy."

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So there were members of the corporation without any record of their acceptance for membership until an Order was ultimately made to issue the stock certificates to them, and without such record of acceptance energy was furnished them.

Tri-County Company has, as by the act under which it is organized it is empowered to do, entered upon and located poles and wires upon, within and along public highways. This grant of power so availed of has resulted in the acquirement by Tri-County Company of special franchises and special privileges, which constitute property. The creation of such special franchises or special privileges in the public highway can only be justified where the business conducted by means thereof is public in character. The acceptance of such special franchise and special privileges by Tri-County involves recognition of the fact that it operates its equipment for public use in the conduct of a business that is of public character.

Tri-County Company does, according to the record, render service "to or for the public." It does then operate "for public use." It renders service to the Hillsboro School in Madison Township. A certificate for a share of capital stock was issued to "Hillsboro School" and delivered to Madison Township Board of Education.

Counsel for Tri-County Company admitted that in this the Company was serving a body politic, "Madison Township," that is, the Hillsboro School, the Madison Township Board of Education.

Where the authority of Madison Township, or the Board of Education of Madison Township, to embark with others upon "consumer ownership" or a co-operative venture does not appear.

What does appear is that the constitution of the State provides:

"No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual association or corporation, or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation."

So, too, Tri-County Company according to the record renders service to two religious membership corporations.

We have not been pointed to any statute granting authority to such a corporation to enter into membership in another corporation and so venture in common with others on a consumer-ownership or co-operative business enterprise.

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In the absence of a statute granting such authority Tri-County Company must in serving these religious membership corporations be regarded as serving them as consumers and thereby engaged in rendering service "to and for the public" and operating for public use.

The grant to, and acceptance by, Tri-County Company of loans of Federal funds indicates that the Company operates "for public use."

This Board agrees with the West Virginia Public Service Commission (Re Harrison Rural Electrification Association, Inc., 24 P. U. R. (N. S.) 7, 11 et seq.) which confronted by similar claims, said: "Since the loan is from public funds, 'persons in rural areas' for whose benefit it is made, must mean 'all' such persons in each such area capable and desirous of receiving such benefit, situated so as to be practically susceptible of receiving the electric service. We do not feel Congress intended public moneys to be advanced for the benefit of a person or class only of the people of an area and denied to others within the area willing and able to receive it. Such funds were evidently intended for all members of the public in the area to be served, and it would be contrary to the legislative intent that membership in this co-operative association should be exclusive and self-determinative. Membership in the association has been actively solicited and no application has been refused. Lines are to be constructed on and across public roads. Membership in the association and the electric service to be secured through it is of public consequence, affecting the communities and the residents of the area at large. Since Federal funds are not to be advanced for purely private purposes, it follows from the foregoing considerations that the applicant's project must be for the purpose of serving the public generally in the territory where constructed, and that it will render a public service. In other words, it will be a utility with its service available to all the local inhabitants."

These considerations lead us to conclude that Tri-County Company does render service "to and for the public" and does "operate for public use," and is subject to the jurisdiction of this Board even though the words "for public use" be given a more restricted content than this Board has above concluded they should be given.

This Board, therefore, denies the motion of the Tri-County Company to dismiss this proceeding for want of jurisdiction.

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There would ordinarily be little difficulty in reaching a conclusion on the merits of this controversy.

The Jersey Central Company has for many years been serving, among other territories, part of Browns Mills, and acquired as early as 1918 all of the Browns Mills Electric Light and Power Company property, including all its right to construct, maintain and operate overhead and underground systems for distributing and transmitting electric current in Browns Mills, and all franchises, permits, ordinances and licenses. The area in controversy is contiguous and tributary to that now served by the Jersey Central Company.

Neither Tri-County Company nor Jersey Central is now serving the area in controversy.

Each had begun preparation to serve such area.

It is not necessary to determine which of the two Companies first began to prepare to serve such area.

The area in controversy is, as above noted, within the franchise area of the Jersey Central Company. It is immediately contiguous to the area served by that Company. It is miles from any area served by the Tri-County Company. The Jersey Central Company was, therefore, entitled, under principles laid down by this Board in prior proceedings, to preference in the area. That Company staked its lines in the area and adopted working orders for construction. Under these circumstances that Company having voluntarily embarked upon extension of its services into the area could not exact of those served through such extensions, extra charges for such extensions and will be obligated to serve them at its filed schedule rates. In this situation it would ordinarily follow that the Jersey Central should be protected as against the entry by another Company into the area.

However, Tri-County Company was actually serving a rural area miles distant. It projected the extension of its lines to Browns Mills, on the urging of a land Company engaged in building up a seasonal development there to furnish service in the area in dispute. It was preparing to serve Lemontown, a rural community in a rural area, through what was known as the Pointville-Lemontown spur. It had constructed about seven and a half miles of line for the service of Lemontown. Part of this construction was over "what was then Fort Dix," through Pointville, "not serving anybody in Pointville then down to Lemontown." Part of this construction was on private right of way over lands

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later acquired by the Government. Tri-County Company after the completion of this construction and before service was actually rendered was required by the Government to remove its lines from the area so acquired by the Government. The result was to leave the line of Tri-County Company through Pointville into Lemontown "without any connection to the distribution system of Tri-County which was feeding it before." Tri-County was then left "with seven and a half miles out on a limb"; that seven and a half miles of line is without any connection to any other part of the Tri-County system. To correct this situation Tri-County prepared to carry its lines from the "termination of (its) facilities at Boyd's Hotel * * * go west in and about State Highway 40, across Whites Bog, through Browns Mills where a right of way area has been cut; then across the Browns Mills area, and then on private right of way into the Pointville or Lemontown spur. This will require the building of approximately ten miles of lines without regard to any members thereon in order to furnish the Lemontown service.

There is testimony that it will not be financially feasible to so serve Lemontown, except as Tri-County Company is able to serve on Hydranga Street and Laurel Avenue, the area in Browns Mills here in controversy. Tri-County Company assumed that it was not a public utility; and that it was entitled to serve in the disputed area. It rested its assumption in part upon its construction of a contract between it and Jersey Central Company for division of territory, which contract was ambiguous. It failed to recognize that Jersey Central Company as a public utility Company could not effectively agree with another public utility Company (much less with a Company claiming not to be a public utility), not to further extend into its franchise territory and to restrict and limit its obligation to serve.

The fact that seven and a half miles of the Tri-County lines "are out on a limb" and that the investment therein is in jeopardy and that the people of Lemontown cannot be served as originally planned is in no wise fault of the Tri-County Company. It is the consequence of a step in the National Defense Program.

As previously noted, this Board would not ordinarily reach the conclusion which it has in this case. It reaches its conclusions for the reasons above noted and for the further reason that Tri-County, whether rightfully or not, assumed itself not to be a public utility and we feel that public interest in this case would

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not be served by jeopardizing the investment already made by Tri-County out of government funds, but rather requires such investment should if reasonably possible be conserved.

Under these circumstances it seems equitable because Jersey Central Company did not until recently manifest any desire voluntarily to enter upon serving in the Browns Mills disputed area and has made no special investment to that end, that Tri-County Company should be permitted to serve so much of the Browns Mills area not now served by Jersey Central Company as will make financially feasible its now projected line of service to Lemontown.

To that end the Board finds and determines: that the Tri-County Electric Company may make its connection for energizing service to Lemontown in the following manner:

Beginning at Boyd's Hotel, thence running in a northwesterly direction to a point opposite Hanover Boulevard in Browns Mills, as shown on Exhibit P-2, and continuing westerly along Hanover Boulevard to the intersection of Hanover Boulevard with Barclay Street, thence southerly along Barclay Street and Hydranga Street to a point 300′ north of Lake Shore Drive, and within 300′ either side of Hydranga Street and Barclay Street, and also in a northwesterly direction from the intersection of Hanover Boulevard and Barclay Street and across the existing lines of the Jersey Central Power & Light Company, across Pine Lake, and thence continuing in a northwesterly direction to a point marked "D" in a circle on Exhibit R-11, where said connection shall be made with the Pointville-Lemontown service.

Tri-County Company shall not serve any customers in Browns Mills along the above described route except as follows: Barclay and Hydranga Street to a point 300 feet from Lake Shore Drive and 300 feet either side thereof.

Since no municipality can directly or indirectly own or hold stock in Tri-County Company and since stockholding is essential to membership and to service, this Board will place no limitation upon Jersey Central in supplying street lighting or in the lighting of public buildings and places.

IV

This Board recognizes that there is need for governmentally aided rural electrification service. The need in this State because of uniform system rates, is not so great as elsewhere.

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It recognizes that the Companies furnishing such governmentally aided service will be comparatively local and small.

It recognizes that while they and their operations must be subject to some measure of regulation the burden of regulation readily borne by the larger electric lighting public utility systems, will bear heavily upon them.

This Board will recommend the adoption of legislation specially providing for the organization of such corporations and simplifying the regulatory provisions as to them.

In the meantime this Board through its power of classification and power to make rules and regulations will do what it can to that end under the statutes as they now stand.

We feel that we should note that this Board finds that those organizing Tri-County Company and others under Federal guidance, and the coercive power of withholding Federal aid, have in the face of comprehensive administrative policy of regulation that our State has adopted in its legislative effort to end the evils of unregulated public utility operation, studiedly sought to obtain all the rights, franchises and privileges of engaging in an enterprise "affected with a public interest" and at the same time avoid and circumvent by resort to technical and fine-spun distinctions, the application of these policies—to find and take advantage of a policy loophole in the regulatory laws.

The end—rural electrification—a worthy end does not justify the means adopted where those means involve circuitous methods of accomplishing the end, and point the way, if successful, to wholly nullifying the effort of our State to guard against, and protect the public from, glaring evils.

This Board finds that those organizing Tri-County Company and others under Federal guidance have sought to deny the protection of resort to the Courts. The by-laws of the Tri-County Company as above indicated, provide for forfeiture by the Board of Directors of the Company of the share of "capital stock" held by a member, and terminate the right of a member to service upon such forfeiture. The by-laws provide for readmission of such member and restoration of service to him at an annual or special meeting of the stockholders, but provide for no invoking of a special meeting by the one whose stock has been so forfeited and whose right to service has been so terminated. So that one as the result of such forfeiture may, in a given case, be deprived of service for approximately a year, and by force of the by-laws the

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action of the members if adverse to the one whose stock is forfeited is *"final;"* that is to say,—not subject to judicial review.

Particularly has the Board observed that the by-laws containing these provisions have not been furnished to some members until the "first meter reading" when stockholding and membership had already become a completed fact.

This Board has endeavored in all good faith and sincerity not to permit these facts to influence its judgment and conclusions.

It cannot, however, refrain from indicating its judgment that the course so taken, strikes at respect for law, and raises to a new level the proposition that "the end justifies the means," no matter what evils the means may bring in their train.

Notwithstanding the observations above noted, however, the Board, as already indicated, has reached its determination making due allowance for the fact that this is the first time in this State that the issue respecting co-operative associations has been before this Board, and so that the public moneys heretofore invested by Tri-County may not be wasted, we hereby make as part of this decision the following Order, viz.:

ORDERED that the Cease and Desist Order heretofore issued by this Board shall remain in force and effect against the said Tri-County except that the same is modified to permit the interconnections for energizing service to Lemontown area, as well as the providing of service in the area of Browns Mills, herein specifically set forth.

Dated, February 6, 1941.

No. 2220

In the Matter of the Application of Beviano Chartered Service for Approval of Municipal Consents for the Operation of One (1) Bus on the Edgar Road Bus Route No. 44 (File No. 118-039).

Herrigel Lindabury & Herrigel (by *J. S. Lindabury*), for the Applicant; *Charles S. Straw,* for Public Service Coordinated Transport.

BY THE COMMISSION:

Applicant requests approval of municipal consents of the Township of Cranford dated October 15, 1940, and the Borough of Roselle dated October 10, 1940, for the operation of one (1) bus

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now approved on the Edgar Road Bus Route No. 44 (file No. 118–039). The route in Cranford is described as beginning at Raritan Road and Centennial Avenue (Traffic Circle) (Berlant Park), and thence via Raritan Road to the Cranford Township-Linden City Line. Returning from Linden on Raritan Road, and thence via Raritan Road, Centennial Avenue and Traffic Circle to Raritan Road. The route in Roselle is described as entering Roselle from Linden on Wood Avenue, and thence via Wood Avenue to Raritan Road at the Roselle Borough-Linden City Line.

These two portions of route are on streets that mark the dividing line between these municipalities and the City of Linden. While it has been assumed, to the present time, that these portions of route were entirely within the City of Linden it now appears that westerly operation on the northerly side of these streets is in these neighboring municipalities. Accordingly, it is necessary that these municipal consents be approved in order to clarify the records with respect to this operation which has been in effect for many years.

No change in route, fares or number of buses is contemplated under this application, which was not opposed.

Upon consideration of the evidence the Board finds and determines that the municipal consents submitted with this application are necessary and proper for the public convenience and properly conserve the public interest and approves of same for the operation of one (1) bus over the route and for the fares set forth in the route description hereto attached.

Dated, February 20, 1941.

BEVIANO CHARTERED SERVICE

Edgar Road Bus Route No. 44 (File No. 118-039)

Has approval for the operation of not more than one (1) bus in the City of Elizabeth, City of Linden, Roselle Borough and Cranford Township, on the following route:

Beginning at the Cranford Township-Linden City Line on the Centennial Avenue Traffic Circle at Raritan Road (Berlant Park), thence on Raritan Road in Linden, Wood Avenue, Edgar Road into Elizabeth, Washington Avenue, South Broad Street, Broad Street, East Jersey Street, Seventh Street, Elizabeth Avenue to Smith Street. Returning on Smith Street, East Jersey Street, Broad Street, South Broad Street, Washington Avenue, Edgar Road into Linden, Wood Avenue through Roselle, Raritan Road, Linden into Cranford and to the place of beginning.

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This route is 7.2 miles long; schedule running time 33 minutes each way.

The fares are:

Between Raritan Road at the Centennial Avenue Traffic Circle and Edgar Road at the Elizabeth-Linden City Line—4.9 miles 5c

Between Edgar Road at the B. & O. R. R. Crossing and Elizabeth Avenue at Smith Street Inbound—3.4 miles—or East Jersey Street at Smith Street (around loop) Outbound—3.5 miles 5c

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No. 2221

In the Matter of the Application of Public Service Coordinated Transport for Approval of Municipal Consents of West Orange, Orange, East Orange and Newark, and to Operate Ten (10) Buses on the Tremont Avenue Bus Route No. 44 (File No. 080-348), Operating Between West Orange and Newark, and for Discontinuance of Service on the South Orange Bus Route No. 172 (File No. 263-504) and Central Avenue Bus Route No. 132 (File No. 080-348) Operating Between the Oranges and Newark.

Charles S. Straw, for Public Service Coordinated Transport; *Maurice Schapira,* for E. Vanderhoff & Sons; *Harold Farkas,* for Wohlgemuth Bus Company, Inc., and Martucci Bus Company; *John A. Mathews* (by *Paul J. O'Neill*), for Independent Bus Owners on the Elizabeth Bus Route No. 12.

BY THE COMMISSION:

Applicant requests approval of (1) municipal consents of the Town of West Orange, dated March 5, 1940, City of Orange, dated March 19, 1940, City of East Orange, dated March 16, 1940, and City of Newark, dated March 20, 1940, for operation by the applicant of ten (10) buses on the Tremont Avenue Bus Route No. 44 (File No. 080–348); (2) discontinuance of service on the South Orange Bus Route No. 172 (File No. 263–504), which line was approved for the operation by Public Service Interstate Transportation Company of five (5) buses between South Orange and Newark, and (3) discontinuance of service on the Central Avenue Bus Route No. 132 (File No. 080–348). This line was approved for the operation by the applicant of five (5) buses between Orange and Newark.

It is to be noted that the municipal consents of Orange, East Orange and Newark, in addition to the grant of consents, also grant permission to Public Service Interstate Transportation Company and the applicant to surrender five "bus permits" of each of

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the two lines proposed to be discontinued. Similar permission, however, was not granted by South Orange through which the South Orange Bus Route No. 172 is now operated.

The proposed Tremont Avenue Bus Route No. 44 is described in detail in Exhibit "A" attached hereto.

The South Orange Bus Route No. 172 and the Central Avenue Bus Route No. 132 as now approved are described in detail in Exhibit "B" and Exhibit "C", respectively, attached hereto.

The proposed Tremont Avenue Bus Route No. 44 will operate on the same street with the South Orange Bus Route No. 172 on Central Avenue between Freeman Street in East Orange and West Market Street in Newark. At this point these two lines will diverge but meet again on Raymond Boulevard at Broad Street and again at Mulberry Street and along Park Place between Raymond Boulevard and Central Avenue, all in Newark. These two lines also cross at the intersection of Tremont Avenue with South Center Street in Orange. The proposed route will parallel on the same streets the Central Avenue Bus Route No. 132 on Scotland Road between Tremont Avenue and Central Avenue in Orange, on Central Avenue between Freeman Street in East Orange and Washington Street in Newark; on Raymond Boulevard and the Raymond Plazas between McCarter Highway and the Pennsylvania Railroad station in Newark, and, in one direction only, on Central Avenue and Park Place between Washington Street and Center Street in Newark.

With respect to the Central Avenue Bus Route No. 132 the present and proposed fares between the points of mutual service above indicated, are the same, but as to the South Orange Bus Route No. 172 the fares on the proposed line between the points of mutual service will be exactly one-half those now authorized. The South Orange Bus Route No. 172 has in effect a fare rate of 10c per zone, 20c through, against the proposed fare rate based on 5c for each of the two proposed zones.

The service on Central Avenue Bus Route No. 132 consists of fifteen (15) round trips per day and service on the South Orange Bus Route No. 172 consists of one trip in one direction only per day. The service proposed on the Tremont Avenue Bus Route No. 44 is seventy-five round trips per day.

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This application is to be considered with an application heard concurrently by the Board entitled:

> "In the matter of the application of Public Service Coordinated Transport for approval of municipal consent of West Orange for change in route on the West Orange Bus Route No. 24 (File No. 395-348) operating between West Orange and Newark, and discontinuance of service on the Oranges Bus Route No. 126 (File No. 252-348) and the Orange Valley No. 44 service of the West Orange Bus Route No. 24 (File No. 395-348),"

because one application, to some degree, is dependent upon the other, more particularly as the proposed line in this case is identical with the Orange Valley No. 44 service of the West Orange Bus Route No. 24 between the Mississippi Avenue Loop in West Orange and Central Avenue at Washington Street in Newark, on Main Street in West Orange and Orange, Scotland Road and Tremont Avenue in Orange and East Orange, Tremont Avenue, Sanford Street, Rhode Island Avenue, Freeman Street and Central Avenue in East Orange and Central Avenue in Newark; at the intersection of Raymond Boulevard and Broad Street and, in one direction only, on Park Place and Central Avenue between Raymond Boulevard and Washington Street in Newark. The proposed Tremont Avenue Bus Route No. 44 also duplicates the Oranges Bus Route No. 126 for a short distance in Orange and West Orange on Main Street between Northfield Avenue in West Orange and Scotland Road in Orange, at the intersection of Central Avenue and West Market Street in Newark and on Raymond Boulevard and the Raymond Plazas between Washington Street and the Pennsylvania Railroad station.

DESCRIPTION OF PRESENT OPERATION OF CENTRAL AVENUE BUS ROUTE NO. 132 AND SOUTH ORANGE BUS ROUTE NO. 172

The application includes the proposed abandonment of these two routes. The Central Avenue line is operated as a rush hour service. It consists of only a few trips and was designed primarily to relieve the peak loads on West Orange Bus Route No. 24–44. Practically all of the service will be supplied by the proposed Tremont Avenue Bus Route No. 44, Central Avenue car line and the Orange Valley Bus Route No. 44.

South Orange Route No. 172, consists of only one inbound trip daily except Sunday. For all practical purposes, a one trip operation is in effect no operation so far as public interest is concerned.

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TRAFFIC CHECKS IN SUPPORT OF NEW PROOFS

Applicants submitted a series of traffic checks and time schedules relating to the instant and contemporaneous case to which we have herein referred. The applicant's contention is that these traffic checks, coupled with testimony as to changing conditions during different periods of the year and the conditions in the area and routes involved, justify the changes and method of operation, both as to routes and proposed volume of service. We will refer to this phase of the matter in connection with the objections to the granting of the application.

OBJECTIONS TO THE GRANTING OF THE APPLICATION

The independent bus owners, each of whom operate one bus on West Orange Bus Route No. 24, between Mississippi Avenue loop in West Orange and the Newark-Elizabeth city line on the route described as the "regular service A" of West Orange Route No. 24, described in "Exhibit B" attached to the Board's conclusions in the related case, object. The objections specifically are:

1. That the municipal consent of the City of Newark is not in proper legal form.
2. That the surrender of consents on one line and the granting of equal number of consents upon such surrender on another line, is contrary to the rule announced by the Board in a prior case involving one of these lines.
3. That the traffic checks and other evidence by applicant do not justify the proposed changes except that objectors concede that the traffic checks indicate more service is required than that now operated on Central Avenue in Newark.

CONCLUSIONS AS TO OBJECTIONS

The objection that the municipal consents granted by Newark are illegal because they were granted by Director of Public Affairs and not by "the Board or Body having control of the public streets" was recently overruled by the New Jersey Supreme Court in *Wohlgemuth Bus Company, et al.* vs. *Public Service Coordinated Transport, et al.,* Atlantic Reporter, 15 A 2nd—No. 9, p. 596.

As to (2), that the granting of this application would be contrary to the Board's previously announced rule is likewise without

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merit for the reason that new municipal consents from all of the municipalities on the proposed route have been obtained and submitted to the Board for approval.

As to (3), that applicant's proofs, including the traffic checks, do not satisfactorily support the application. A factual question is involved which must be determined by the Board. While checks and other data do not disclose how many of the present riders will be benefited or adversely affected by the proposed changes, we have reached the conclusion, after a thorough analysis of the proofs that we should conclude, in view of the comprehensive plan here under consideration, that the proofs are sufficiently informative to justify a finding that the entire scheme of proposed operation will be in the public interest. That is apparent since it appears that between various points affected by the changes, service will be increased, a direct service will be provided where a transfer is now required, and new areas will be given service. Conversely, between other points, service will be decreased, transfers will be required where direct service is now available and in some inconsequential instances, service will be eliminated. However, as we have just determined, the general plan, it appears to us, will provide a convenient and necessary service to afford a larger number of riders than those who may be inconvenienced.

Pursuing the analysis further, it is to be noted that where the present average number of passengers per trip is between nine and ten it is proposed to increase service some seven per cent and that at another point where the average number of passengers per trip is between thirteen and fourteen a one per cent decrease is proposed. The maximum load for any one-half hour period on all services at the intersection of Northfield Road and Main Street is less than seating capacity, and during most of the day the cars and buses at this point have only about one-quarter of their seats occupied. However, it is proposed to increase inbound service at this point by eighteen trips, from 270 to 288, and outbound service by nineteen trips, from 275 to 294; but a slight decrease in number of trips is proposed for South Broad Street in Newark where for one-half hour period the number of standees nearly equals one-half the seating capacity in the morning rush hours and there are a considerable number of standees during the evening rush period.

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The point of maximum load is on Central Avenue and High Street in Newark. At this point the facilities involved in this application average throughout the day loads equal to three-quarters of the seats available. This is an exceedingly high average. There are two one-half hour periods during the non-rush hours when the average load is in excess of the seating capacity, and one-half hour period when the number of standees averages nearly three-quarters of the number of seated passengers. There is no one-half hour period during the day when the number of passengers in one direction or the other averages less than half the available seats.

West Orange Bus Route No. 24, is a relatively long route opeating through congested territory for practically its entire length. Numerous complaints, from time to time, have been lodged with the Board because of alleged heavy loading and the irregular service. It is anticipated that the granting of the two applications will in a large measure remove the cause for such complaints. Obviously, more service will decrease average loads. A decrease in average loads, as must be obvious, means less frequent stops and less delay, thus increasing overall speeds in tending to effect a more regular operation. With the increase in service there is no reason why wholly adequate service should not at all time be provided throughout this area.

Objection three includes, as we gather from the proofs and arguments, the claim that the granting of the application will deprive objectors of some of the riders along that portion of West Orange Route No. 24. However, objectors failed to submit any specific proofs that such a result will follow the granting of the application.

Objectors operate only three of the thirty-two buses on this line. Moreover, it appears that at all the points checked where service increases are proposed, these three buses average from 7½ per cent to 19 per cent heavier loads than those of the applicant. We think that this revenue will not be appreciably reduced by the granting of the application. In any event, we cannot speculate and as we have stated, there is no substantial proof of probable loss of revenue.

In conclusion, we are satisfied that the plan proposed in the two applications will result in improving service on and along and in the neighborhood of West Orange Bus Route No. 24-44 which improved and increased service is undoubtedly necessary and required by the public interest.

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Upon consideration of all the evidence in this case and such portions of the evidence in the concurrent case hereinabove referred to as are applicable to this case, the Board finds and determines that the municipal consents submitted with this application are necessary and proper for the public convenience and properly conserve the public interest and approves of same for the operation of not more than ten (10) buses on the route and for the fares set forth in the route description hereto attached, marked Exhibit "A" and approves of the discontinuance of service on the South Orange Bus Route No. 172 and Central Avenue Bus Route No. 132, descriptions of which are attached hereto and marked Exhibits "B" and "C" respectively, at such time as there shall have been submitted to the Board proper evidence that the municipal consents heretofore granted for these operations have been surrendered to the respective municipalities.

Dated, February 27, 1941.

EXHIBIT A

PUBLIC SERVICE COORDINATED TRANSPORT

Tremont Avenue Bus Route No. 44 (File No. 080-348)

Has approval for the operation of not more than ten (10) buses in West Orange, Orange, East Orange and Newark on the following route:

Beginning at Mississippi Avenue Loop near Harrison Avenue in West Orange, thence on Mississippi Avenue, Harrison Avenue, Main Street into Orange, Scotland Road, Tremont Avenue into East Orange, Sanford Street, Rhode Island Avenue, Freeman Avenue, Central Avenue into Newark, Washington Street, Raymond Boulevard, Raymond Plaze West to the Pennsylvania Railroad Station. Returning on Raymond Plaza East, Raymond Boulevard, Park Place, Central Avenue and same as the going route in the reverse direction to the place of beginning.

This route is 8.1 miles long, schedule running time 38 minutes each way.

The fares are:

Between the Mississippi Loop in West Orange and Central Avenue at West Market Street in Newark—6.3 miles	5c
Between Central Avenue at 17th Street in East Orange and Pennsylvania Railroad Station in Newark—2.3 miles	5c

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EXHIBIT C

PUBLIC SERVICE COORDINATED TRANSPORT

Central Avenue Bus Route No. 132 (File No. 080-348)

Has approval for the operation of not more than five (5) buses in Orange, East Orange and Newark on the following routes:

A. Regular Service—Beginning on Argyle Avenue at Valley Street in Orange, thence on Argyle Avenue, Scotland Road, Central Avenue through East Orange into Newark, Park Place, Centre Street, McCarter Highway, Raymond Boulevard, Raymond Plaza West to the Pennsylvania Railroad Station. Returning on Raymond Plaza East, Raymond Boulevard, McCarter Highway, Centre Street, Park Place, Central Avenue through East Orange into Orange, Scotland Road, Morris Street, Valley Street to Argyle Avenue, the place of beginning.

This service is 6.0 miles in length.

B. City Line Service—Beginning on Central Avenue at South 17th Street in East Orange, thence on Central Avenue and same as the A service route to the Pennsylvania Railroad Station. Returning same as the A service returning route to Central Avenue at South 15th street in Newark, thence on South 15th Street, 9th Avenue into East Orange, South 17th Street to Central Avenue, the place of beginning.

The fares are:

Between Valley Street at Argyle Avenue in Orange and Central Avenue at West Market Street in Newark	5c
Between Central Avenue at 17th Street in East Orange and the Pennsylvania Railroad Station in Newark	5c
Through fares	10c

Subject to the restriction that—the number of trips scheduled for this operation shall be limited to not more than 20 per day. These trips shall be operated only during that portion of the day formerly covered by service of this line and that of the Central Avenue Car Line Shuttle Service.

EXHIBIT B

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY

South Orange Bus Route No. 172 (File No. 263-504)

Has approval for the operation of not more than five (5) buses in South Orange, Orange, East Orange and Newark on the following route:

Beginning on Prospect Street at the South Orange-Maplewood Boundary Line in South Orange, thence on Prospect Street, South Orange Avenue, Center Street into Orange, Central Avenue through East Orange into Newark, West Market Street, Bank Street (Broad Street), Park Place, Broad Street, Lombardy Place, Ogden Street, Bridge Street to the Harrison Town Line. Returning on Bridge Street, Ogden Street, Mul-

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berry Street, Raymond Boulevard, Broad Street, Academy Street, High Street, Bank Street and the going route in the reverse direction to the place of beginning.

The fares are:

Within South Orange, Orange and East Orange	10c
Within Newark	10c
Through fare	20c

Subject to the restriction: that the operators of said buses shall carry only seated loads.

No. 2222

In the Matter of the Application of Westwood Transportation Lines, Inc., for Approval of Municipal Consents for the Operation of twelve Buses Between Rochelle Park and Weehawken, Rochelle Park Bus Route (File No. 102-003).

George M. Eichler, for Westwood Transportation Lines, Inc.; *Charles S. Straw* and *J. H. Mulhern,* for Public Service Coordinated Transport; *Grover R. James,* for Walter Kidde, Trustee, New York, Susquehanna and Western Railroad Company; *Maurice J. Cronin,* for Garden State Lines; *Wall, Haight, Carey & Hartpence* (by *Gerald F. O'Mara*), for West Shore Railroad Company and New York Central Railroad Company.

BY THE COMMISSION:

The application is for approval of municipal consents to operate twelve auto buses in the following municipalities: Township of Rochelle Park, Borough of Maywood, Borough of Bogota, Village of Ridgefield Park, Borough of Ridgefield, Borough of Palisades Park, Borough of Fairview, Town of Guttenburg, Town of West New York and Township of Weehawken.

Numerous objections to various municipal consents were interposed, all of which have been considered and over-ruled.

The proposed route as described in Schedule "A" attached hereto passes through the City of Hackensack, located between the Borough of Maywood and Bogota and through the Township of North Bergen, located between the Borough of Fairview and the Town of Guttenburg. Municipal consents have not been granted by the City of Hackensack and the Township of North Bergen.

Briefly stated, the purpose of the application is to provide direct and local service between the Township of Rochelle Park and the Township of Weehawken, a distance of about sixteen miles.

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The application was opposed by the trustees of the New York, Susquehanna and Western Railroad, Public Service Coordinated Transport and Garden State Lines, all on the ground that the entire territory is now adequately serviced by direct or indirect bus operations and that public necessity and convenience do not require additional service.

We will consider these objections separately.

First, that of the New York, Susquehanna and Western Railroad: This Company, which is now in the process of reorganization because of financial losses, operates daily, twenty westbound and twenty eastbound trains between Rochelle Park and Weehawken Ferry; twenty westbound and eighteen eastbound between Maywood and the Ferry, thirty east and westbound between Hackensack and the Ferry; seven westbound and six eastbound between Bogota and the Ferry; eight westbound and seven eastbound between Ridgefield Park and the Ferry; six westbound and five eastbound between North Bergen and the Ferry. None of this service, however, a part of which is operated to the Susquehanna Transfer by new Diesel motor cars, except between Rochelle Park and Ridgefield Park, will be in direct competition with the proposed service.

"Q. You will concede, though, that direct competition to be effected by this service is simply between Rochelle Park and Ridgefield Park?
A. That is right so far as our railroad is concerned, yes.
Q. So far as your railroad is concerned?
A. Yes.
Q. How many trains do you run between Rochelle Park and Ridgefield Park?
A. Five steam trains each way.
Q. Between Rochelle Park and Ridgefield Park?
A. Yes, that makes those stops.
Q. And how many Diesel between Rochelle Park and Ridgefield Park?
A. Diesels run eight westbound and seven eastbound.
Q. Stopping at Ridgefield Park?
A. Yes, the time table here shows it.
Q. Then you would say you run approximately thirteen services each direction between Rochelle Park and Ridgefield Park?
A. Yes, that is right, they make those stops, yes."

The distance between Rochelle Park and Ridgefield Park is about seven and one-half miles and the running time is about eighteen to twenty minutes.

Two municipalities, Maywood and Bogota, for which consents have been granted, are situated between Rochelle Park and Ridgefield Park. The Railroad Company did not produce any proof

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as to the extent of the local business between Rochelle Park and Ridgefield Park. Without such proof, the claim of prejudicial competition is unsupported.

We are, therefore, obliged to overrule the contention that approval of the application would prejudicially protect the interests of the railroad.

Second, the objection of the Public Service Coordinated Transport is that "Various Public Service routes serve this territory for the main part, they are right on the same street, with practically no exception, as the applicant's route".

Amplifying the objection, witnesses testified: "regarding the municipalities that these lines traverse and the method by which the various passengers can board at one point and get off at another point along Public Service lines covering the route which the applicant seeks to serve".

Attention was directed to the fact that there is direct service between Rochelle Park and Hackensack on Hudson River Bus Route No. 1, and Passaic-Lodi No. 42. Applicant's proposed line follows objector's Hudson River No. 1 Route from Rochelle Park to Bogota. Applicant, however, does not hold a municipal consent from Hackensack and, therefore, may not discharge or accept passengers in Hackensack.

Another illustration of alleged competition as contended is the area from Hackensack to Fairview which is served by objector's Hackensack-Journal Square Route No. 124 and Hackensack-Bergenfield Route.

A third area of purported competition is between Palisades Park and Weehawken, covered by objector's Dumont No. 54 route over identical streets as applicant's route. The maps in evidence corroborate this testimony.

It will be noted, however, that objector's operations as indicated by the witnesses, are partial operations but that there is no direct route from Rochelle Park to Weehawken. That fact is conceded by the objector.

> "Q. Does your company offer a through route between Rochelle Park and Weehawken, along the route proposed to be served by applicant?
> A. No."

Third, the objection of the Garden State Lines is that the proposed operation "will be competitive in the communities of Rochelle Park, Maywood, Hackensack, Bogota and Palisades Park".

> "Q. That is directly competitive through the same municipalities?
> A. Directly competitive through the same municipalities."

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In Rochelle Park and Maywood, the proposed route will operate on Central Avenue, one block distant from this objector's operation on Passaic Street; in Bogota, on Palisade Avenue and Fort Lee Road.

It is further contended that the indirect service of the objector will be likewise effective and that this competition will be particularly serious because the Company "right now is losing money continuously on the operation of that local route".

Realizing the force of the objection, counsel for the applicant stated on the record:

> "I want to make an offer here, if Your Honor please, that so far as the directly competitive services are concerned, we are willing to be restricted. We do not want to engage in any directly competitive service in any area where there is direct service and I am willing to offer for the record, for the consideration of the Board, some suggested restrictions in that respect."

In support of the application, a supervisor and checker for applicant testified that he was stationed at the Port Authority Building at the Lincoln Tunnel, that his business was "checking buses as to time and answering questions that people come over there and ask for bus transportation to get to Rochelle Park or Maywood or Bogota or any place like that. I have on an average of ten or fifteen people a day who I can't put on and I have to tell them * * * how to reach their destination in Bogota, Ridgefield Park, Palisades Park, Ridgefield and Fairview".

A Public Service bus operates from the Weehawken Ferry to the top of the West Shore Ferry hill, a distance of about a mile where transportation may be obtained for various municipalities. There is another bus about a half mile distant.

This testimony was corroborated by a witness who was employed as a starter at Palisades Park. This witness testified that numerous persons desiring "public transportation to points north and south along the route of the Westwood Transportation Lines" frequently inquire as to means of transportation because applicant is not permitted to conduct a local business between Weehawken Ferry and Rochelle Park.

One witness testified that he lived at Fairview and worked at Weehawken, that the closest transportation required a walk of twenty-five minutes from the bus terminal to the factory.

A police officer in the employ of the Port of New York Authority testified that he lived at Rochelle Park and that the only "means

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of transportation between Rochelle Park and that area of Weehawken involves two different buses and then there is a walk where you go down to the tunnel all of which results in a delay of at least a half an hour each way".

Witnesses testified further that "persons frequently ask concerning the transportation facilities to Rochelle Park, Maywood and Bogota."

The Chief of Police of Ridgefield Park testified that the direct operation proposed by applicant would be a convenience for residents of Ridgefield Park and avoid a transfer to reach the Weehawken area.

A representative of the Ridgefield Park Chamber of Commerce testified to the same effect.

Some testimony was submitted by residents of Palisades Park, Chairman of the Police Committee of Weehawken, Police and Transportation Committees of Weehawken, Chief of Police of Ridgewood, Chairman of the Police and Transportation Committee of Fairview who testified: "There is no direct service from Fairview, the heart of Ridgefield Park, Bogota, Rochelle Park or Maywood * * * a number of residents are employed at Maywood Chemical Works, Bogota, Ridgefield Park and Ridgefield and that the direct service will be a real convenience to these persons."

These excerpts from the testimony typify the reasons advanced by all applicant's witnesses in urging the approval of the application.

While the testimony is voluminous and the exhibits numerous, the problem to be solved is simple.

a. Does public necessity and convenience require a direct route from the municipalities north of Weehawken to Weehawken, and

b. Will the granting of approval for a direct route be prejudicial to existing lines in the field.

As to (a), an analysis of applicant's proofs demonstrates the necessity for a direct route to afford service to the various municipalities and industrial plants located therein, which are now available only by indirect routes and the payment of more than one fare.

As to (b) the proofs are equally clear that between some of the intermediate muncipalities, unless restricted, applicant will compete with existing facilities. Such potential competition, however, does not bar approval of the application. The legal right of the existing facilities to be protected from prejudicial competition will be satisfied by the imposition of proper restrictions.

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Upon consideration of the proofs and exhibits, the Board finds and concludes that public necessity requires approval of the municipal consents of the Township of Rochelle Park, Borough of Maywood, Borough of Bogota, Village of Ridgefield Park, Borough of Ridgefield, Borough of Palisades Park, Borough of Fairview, Town of Guttenburg, Town of West New York and Township of Weehawken, for the operation of twelve buses on the route, for the fares and subject to the restrictions set forth in the route description (Exhibit A) hereto attached, said restrictions being as follows:

1. No passengers shall be accepted who begin and end their trips between and including Hudson Boulevard East at 48th Street in Weehawken and Columbia Avenue at Grand Avenue in Palisades Park.
2. No passengers shall be accepted who begin and end their trips between and including Palisade Avenue at Munn Avenue in Bogota and the Rochelle Park Terminus on Rochelle Avenue at Passaic Street.
3. No passengers shall be accepted within the municipal limits of the Borough of Palisades Park whose destination is between and including Palisade Avenue at Munn Avenue in Bogota and the Rochelle Park Terminus at the intersection of Rochelle Avenue with Passaic Street and no passengers shall be accepted between and including the intersection of Rochelle Avenue with Passaic Street in Rochelle Park and Palisade Avenue at Munn Avenue in Bogota whose destination is within the municipal limits of Palisades Park.
4. No intrastate passengers shall be accepted or discharged within the municipal limits of the City of Hackensack and the Township of North Bergen.

Dated, March 27, 1941.

WESTWOOD TRANSPORTATION LINES, INC.

Rochelle Park Bus Route (File No. 102-003)

Has approval for the operation of not more than twelve (12) auto buses in Rochelle Park Township, Maywood Borough, Bogota Borough, Ridgefield Park Village, Palisades Park Borough, Ridgefield Borough, Fairview Borough, Town of Guttenberg, Town of West New York and Weehawken Township, on the following route:

Beginning on Rochelle Avenue at Passaic Street in Rochelle Park, thence on Rochelle Avenue, Central Avenue into Maywood, Maywood Avenue, Passaic Street into Hackensack, State Street, Mercer Street, River Street, Bridge Street, Court Street, Hackensack River Bridge into Bogota, Fort Lee Road, River Road, Main Street, Palisade Avenue to Ridgefield Park, North Avenue, Main Street, Mt. Vernon Street, Teaneck Road, Truitt Street, New Jersey State Highway Route No. 6 through Ridgefield and into Palisades Park, Columbia Avenue, Broad Avenue through Ridgefield to Fairview, Bergen Turnpike, Fairview Avenue to North Bergen, Park Avenue, Hudson Boulevard East

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through Guttenberg, West New York and into Weehawken, Lincoln Tunnel Plaza and Lincoln Tunnel to New York State. Returning on Lincoln Tunnel, Lincoln Tunnel Plaza, Park Avenue, Willow Avenue, 19th Street, Park Avenue, Hudson Boulevard East and same as the going route in the reverse direction to New Jersey State Highway Route No. 6 in Ridgefield Park, thence on New Jersey State Highway Route No. 6, Hilly Place, Emerson Street, Teaneck Road and continuing same as the going route in the reverse direction to the place of beginning.

This route is about 16 miles long.

The fares are as follows:

Between Rochelle Park or Maywood and:	
Bogota, Ridgefield Park or Ridgefield	10c
Fairview or Guttenberg	15c
West New York or Weehawken	20c
Between Bogota or Ridgefield Park and:	
Bogota, Ridgefield Park, Palisade Park or Ridgefield	5c
Fairview, Guttenberg or West New York	10c
Weehawken	15c
Between Palisade Park or Ridgefield and:	
Palisade Park, Ridgefield or Fairview	5c
Guttenberg, West New York or Weehawken	10c
Between Fairview and:	
Weehawken	10c
Between Guttenberg, West New York or Weehawken and:	
Weehawken	5c

Subject, however, to the following restrictions:

1. No passengers shall be accepted who begin and end their trips between and including Hudson Boulevard East at 48th Street in Weehawken and Columbia Avenue at Grand Avenue in Palisades Park.

2. No passengers shall be accepted who begin and end their trips between and including Palisade Avenue at Munn Avenue in Bogota and the Rochelle Park Terminus on Rochelle Avenue at Passaic Street.

3. No passengers shall be accepted within the municipal limits of the Borough of Palisades Park whose destination is between and including Palisade Avenue at Munn Avenue in Bogota and the Rochelle Park Terminus at the intersection of Rochelle Avenue with Passaic Street and no passengers shall be accepted between and including the intersection of Rochelle Avenue with Passaic Street in Rochelle Park and Palisade Avenue at Munn Avenue in Bogota whose destination is within the municipal limits of Palisades Park.

4. No intrastate passengers shall be accepted or discharged within the municipal limits of the City of Hackensack and the Township of North Bergen.

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No. 2223

In the Matter of the Formal Complaint of Mrs. J. M. Arnold vs. Public Service Coordinated Transport, In re School Tickets.

Mrs. J. M. Arnold, in her own behalf; *Charles S. Straw,* for Public Service Co-ordinated Transport.

BY THE COMMISSION:

Complainant resides at No. 11 North 21st Street, East Orange, New Jersey, which is about four blocks above the Ampere depot.

Complainant's son was at the time nineteen years of age and attending Drake Business College in Newark. The gist of the complaint is that respondent refused to accept school tickets on the Ampere Bus Route used by the son during July and August and during the Christmas holidays when public schools are closed.

The reglar fare from Ampere to Newark is 10c with a 5c zone within East Orange. A "school ticket" sells for three cents and is good for riding in a five cent zone. The so-called "school ticket" specifically provides on the face thereof as follows: "Good for one ride to or from school, on single car or bus within single fare limits, on street car lines and bus lines operated in substitution of street car lines as designated in current regulations of Public Service Coordinated Transport."

The Company's position as to this complaint is that since the Ampere Bus Route No. 2 is not a bus line operated in substitution of street car lines that it is under no franchise obligation to accept school tickets on said bus line. It concedes the obligation to accept school tickets on all bus lines which are substituted for street car lines where the municipal ordinance granting the franchise for the operation of the street car lines imposed the duty for the issuance of such school tickets.

At the hearing the Company indicated that in addition to honoring school tickets on lines substituted for street railways, it also honored school tickets on other lines where at the time of the acquisition of the particular line by the Company the practice of issuing school tickets was in force. The Company did continue and has continued such practice.

Since it appears that the Company does accept school tickets on all buses which have been substituted for the operation of street railways and since the complaint in this case does not relate to such

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a substituted bus line this Board concludes that the complaint in so far as this phase is concerned must be and the same is hereby dismissed.

Another phase of the complaint was that the respondent refused to accept school tickets during summer months and public school holidays. In this regard it is to be noted that on the reverse side of the school ticket there appears a limitation that "these tickets are good only during school term and on class days between 8:00 A. M., and 5:00 P. M.; they will not be honored at any other time of day, or on Saturdays, Sundays or Holidays." In view of the nature of the ticket and the reduced fare at which it is offered, we believe that this limitation is not arbitrary but is a fair and reasonable one and that the regulation that such tickets are good "only during school term" relates to regular school terms in general force. Therefore, the Board concludes that this phase of the complaint must likewise be dismissed.

The Board long since reached the conclusion that this complaint must be dismissed. It withheld its decision because it hoped that some uniform action by all auto bus companies with respect to school children's tickets might be effected. The Board has held public informal conferences to this end, but the problem is complicated and basis for uniform action has not yet been reached.

Dated, April 3, 1941.

No. 2224

In the Matter of the Reasonableness of the Schedule of Charges for Service by the Atlantic City Sewerage Company.

Frank H. Sommer, Counsel, *John A. Bernhard,* Assistant Counsel, for the Board; *Thomas D. Taggart, Jr.,* Mayor, *Samuel Backer,* Counsel, for City of Atlantic City; *Samuel Backer,* Counsel, for Atlantic City Chamber of Commerce, Atlantic City Real Estate Board and Atlantic City Hotelmen's Association; *Joseph F. Autenrieth,* Counsel, *Thompson and Lloyd* (by *John Lloyd, Jr.*), Counsel, for the Atlantic City Sewerage Company.

BY THE BOARD:

This proceeding resulted from a petition filed by the Atlantic City Sewerage Company, dated June 7, 1940, which asked that the Board approve a general increase in charges for service in the manner and form set forth in a revised schedule attached to the

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petition. The petitioner proposed that these increases should become effective on July 15, 1940.

The proposed schedule provided increases in the flat charges for each of the forty-one classes of service established by the schedule then effective and provided flat charges for two new service classifications (air conditioning and refrigeration). It is estimated that for 1941 the schedule of charges proposed by the respondent would increase operating revenue, after adjustments and refunds, by $120,817, from $441,438 to $562,255 (Exh. C-3). This is an increase of 27.4 per cent in operating revenue.

Among the reasons alleged by the Company as justifying the petition for increased rates is the increase both in investment and operating cost resulting from installation of a chlorination plant pursuant to an Order of the State Department of Health dated April 11, 1939. Reference is also made to increased taxes and the failure of present revenue to produce a fair return on the value of petitioner's property devoted to the public use.

The burden is upon the petitioner to prove the reasonableness of this proposed general increase in charges for service.

I. HISTORY OF COMPANY AND DESCRIPTION OF PROPERTY

A review of the history of the Company and a brief description of its business and property are necessary to an understanding of the issues presented in this proceeding.

Sewerage service in Atlantic City was first provided by the Improved Sewerage and Sewage Utilization Company under franchise granted November 12, 1884. The present Atlantic City Sewerage Company was incorporated December 28, 1888, and in 1889 took over the property of the Improved Sewerage and Sewage Utilization Company.

On December 30, 1905 the City Council of Atlantic City adopted an ordinance fixing a schedule of rates for the Company. The rates so fixed were a slight increase over those previously charged.

The ordinance further made provision for acquisition by the City of Atlantic City, at any time prior to December 31, 1920, of all the real and personal property of The Atlantic City Sewerage Company, together with its rights and franchise used in connection with its sewerage system. A requirement of the ordinance with respect to the acquisition provision was that the Company

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should annually, on or before the 1st day of February in each year beginning with 1907, submit to the City Comptroller of Atlantic City a verified itemized statement of its expenditures for improvements and extensions of its system and plant during the proceeding calendar year. The City Comptroller was directed to audit and verify the statement by examination of the books, vouchers, payrolls and records of the Company, and to submit to the City Council a report of his audit and examination.

There is no present available record of the charges for service made by the Company when it first began operations. The original rates were increased by the ordinance, above referred to, adopted by the City Council of Atlantic City on December 30, 1905. The ordinance rates remained in effect for a period of approximately sixteen years until, as a result of hearings on an application of the Company for approval of increased rates, filed with the Board on October 28, 1921, the Board ordered increased rates below those asked for by the Company. These new and higher rates became effective August 1, 1922. Subsequently the Company, on May 14, 1924, filed an application for further substantial increases in its rates. After a hearing, the Board granted the Company's application. The present rates are those authorized by the Board, effective June 3, 1924.

References in this report to the 1921 rate case should be understood to refer to the proceedings above described.

The City of Atlantic City is located on a group of irregularly-shaped sand islands on the southern New Jersey coast, with the principal area of the city situated on one large island. The highest point in the city is about six feet above high water, and in some places tide water is found at three to four feet below the surface. Quicksand occurs frequently at varying depths. Separating the islands from the mainland on the west is a tortuous tidal channel, known as the Beach Thoroughfare. This has various branch thoroughfares, which form the smaller islands. The City is bounded by the Atlantic Ocean on the east.

The permanent population of Atlantic City is approximately 70,000, but at times during the resort season the population may increase to nearly 500,000. It is said that more than 16,000,000 people visit Atlantic City annually.

It is thus seen that the physical conditions, together with the unusually large fluctuation in population, create difficulties both in construction and operation of the sewerage system.

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The original collecting system was planned to serve what is now the principal commercial and hotel section of the city. The plan provided for a deep receiving well and pumping station located at Baltic Avenue and Chalfonte Avenue. Sewage flowed by gravity to the pumping station whence it was forced by pumps to filters on the meadows northwest of the city. In 1897 the sewage disposal works were moved farther out to what is known as City Island, where the present treatment plant of the Company is located.

As the city grew the system was expanded to meet the additional requirements, until at the present time the area served by the collecting system of The Atlantic City Sewerage Company amounts to just a little less than three square miles.

Across Inside Thoroughfare and northwest of the southwestern end of the city lies the section known locally as Chelsea Heights. The facilities for handling sewage in this area are owned by the City of Atlantic City but are operated by The Atlantic City Sewerage Company under a contract with the city. This system is not connected physically with the system of the Company.

Because of the limitations imposed by the topography of the area, expansion of the Company's sewerage system took place by development of successive isolated drainage basins. In the beginning, sewage from these basins was permitted to flow directly by gravity into the thoroughfares. This objectionable practice led to agitation for treatment of the sewage and discontinuance of the discharge of sewage at the several points along the thoroughfares. Successive consolidations of the small collecting systems were made until at the present time all of the sewage is treated and handled at the City Island plant previously mentioned, with the exception of a summer peak flow which is treated and discharged at the Texas Avenue plant.

The Company's service area is composed of four principal districts, known respectively as the Baltic Avenue district, Texas Avenue district, Raleigh Avenue district and the Venice Park district. These names are derived from the location of the pumping station which serves each district. The Baltic Avenue district is essentially the area served by the original plant; to the southwest is the Texas Avenue district, and still further southwest is the Raleigh Avenue district. The Venice Park district is located on a separate island northwest of the Baltic Avenue district.

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The sewage collected in the Raleigh Avenue district flows by gravity to the Raleigh Avenue station, whence it is pumped through a 14 inch cast iron force main to a point on Texas Avenue where it joins the sewage collected in the Texas Avenue district. The Raleigh Avenue station is equipped with two centrifugal sewage pumps having a total rated capacity of 3,168,000 gallons per day, and one centrifugal pump having a rated capacity of 2,376,000 gallons per day. These pumps are direct connected by vertical shafts with electric motors which are automatically controlled by the level of the sewage in the wet well and are so arranged that one of the pair of pumps is always held as a spare. The operating pump carries the load until its capacity is reached, when the large pump is thrown into service automatically.

The sewage received from Raleigh Avenue and that collected in the Texas Avenue district flows by gravity through a 24 inch trunk sewer to the Baltic Avenue station. However, for about six weeks during the summer there is a very marked increase in the flow of sewage. The excess of this flow over the capacity of the existing trunk sewer spills over a weir and is carried to the Texas Avenue station where it is screened, treated and discharged into the Beach Thoroughfare. At low tide the discharge is by gravity but pumping is required at high tide. The pump equipment at the Texas Avenue station consists of two centrifugal sewage pumps with a total rated capacity of 4,608,000 gallons per day, direct connected by vertical shafts with electric motors which are automatically controlled by the height of the tide.

At the Baltic Avenue station all the sewage collected in the system is received, screened, and pumped through a system of cast iron force mains to the City Island treatment plant. At this station there are five modern centrifugal sewage pumps having a total rated capacity of 61,000,000 gallons per day, direct connected by vertical shafts to electric motors. In normal operation these pumps are used in combinations depending on the head to be pumped against. There are also two old centrifugal sewage pumps, with a total rated capacity of 14,000,000 gallons per day, belt connected to electric motors. These pumps are inefficient and are operated only under storm conditions. In reserve is a centrifugal sewage pump, with a rated capacity of 15,000,000 gallons per day, direct connected to a Diesel engine. The average pumpage at Baltic Avenue station is 13,600,000 gallons per day.

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There has been a measured maximum daily pumpage of 19,553,000 gallons.

The sewage in the Venice Park district flows by gravity to the Venice Park pumping station, whence it is pumped through a 10 inch cast iron force main to the City Island treatment plant. The station pumping equipment consists of two centrifugal sewage pumps, with a total rated capacity of 864,000 gallons per day, direct connected by vertical shafts to electric motors. These pumps are automatically controlled and one is held in reserve.

At the City Island treatment plant the sewage passes through a grit chamber, is chlorinated and then passes through twelve sedimentation tanks. The effluent from the sedimentation tanks is discharged into the Beach Thoroughfare. The sludge from the sedimentation tanks is removed by pumps, spread on sludge beds to dry and is finally disposed of as material for raising the elevation of the surface of City Island.

The collecting system of the Company consists of eighty-one miles of pipe ranging in size from 6 inches to 66 inches. The pipe is chiefly terra-cotta with a small amount of cast iron pipe and a very small amount of 15 inch to 66 inch diameter concrete pipe. These collecting mains are laid at depths ranging from practically at the surface of the street to fourteen feet. The various force mains in the system consist of approximately 7½ miles of cast iron pipe, mostly Class B, varying in size from 10 inches to 36 inches in diameter.

The number of service connections has increased from 1849 in 1891 to 13,021 in the year 1940.

II. THE RATE BASE

1. LAND AND FILL.

The evidence shows that as at December 31, 1939, the book cost of land was $118,213 (Exh. P-5). This amount of so-called "book value" does not represent the actual purchase cost of the land to respondent. As of December 31, 1921, an existing book cost of $39,913 was written down to $33,313 on the basis of the amount assigned to land in the Board's 1921 rate base allowance. The net additions to the land account from January 1, 1922 to December 31, 1939 amounted to $84,900, making a ledger value at the end of the period of $118,213. The historical cost of $124,813 is supported in detail by Exhibit P-5 and it is probable that the actual expenditures approximate this sum.

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Analysis of Exhibit P-5 shows that the expenditures charged to the land account for filling, dredging and reclaiming amounted to $47,734 on all land. The balance of $70,479 may be regarded as the purchase cost of the land except as it has been affected by the restatements of book figures.

Mr. Stanley N. Williams, a qualified civil engineer, who has been associated with the engineering organization of Mr. Clyde Potts over a period of about 25 years, was the principal witness for respondent. He testified that the total expenditure for fill at City Island had been $43,360, of which $24,895 had been charged to the land account, and $18,465 to the disposal plant accounts on respondent's books. The total amount of $47,734 charged to the land account for filling, dredging and reclaiming land included the $24,895 at City Island, $22,217 at the New York Avenue storage yard, and $622 at Venice Park.

In his reproduction cost exhibit (P-14), Mr. Williams included $16,750, plus overheads, for 67,000 cubic yards of fill at the City Island plant. It appears that Mr. Williams estimated that 67,000 cubic yards of fill had been required to place the City Island land in its present condition.

In addition, Mr. Williams for the Company included land in his exhibits at its total book cost of $118,213. The agreed inventory, which includes fill on land at City Island but not elsewhere, must be accepted by the Board as correct. Therefore, Mr. Williams' final estimate includes an element of duplication and is excessive by an amount which may be as large as $47,734.

The lands owned by The Atlantic City Sewerage Company were independently appraised on behalf of Atlantic City by Messrs. Myers and Beckman with respect to their current market value. There is no question concerning the qualifications of these men. Mr. Myers has been engaged in the real estate business in Atlantic City for twenty years and Mr. Beckman for sixteen years.

Mr. Myers testified that the aggregate fair market value of the several parcels of land owned by the respondent is $32,453 (Exh. AC-3). This estimate of current market value is based upon the present condition of the land, except that the land upon which the City Island plant is located was appraised as unfilled land. The lands were appraised by Mr. Beckman at $31,459 (Exh. AC-4) on exactly the same basis.

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The testimony by these local real estate experts has persuasive force. An average appraised value of $32,000 will be accepted by the Board as the reasonable current market value of land including the City Island tract in an unimproved condition. Mr. Williams' estimate of $16,750, plus overheads, or a total cost of $19,353, will be accepted as the cost of reproducing fill on land. Therefore, land plus fill will be included at $51,353 on a present value basis and at $124,813 for the purpose of the original cost estimate.

2. EVIDENCE OF COST OF REPRODUCTION

Mr. Stanley N. Williams on behalf of The Atlantic City Sewerage Company, and Mr. Malcolm Pirnie on behalf of the City of Atlantic City, each presented evidence of cost of reproduction new. Mr. Pirnie is a consulting civil engineer with some thirty years experience in sanitary engineering, particularly with reference to water works, water supplies, sewerage and sewage disposal.

The inventory of the collecting system and force mains, prepared by Mr. Williams as of December 31, 1939, had as its basis an inventory prepared by Mr. Clyde Potts in 1921. This 1921 inventory was revised by adding thereto the inventory of net additions to the collecting system and force mains for the years 1922 to 1939 inclusive (Exh. P-14). The collecting system and force mains amount to approximately 85 per cent of the total cost of the property on either a book cost or reproduction cost basis. The inventory of other property, pumping station and buildings also was prepared by Mr. Williams. The inventory of equipment, tools, materials and supplies was prepared by the Company. (Exh. P-4).

Mr. Pirnie and the Board's Engineers checked the inventory supplied by Mr. Williams and, after minor adjustments, there is substantial agreement as to the physical quantities.

THE WILLIAMS ESTIMATE

The inventory was priced on the basis of the prices current as of the date of the inventory. It was assumed that the entire property would be constructed over a period of two years. The following tabulation is a summary analysis of the cost of reproduction estimate as at December 31, 1939 submitted by Mr. Williams for the respondent. The table omits the items found to

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be improperly included (Exh. P-20) and does not include fill on land or land itself which is shown elsewhere at appraised value.

Item	*Reproduction Cost—New*	*Accrued Depreciation*	*Reproduction Cost—Less Depreciation*
Material and Labor	$3,256,185	$829,932	$2,426,253
Engineering, legal and administrative costs (9 per cent)	293,056	74,693	218,363
Interest during construction (6 per cent)	212,955	54,278	158,677
Total	$3,762,196	$958,903	$2,803,293
Pavement over mains—prior to 1921	103,749	39,840	63,909
Equipment, tools, materials and supplies	.....	.....	27,157
Total reproduction cost of property other than land	$3,865,945	$998,743	$2,894,359

It should be noted that the above table omits items found to be improperly included (Exh. P-20), land as shown by the books, and fill on land.

In the judgment of the Board, the unit prices applied by Mr. Williams to the collecting system and force mains are on the high side. The superstructure of the Baltic Avenue pumping station is included at a reproduction cost estimate new of $49,816. The Board is of the opinion that this amount is grossly excessive. Likewise the cost of piling and of concrete at the City Island plant is believed to be inflated.

Mr. Williams based his estimate of accrued depreciation upon the age-life method. Under this method an estimate of the expected life of different items of property is based on past experience and observation, then the amount of accrued depreciation is estimated as a straight line relationship between the average actual ages of the property units and their estimated average service lives.

THE PIRNIE ESTIMATE

In his initial pricing of the inventory Mr. Pirnie applied unit prices current on October 31, 1940 (Exh. AC-6). He also assumed that the construction would be completed over a two year

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period. The reproduction cost estimate of this witness is summarized as follows:

Material and labor	$2,506,305
General construction overheads	389,480
Estimated reproduction cost new, exclusive of land and cost for replacing pavement	$2,895,785
Deduct City Island land fill and overheads	19,353
	$2,876,432
Pavement:	
Actual amount from December 31, 1921, to December 31, 1939..	$83,729
Allowance for pavement replaced prior to December 31, 1921, as claimed by Company (Exh. P-17)	103,749
Equipment, tools, materials and supplies at Company's book cost	48,913
Total estimate of reproduction cost new not including land	$3,112,823

Mr. Pirnie's estimate of accrued depreciation was $555,000. This is a judgment figure. The witness supplied no estimates of depreciation materialized in classes of units or units of property. Mr. Pirnie explained that his method "approaches the observed depreciation method," and that based upon his general investigation of the condition of the property "it was just my judgment that that amount of depreciation was all that did exist in this property."

On the basis of spot prices as of October 31, 1940, Mr. Pirnie's estimate of cost of reproduction less depreciation, exclusive of land and fill, is $2,557,823. Mr. Pirnie, however, made a series of adjustments in discussing this estimate as evidence of the rate base (Exh. AC-7).

The first was the deduction of $290,000 for the purpose of substituting the average cost of construction over the past five year period for the spot prices as of October 31, 1940. The witness testified that during recent years the cost of constructing sewerage properties had fluctuated at a level from eleven to fifteen per cent below the construction costs as of Octobr 31, 1940. It appeared, therefore, that the reproduction cost estimate by Mr. Williams and the $2,557,823 found by Mr. Pirnie each are affected by the higher costs existing at the time of the appraisal.

The ascertainment of a reproduction cost estimate is not a matter of the exact equivalent upon the market of material prices and the cost of labor at the date of the appraisal. The Courts

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have indicated that the prices should not be confined to any particular date but may represent averages maintaining through the reasonable time required for actual reconstruction of the property. *Pacific Gas and Electric Company* vs. *Railroad Commission of California* (1938) 26 P. U. R. (N. S.) 1, 26 F. Supp. 507.

> "It also is an established rule that prevailing prices for a particular year in question should not be deemed controlling, but rather average prices prevailing over a period of years immediately preceding, taken in connection with the reasonable outlook for the immediate future." (*Elko-Lamoille Power Company* vs. *Public Service Commission of Nevada*, Dist. Ct. (1932) P.U.R. 1933B, 1 F Supp. 790, 191; *McCardle* vs. *Indianapolis Water Company* (1926), 272 U. S. 400, 71 L. ed 316.)

The period recognized by Mr. Pirnie for pricing purposes was longer than the assumed construction period. It is possible, however, that he believed the longer period should be taken because of the hypothetical character of the reproduction cost estimate and the uncertainity as to prices during the immediate future. At any rate, the Board must reject the contention of Counsel for petitioner that Mr. Pirnie's deduction of $290,000 from his initial cost of reproduction estimate "is wholly illegal."

The second adjustment by Mr. Pirnie is the deduction of the difference between the accumulated depreciation reserve as adjusted to reverse the write-down ($988,843) and his estimate of accrued depreciation ($555,000). This deduction in the amount of $433,000 was made on the ground that the Company had collected amounts for annual depreciation in excess of its reasonable depreciation requirements, that the excess had been invested in the property and that it is deductible as property contributed by the customers. Of course, the effect of this step is the same as though Mr. Pirnie originally had deducted the total depreciation reserve and had prepared no estimate of accrued depreciation. Deduction of the full amount of the depreciation reserve from investment cost supplies a figure which is evidence of the rate base. The depreciation reserve, however, is not necessarily the equivalent of the accrued depreciation, which is an element in a cost of reproduction estimate.

Mr. Pirnie also adds an amount of $250,000 as a so-called allowance for "intangible values." The reasonableness of this addition will be discussed at a later point under the heading of "going value." It appears, therefore, that Mr. Pirnie's estimate

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of reproduction cost on the basis of average prices, depreciated, excluding land and "intangible values" is $2,267,823.

3. EVIDENCE OF ORIGINAL COST

Mr. Schwartz testified that $1,923,070 is a reasonable estimate of the original cost less the adjusted depreciation reserve as of December 31, 1939. Mr. Schwartz has been connected with the Board's staff in various capacities for seventeen years and for three and one-half years has been Deputy Chief Engineer and in this proceeding was in immediate charge of the work performed by the Board's engineers and accountants. The figure of $1,923,-070 is partly an estimate because the amount of fixed capital ($622,412) shown by the books as of February 1, 1904, represented net current value and not actual cost to The Atlantic City Sewerage Company. It is not known whether this appraisal was in excess of or less than the actual investment in the property as at the appraisal date. There had been, however, no material change in the general level of construction costs during the preceding twenty years and the net appraised value, recorded on the books in 1904 without the establishment of a depreciation reserve, may be considered a reasonable estimate of original cost less depreciation (Exh. C-1).

The Company's records show that gross additions to fixed capital from February 1, 1904 to December 31, 1921 aggregated $723,386. Although detailed supporting records are not available, the City Comptroller, in accordance with provisions of the City's purchase option, audited nearly all fixed capital additions from 1906 to 1920 inclusive. Counsel for the petitioner contends that because of the gap of two years in the audited records the amount of such gross fixed capital additions is in considerable doubt. Since the amounts for the fifteen year period are supported by the City audit, the Board sees no reason to question the correctness of the Company's own general ledger figures for the remaining two years. A deduction of $93,698 is made on account of the Company's failure to record retirements on its books.

For the period from 1921 to December 31, 1939, supporting records are available and were examined. The net additions shown by the Company's records were reduced by $11,914 to reflect adjustment of various errors discovered in the accounts.

The net additions during the period January 1, 1940 to October 31, 1940, are recorded on the books at $155,608. This amount

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includes $19,346 which represents the cost of experimental facilities and work which have been abandoned and which the Board considers should be written off. The estimated cost of completing the chlorination project is $16,653, which amount the Board considers should be included in the rate base to be found. The adjusted amount is $152,915.

The depreciation reserve stated on the Company's books as at December 31, 1939 was adjusted to reverse a net write-down of $106,466 in 1925 and 1926 and to give effect to certain other adjustments totaling $9,939 (Exh. C-1). The adjusted depreciation reserve ($998,783) is deducted from the estimate of $2,921,-853 as the original cost at December 31, 1939.

The Brief of Counsel for petitioner contends that because the net appraised value was recorded on the books in 1904, the effect of deducting the depreciation reserve is to make a double deduction for depreciation. Since no depreciation reserve had been accumulated or was reflected on the books in 1904, it is impossible to consider that the reserve accumulated subsequent to 1904 reflects depreciation accrued prior to that date. It also is contended that the purpose of the annual provision for depreciation since 1921 was to retire the $1,775,000 gross appraised value recorded on the books as of 1921, and that, therefore, the total amount of the depreciation reserve is not properly deductible from the original cost estimate.

The depreciation reserve represents the accumulated amounts set aside from revenue for the purpose of maintaining the integrity of the investment and not for the purpose of replacing the property at a transitory reproduction cost estimate.

It is usually provided that the depreciation reserve shall be accumulated by annual charges for depreciation expense against operating revenues. It is assumed, in the absence of a showing to the contrary, that revenues have been sufficient to pay operating expenses, taxes and the depreciation expense and leave a fair return for the investors in the Company. If these conditions are fulfilled, the depreciation reserve does not represent in any part a sacrifice by the stockholders of the Company.

Funds acquired by means of the depreciation reserve are usually invested in the property. Otherwise, they remain as cash or exist as assets of some other form. Since such funds, so invested, do not represent a sacrifice by the stockholders, it is necessary to deduct the amount of the accumulated depreciation reserve in order to determine the net investment in the property.

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The estimated original cost to December 31, 1939, less the adjusted depreciation reserve and the historical cost of land is $1,798,257.

4. 1921 RATE BASE ADJUSTED

Mr. William T. Riley, Chief Accountant of the petitioner, testified that the net book cost of the property was $2,778,830 as at December 31, 1939 (Exhs. P-2, P-3). The witness variously described this figure as "net book cost" and "net value assets." The figure is not an estimate of value. As a book cost figure it results from the fact that the rate base of $1,600,000, fixed by the Board as of December 31, 1921, was substituted in the Company's accounts for the then existing amounts of book cost. Regardless of whether such a write-up of book cost to "fair value" was permissible under the accounting standards and practices of the time, the resulting book cost figures have no signifiance today for the purposes of the present proceeding.

Further, the so-called book cost is a meaningless composite of appraised value of tangible property, actual cost of additions and improvements and an allowance of $135,000 for intangibles in the 1921 rate base.

Mr. Schwartz testified that the tangible property was included in the 1921 rate base at $1,455,000. If the net additions from that date to December 31, 1939, plus the book cost of materials and supplies as at the latter date, are added, the total is $3,191,069. Deduction of the increase in the depreciation reserve, as adjusted, from the Board's 1921 valuation of tangible property results in a figure of $2,584,951.

5. GOING VALUE

The claim of respondent for an allowance of $400,000 to represent going value, is based upon the testimony of Mr. Stanley Williams, who estimated the income which would be foregone before "a Company becomes self-liquidating." Briefly, the method adopted by the witness in preparing his estimate was to study the "developmental period," using for the purpose the experience of other sewerage enterprises in securing customers in four towns, namely, Morristown, Rockville Center, Boonton, and Rockaway. He concluded from these studies that in Atlantic City thirty per cent of the total consumers would be attached at the start of oper-

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ations, sixty-four per cent at the end of the first year, seventy-three per cent at the end of the second year, eighty-two per cent at the end of the third year, ninety-one per cent at the end of the fourth year, and one hundred per cent at the end of the fifth year.

Having assumed that the plant would be constructed in its entirety prior to the beginning of operations, the witness estimated that the total percentage of idle plant would be one hundred and twenty-five per cent over the period of five years. He further assumed that a fair rate of return was six and one-half per cent, and estimated that the total amount of "lost return" plus taxes on idle plant would be $408,673 on the basis of his estimate of undepreciated reproduction cost.

This testimony by the Witness Williams is too speculative to be entitled to weight as evidence of the allowance which ought to be made for going value as an element of the rate base.

In the first place, Mr. Williams wholly disregarded the statement by the United States Supreme Court that: "Past losses obviously do not tend to prove present values." His method is the method of capitalization of past deficits which as long ago as 1921 the Supreme Court held to be improper. *Galveston Electric Company* vs. *City of Galveston,* 258 U. S. 388, 42 Supp. Ct. 351 (1921).

Mr. Malcolm Pirnie, who testified on behalf of Atlantic City, included $250,000 as an "allowance for intangible values," which he described variously as "the developmental preliminary expense" and as the value as a going concern in excess of the value of the physical property which exists because the property has its attached business. Witness Pirnie made this lump sum allowance without any effort to lend objective support to his opinion.

In *Dayton Power and Light Company* vs. *Public Utilities Commission,* 292 U. S. 290, 54 Sup. Ct. 647 (1934) Mr. Justice Cardozo said: "Going value is not something to be read into every balance sheet as a perfunctory addition."

Neither Mr. Williams nor Mr. Pirnie made any effort to distinguish between value inherent in the property as a going concern and the value based upon its earning power in the market served. It is historical and current costs which are evidences of "fair value" or the rate base; hence the definition of going value in a manner which excludes market or commercial value forces reliance upon operating deficits or developmental costs such as the cost of attaching business or training personnel. These expendi-

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tures are charged as operating expenses and are not acceptable evidence of going value in rate cases.

The Supreme Court has referred to the duplication involved in recognizing developmental expenditures both as an operating expense and as an element in the rate base. *Los Angeles Gas and Electric Corporation* vs. *Railroad Commission of California,* 289 U. S. 287, 53 Sup. Ct. 637 (1933); *Dayton Power and Light Company* vs. *Public Utilities Commission,* 292 U. S. 290, 54 Sup. Ct. 647 (1934); *Columbia Gas and Fuel Company* vs. *Public Utilities Commission of Ohio,* 292 U. S. 398, 412, 54 Sup. Ct. 763 (1934).

Even if acceptance of Mr. Williams' estimate were permissible under the decision of the Supreme Court in the Galveston case, it would be unacceptable because of its hypothetical nature. Neither the testimony in this proceeding nor available records indicate that operating deficits were in fact experienced by Atlantic City Sewerage Company during the period of the development of its property.

Even if operating deficits had been experienced it must be recalled that the testimony of Witnesses Williams and Pirnie was based upon cost of reproduction theories. The cost of reproduction approach accepts current conditions, including current or recent prices of labor and material; to be consistent it must recognize the existing development of the market and living habits of the people served. The historical cost of securing acceptance of the service need never be duplicated. It is unnecessary today to recognize such cost in order to attract the capital required for reproduction of the sewerage plant and facilities.

The acceptance of and demand for sewerage service in Atlantic City is very unlike the acceptance of and demand for service in the four smaller communities studied by Mr. Williams as the basis of his estimates. Even if it were permissible for the wtness to disregard current conditions, conclusions based upon the developmental periods in these four smaller communities would be highly conjectural and unreliable when applied to Atlantic City.

The Board considers that where there is no satisfactory evidence of the amount of going value, it should be excluded as an item of property to be separately appraised. *Columbia Gas and Fuel Company* vs. *Public Utilities Commission of Ohio,* 292 U. S. 398, 411, 54 Sup. Ct. 763 (1934); *St. Joseph Stock Yards Company* vs. *United States,* 11 F. Supp. 322, 334 (1935), Aff. 298 U. S. 38; *Denver Union Stock Yard Company* vs. *U. S.,* 304 U. S. 470, 479, 58 Sup. Ct. 990 (1938).

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For the reasons thus outlined, the Board will make no separate allowance for going value. It considers that there is an element of value in an assembled, established and successfully operated property, which is not present in property not so advanced and has recognized this element to the extent which in its judgment is reasonable.

6. WORKING CAPITAL

In view of the fact that the practice of the Company is to bill and collect in advance for sewerage service, it is apparent that no allowance for working capital should be included as an element in the rate base of the Atlantic City Sewerage Company.

7. SUMMARY OF RATE BASE EVIDENCE

	Cost of Reproduction Estimates as Adjusted by Board			
		Pirnie		*Original Cost*
	Williams Spot Prices	*Spot Prices*	*Average Prices*	*Schwartz Estimate*
1. Tangible property, excluding land, materials and supplies, and general equipment	$3,865,945	$3,063,910	$2,773,910	$2,748,127
2. Land and fill[1]	51,353	51,353	51,353	124,813
3. Tangible property, excluding materials and supplies, and general equipment	$3,917,298	$3,115,263	$2,825,263	$2,872,940
4. Depreciation	998,743	555,000	555,000	998,783
5. Item 3 less Item 4	$2,918,555	$2,560,263	$2,270,263	$1,874,157
6. Materials and supplies and general equipment—net	27,157	48,913	48,913	48,913
7. Net plant additions Jan. 1, 1940, to Oct. 31, 1940, plus estimated cost to complete chlorination project[2]	152,915	152,915	152,915	152,915
8. Total	$3,098,627	$2,762,091	$2,472,091	$2,075.985

[1] See Part II (1) of this decision.

[2] See Part II (3) of this decision.

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III. THE FAIR RETURN

Mr. William C. Gilman, partner of the firm of Gilman and Hickey, investment counselors, testified that a return of $160,000 would be fair and is required to maintain the credit of the Company, enable it to obtain capital funds required for extensions and improvements, and enable it to refund its outstanding six per cent bonds at a reasonable rate of interest. Mr. Gilman was familiar with the character of the operations of the Company and had studied its financial statements for a period of years. The witness' estimate of the cost of capital to The Atlantic City Sewerage Company was based largely upon the available data with regard to cost of capital to other Companies regarded by him as comparable with the respondent.

Mr. Gilman testified that the recent level of net operating revenue is not sufficient to permit The Atlantic City Sewerage Company to refund its bonds. It appears that his statement that $160,000 is the fair return is based principally upon his estimate that if the net operating revenue of the Company were "between two and three-quarter and three times" its interest requirements, it could issue four per cent refunding bonds at a premium sufficiently large to cover the call premium on the outstanding bonds and possibly the expenses in connection with issuance of new bonds.

The principal amount of the bonds outstanding in the hands of the public is $1,350,000. Therefore, the annual interest requirement for four per cent bonds would be $54,000. The return said by Mr. Gilman to be required is within the range of two and three-quarter to three times bond interest, which is equivalent to a fair return of from $148,500 to $162,000. Mr. Gilman's figure of $160,000 thus is toward the upper limits of what is regarded by him as the area of reasonableness.

The Board does not believe that it would be reasonable to allow a return fixed at the upper limits of what is said by this witness to be the area of reasonableness. The yields on bonds of good and medium investment quality are at an extraordinarily low level. The pressure of funds seeking opportunities for investment is so great that in the judgment of the Board a coverage of three times requirements is unnecessary and unreasonably high for a Company such as The Atlantic City Sewerage Company. No other

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type of utility enterprise has either a more inelastic customer demand or a greater stability of revenue than a sewerage Company.

IV. FINDING AS TO RATE BASE AND FAIR RETURN

Weighing all the evidence, the Board finds that the fair rate base for The Atlantic City Sewerage Company as of October 31, 1940, and including the estimated expenditures subsequent to that date necessary to complete the chlorination project, is $2,500,000, on which amount the Company is entitled to earn at the rate of 6 per cent or $150,000 per annum.

V. REVENUES AND EXPENSES

Statements relating to the annual operating revenues and operating expenses of the Company are available from the annual reports filed with the Board and from Exhibits P-7, P-8, and C-3 in the record.

1. OPERATING REVENUES

The Company estimates that the operating revenue for each of the years 1940 and 1941, under present rates, will amount to approximately $437,090 (Exhs. P-7 and P-8).

Exhibit C-3, entitled "Staff Exhibit relating to Operating Revenues, Operating Expenses and Return" was introduced by the Board. Exhibit C-3 sets forth an estimate of the total operating revenues for the year 1941, under present rates, amounting to $442,227. In arriving at this estimate appropriate consideration was given to the recent trend of various items of revenue as well as to prospective additional business to be obtained in 1941.

The revenue statements submitted by the Company are distorted because of the accounting treatment of items in the following classifications:

1. Doubtful rentals.
2. Adjustments and refunds for non-use.
3. Use of cars, plant and marine equipment.

These distortions in the Company's revenue statements must be eliminated before it is possible to estimate the true prospective revenues for the year 1941. The nature of the adjustments and

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the reasons therefor are fully set forth in Exhibit C-3. There was no rebuttal testimony or cross-examination of the witness on his revenue estimates.

The Board, therefore, concludes that a fair and reasonable estimate for operating revenues, under present rates, for the year 1941 is $442,227. This amount will be used in subsequent calculations.

2. OPERATING EXPENSES

In Exhibit C-3 Mr. Schwartz shows that the accounting practice of the Company with respect to certain items in the classification of expense accounts leads to a distortion of these expense items. Consequently, as in the case of operating revenues, it is necessary to make certain revisions and adjustments in the statements submitted by the Company in order to arrive at a correct conclusion as to experienced annual operating expenses and a reasonable estimate for the year 1941.

In making such revisions and adjustments as shown in Exhibit C-3, appropriate consideration was given to the trends and averages of various principal operating expense accounts during recent periods of years terminating with the year 1939. In view of the rather constant level of expenses as a whole in the period 1934 to 1939 inclusive, it is considered that an estimate for the year 1941 should be based on adjusted expenses for the year 1939. Exhibit C-3 shows adjusted operating expenses of $127,986 for the year 1939.

Among the adjustments included were eliminations of $840 for rent of an office in New York City, and $2,650 for the salary of a secretary to Mr. Calvert, president of the Company. The testimony shows and the Board finds that neither the interests of the Company nor its customers require the maintenance of an office in New York City, and furthermore, that the salary of a secretary to the president of the Company is not an appropriate expense for the Sewerage Company, because her duties are almost exclusively concerned with other matters in Mr. Calvert's office. On the other hand, the Board finds that it is reasonable to make some allowance for additional office space in Atlantic City, and in view of the lack of any testimony in respect to the exact requirements, it will make an allowance for additional rent equal to the rent now being paid for office space in New York City, i.e. $840.

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The Board concludes from its consideration of the evidence that for the purpose of this case the amount of $127,986 plus an allowance of $840 for rent of additional office space at Atlantic City, or a total of $128,826, represents a reasonable annual allowance for operating expenses, exclusive of taxes, depreciation and additional chlorination expenses.

3. CHLORINATION EXPENSES

The matter of determining a reasonable estimate of chlorination costs is of major importance. Exhibit P-1 is a copy of an Order of the State Department of Health which calls for "continuous disinfection of all sewage—as to cause destruction of the organisms of the coli-aerogenes group to the extent that they shall be absent at all times in the final effluent in all standard one cubic centimeter portions; and effective sedimentation to mean: the removal of suspended solids so that the aforesaid effective chlorination will be obtained." Exhibit P-12 represents a report by the Bureau of Engineering of the State Board of Health with respect to chlorination of sewage at the City Island plant, which sets forth the following conclusions:

> "1. That the aforesaid additions and alterations to the City Island plant, particularly the settling units, were not in operation a sufficient length of time to permit the establishment of a procedure of efficient operation.
>
> "2. That if the additions and alterations were completed and operated fully in an efficient manner, the sewage treated at the City Island plant on October 15 and October 23, 1940, could have been disinfected effectively with an application of chlorine slightly in excess of 30 p. p. m.
>
> "3. That a higher rate of chlorine application should be required to treat the more concentrated sewage during the peak summer loads, but that this amount could not be forecast on the basis of the available data."

Mr. Joseph LeChard testified for the Company with respect to the additional chlorination and other expenses. Mr. LeChard is Sanitary Engineer for the Company, which position he has held for the past twelve years. He has had prior experience and training in sanitary engineering.

Exhibit P-7, submitted by Mr. LeChard on behalf of the Company, makes claim that the additional annual operating costs for chlorination and the enlarged sedimentation plant, exclusive of depreciation, would be $45,092. Mr. Pirnie, the City's witness on the subject, testified that in his opinion such additional operating costs would amount to $40,745 (Exh. AC-10). Mr. Schwartz,

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testifying for the Board, accepted Mr. Pirnie's estimate as reasonable and used it in his computations (Exh. C-3).

The problem involves a determination of the relative weights to be given the evidence supporting the Company's estimate and the Pirnie estimate. It will be noted that the difference between the two estimates is $4,347, which is approximately ten per cent.

Mr. LeChard testified that in making up his estimate he used the dosage indicated as proper by the engineers of the State Department of Health.

Mr. Weston Gavett of Mr. Clyde Potts' organization, qualified as a sanitary and hydraulic engineer, testified in considerable detail concerning the requirements of the State Department of Health and also concerning conferences between the parties which were held prior to the issuance of the chlorination Order by the State Department of Health, Mr. Gavett has done considerable work on experimental chlorination of Atlantic City sewage. His testimony supported that of Mr. LeChard.

Mr. Gavett testified that the present regulations of the State Department of Health for effective disinfection of Atlantic City sewage is "more than is usually required in sewage chlorination." Counsel for Atlantic City contended that the prospective cost of chlorination is excessive because the standard of purification established by the Order of the State Department of Health is unreasonably high. However, the Board of Public Utility Commissioners must, for the purpose of this rate proceeding, give effect to a valid and effective Order of the State Department of Health.

Mr. Pirnie and Mr. LeChard did not agree as to the number of additional employees that would be required to operate the new facilities. Mr. Pirnie estimated (Exh. AC-10), that the additional labor could be performed by one less man than estimated by Mr. LeChard. The make-up of the labor item was explained in full detail by Mr. LeChard.

In view of the testimony on this point the Board will allow for the purposes of this decision, the amount of $45,000 to cover estimated additional annual operating expenses, exclusive of depreciation, incident to the operation of the treatment facilities installed pursuant to the Order of the State Department of Health. If the Order of the Department of Health is modified and the additional operating expense proves to be less than $45,000 the Board will require appropriate adjustments to be made.

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4. RATE CASE EXPENSES

The Board is of the opinion that an annual allowance should be made in operating expenses for the amortization of the cost to the Company of the present proceeding. It appears from the tentative information available to the Board that such cost will amount to approximately $30,000.

The Board concludes that whatever the exact amount of reasonable rate case expense it should be amortized over a period of approximately ten years and the amount of $3,000 will be included in operating expenses for the purposes of this proceeding.

In respect to these rate case expenses, the Board will require the Company to submit, as soon as practicable after the termination of this case, an itemized statement of the actual expenditures made by the Company.

5. TAXES

Exhibit C-3 includes an estimate of annual taxes for the year 1941, which gives effect to the prospective changes in operating expense items as listed in the Exhibit. The reasonableness of this estimate has not been seriously questioned and it is accepted by the Board. However, the amount of $100,153 (Exh. C-3) is adjusted by reduction to $98,435 in order to give effect to a change in estimated Federal income taxes due to further adjustments of operating expenses made in this decision.

Since the Company has not actually refunded its bonds, the Board concludes that a possible future increase in the Federal income tax because of refunding at some indefinite time in the future is not a proper item for inclusion in revenue deductions in fixing charges for service for the immediate present and reasonable future. The tax rates used in the estimates are those of the known present and no attempt has been made to forecast future tax levels. The effect on total taxes of any increase in charges for service which may be allowed as a result of this proceeding, is recognized later in this decision.

6. ANNUAL DEPRECIATION EXPENSE

As of December 31, 1939 the depreciation reserve balance as shown on the Company's books amounted to $882,377. After giving effect to reversal of adjustments made by the Company in connection with setting up a previous appraisal on its books, the

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depreciation reserve balance as of December 31, 1939 amounts to $998,783. The latter figure is equivalent to approximately 36.34 per cent of $2,748,127, which is the estimate of original cost of depreciable property, not including trucks, tools and equipment, as of December 31, 1939.

If the Company were to continue to charge depreciation in accordance with its present practice, it is evident that an amount sufficient fully to retire all property now in existence would be accumulated long before the property would reach the end of its useful life. Therefore, it is concluded that the Company's annual charge to expense for depreciation is excessive. The Company's annual provision for depreciation obviously is based upon estimated service lives which are shorter than the service lives suggested by either the Company's experience or by the testimony of Witnesses Williams and Pirnie. Another factor which contributes to the excessive annual charges for depreciation expense is application by the Company of its adopted depreciation rates to written up ledger values instead of actual cost of the depreciable property.

The Company questions the propriety of Mr. Schwartz using his estimate of original cost (Exh. C-1) as the basis for calculation of the annual depreciation charge. The correctness of the original cost estimate is established elsewhere in this decision. The Company's further objection to Mr. Schwartz's estimate of the annual depreciation requirement is an attempt to justify the 1925 write-up of its fixed capital and its practice of applying the depreciation rate to this inflated amount.

The Board's engineers have made an independent study of the Company's retirement experience during the period from January 1, 1922 to December 31, 1939. This study indicates that retirements of property during the period averaged $10,300 per annum, which gives an average experienced retirement rate of 0.46 per cent of the cost of depreciable property. Since the retirement experience alone does not represent the full amount of depreciation that should be provided for, the Board's engineers adjusted the analysis figures and arrived at an overall rate of 1.1 per cent of the cost of depreciable property exclusive of trucks, tools and equipment, as representing their judgment of an appropriate rate of depreciation accrual.

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If this overall rate of 1.1 per cent is applied to the cost of depreciable property exclusive of trucks, tools and equipment as of December 31, 1939 ($2,748,127), the result is $30,229. To this amount must be added annual depreciation on the new chlorination facilities and on trucks, tools and equipment. It is shown in Exhibit C-3 that the present annual depreciation on the chlorination facilities is $4,621, which is at the rate of approximately 3 per cent; and on trucks, tools and equipment it is $3,263, which is at the rate of approximately 10 per cent. It is further shown in Exhibit C-3 that of this latter amount only $2,219 is, on the average, assignable to operating expenses. Thus, the present total annual charge to expense for depreciation should be $37,069.

In arriving at this conclusion actual retirement expense has been used merely as a guide and appropriate consideration has been given to the expected service lives of the various items of property and the manner in which the property is being maintained. The Board is of the opinion that a composite annual depreciation rate of 1.25 per cent is adequate to provide for retirements as they occur and will for the future provide a sufficient margin for accumulation of additional reserve so that the integrity of the investment will not be impaired. After giving consideration to the net additions to property during 1940 (not including chlorination and treatment facilities already provided for) and the prospective additions during 1941, the Board concludes that $37,250 is a reasonable allowance for annual depreciation expense for the purpose of this case.

The Company's argument that $37,000 is not a sufficient annual depreciation allowance because of anticipated price increases in the next few years is not pertinent because the cost to be retired is the original cost of the property. The argument that the Company will be unable to refund its bonds because of an inadequate depreciation accrual has no force because the present adjusted reserve is equivalent to 36.34 per cent of the estimated original cost of the depreciable property and is more than ample to cover the depreciation now accrued in the property.

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VI. SUMMARY AND CONCLUSIONS AS TO FAIR RETURN

The estimated annual return which the Company should experience under present rates, after providing for adjusted operating expenses, chlorination expense, amortization of rate case expense, taxes and depreciation is $129,716, as follows:

Estimated Operating Revenues		$442,227
Revenue Deductions:		
Adjusted Operating Expenses	$128,826	
Estimated Chlorination and Related Expense	45,000	
Amortization of Rate Case Expense	3,000	
Estimated Taxes	98,435	
Depreciation Expense	37,250	
		312,511
Estimated Annual Return		$129,716

The Board has found that the fair annual return for the respondent as of the present time is $150,000. Thus it appears that the return the Company is able to earn under present rates is $20,284 less than it is entitled to earn. Because the Company must pay a franchise tax of 5 per cent on operating revenue and a United States income tax of approximately 24 per cent on net taxable income it is found that an increase in operating revenue of $28,013 will be required to realize the additional return of $20,284 to which the Company is entitled. Therefore, the Board will permit the Company to increase its charges for service to the extent necessary to produce additional operating revenue of approximately $28,000, including revenue to be derived from the two additional classifications for service proposed by the Company, viz.: refrigeration and air conditioning, service heretofore furnished without specific compensation.

If the Company were permitted to charge for its service in accordance with the rates proposed to become effective July 15, 1940, it would realize an annual operating revenue of approximately $562,255 which is approximately $92,800 greater than the operating revenue found by the Board to be adequate in this situation.

The Board therefore finds that said charges for service proposed by the Company and suspended by the Board are unjust, unreasonable and higher than necessary to produce a fair return and that they should be disapproved.

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Accordingly, it is hereby ordered:

1. That the schedule of charges filed by the Company to be effective July 15, 1940 is hereby disapproved.

2. That the Company shall submit for the consideration of the Board, within fifteen days of the date of this Order, a revised schedule of charges for service so designed as to produce on the basis of present billing data, together with reasonable charges for air conditioning and refrigeration service, an increase of not more than $28,000 in annual operating revenue.

3. That the Company shall maintain complete records of its chlorination expenses, including records of the rate of chlorine dosage administered and records of all tests of the effluent showing the results accomplished.

4. That the Company shall, as soon as practicable after the date of this Order, submit to the Board an itemized statement of the actual cost incurred by the Company in connection with this proceeding.

Dated, April 9, 1941.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

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NEW JERSEY SUPREME COURT

Nos. 219 and 232. October Term, 1941.

Atlantic City Sewerage Company,
Prosecutor,
vs.
Board of Public Utility Commissioners,
Defendant.

City of Atlantic City,
Prosecutor,
vs.
Board of Public Utility Commissioners and Atlantic City Sewerage Company,
Defendants.

Argued October 8, 1941. Decided May 5, 1942.

On certiorari.

Before *Brogan, Chief Justice,* and *Justice Heher.*

For the Atlantic City Sewerage Company, *Autenrieth & Wortendyke* and *Thompson & Lloyd; Joseph F. Autenrieth,* of counsel.

For the City of Atlantic City, *Samuel Backer.*

For the Board of Public Utility Commissioners, *John A. Bernhard; Frank H. Sommer,* of counsel.

The opinion of the court was delivered by

HEHER, J.

The Atlantic City Sewerage Company and the City of Atlantic City have sued out cross-writs of certiorari to review the judgment of the Board of Public Utility Commissioners disapproving a proposed schedule of charges for the Company's various services and directing the submission of a revised schedule "so designed as to produce on the basis of present billing data, together with reasonable charges for air conditioning and refrigeration service, an increase of not more than $28,000, in annual operating revenue." The determination was predicated on findings that the fair rate base as of October 31, 1940, including the "estimated expenditures subsequent to that date necessary to complete" a

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chlorination plant demanded by the State Board of Health, was $2,500,000; that the Company "is entitled to earn" thereon "at the rate of 6 per cent, or $150,000 per annum;" that the "estimated annual return" under the pre-existing rates, less adjusted operating expenses, chlorination expense, amortization or rate case expense, taxes and depreciation, is $129,716, or $20,284 less than is just and reasonable; that the Company is required to pay a franchise tax of 5 per cent on operating revenue and a Federal income tax of approximately 24 per cent on net taxable income; and that therefore an increase in operating revenue of $28,013 is requisite to realize the prescribed additional return of $20,284.

It is the insistence of the Company that the proofs establish a rate base value of $3,000,000, entitling it "to an increase in rates in the sum of approximately $160,000, designed to be raised by its proposed schedule of rates," and that a lesser valuation for rate purposes would be confiscatory. The municipality on the other hand, maintains that there is no rational basis in the evidence for a finding of a rate base in excess of $2,300,000, and that the rate increase granted by the Board is therefore arbitrary and illegal.

The Company is a public utility as defined by R. S. 1937, 48:2–13. It was incorporated on December 28, 1888, and has ever since rendered sewerage service in Atlantic City. This municipality comprises a group of irregularly-shaped sand islands. Its highest point is about six feet above high water; and in places tidewater is found at three to four feet below the surface. It is bounded by the Atlantic Ocean on the east; and a tidal channel known as the Beach Thoroughfare separates the islands from the mainland on the west. Its permanent population is approximately 70,000, but at times during the summer season it increases nearly to 500,000. Concededly, the physical conditions and the extraordinarily large fluctuation in population have given rise to constructional and operational difficulties. The original collecting system was designed to serve what is now the principal commercial and hotel section of the municipality, located on the main island. It provided for a deep receiving well and pumping station at Baltic and Chalfonte Avenues. Sewage flowed by gravity to the pumping station, whence it was conveyed by pumps to filters on the meadows northwest of the City. In 1897 the disposal works were moved to City Island, where the Company's treatment plant is now established. The growth of the City required

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an expansion of the sewerage system; and the area now served is slightly less than three square miles. The facilities for the disposal of sewage in the Chelsea Heights section are owned by the City, but operated by the Company under a contract with the City. There is no physical connection between the two systems. There are four pumping stations, one in each of the four principal districts comprising the service area. Except during the summer season, all the sewage is treated at the City Island plant and then conveyed through twelve sedimentation tanks, whence the effluent is discharged into the Beach Thoroughfare. The sludge from the tanks is removed by pumps, dried, and devoted to the raising of the elevation of the surface of City Island. When the summer flow is beyond the capacity of the City Island facilities, the excess is treated at a pumping station situate on Texas Avenue, whence it is discharged into the Beach Thoroughfare. The Company's collecting system includes 81 miles of pipe, chiefly terra-cotta, ranging in size from 6 to 66 inches. The mains are laid at depths varying from near the street surface to 14 feet. The force mains consist of approximately 7½ miles of cast-iron pipe, mostly Class B, ranging in size from 10 to 36 inches in diameter. The number of service connections has increased from 1,849 in the year 1891 to 13,021 in the year 1940.

1. VALUATION OF PROPERTY:

The Company submitted two valuation bases—(1) plant reproduction cost new less depreciation, amounting to approximately $3,400,000; and (2) book value in the sum of $3,060,000. These are terms "yardsticks designed to reflect the 'present value'" of the property as a rate base. The City's estimate of "reproduction cost new less depreciation" is condemned as grounded on "average prices" and an "excess in the depreciation reserve;" and the vice of the Board's valuation is asserted to be the acceptance of the original cost of the property without attempting "to trend" such "cost to reflect prevailing prices at the time of the inquiry."

We concur in the Board's appraisal of the property as the fair value base. Its own expert calculated the original cost of the property, less depreciation, at $2,075,985.49; and there is no reasonable basis in the proofs for a finding in excess of that sum. Although they were in substantial agreement as to the inventory, and there was a common assumption of reproduction cost in a

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two-year construction period, the Company's expert estimated the reproduction cost of the physical property on the basis of the prices prevailing "at the time of the inquiry," less depreciation, at $3,031,925, while the City's expert, using prices "current on October 31, 1940," fixed it at $2,745,629. The former made an addition of $400,000 for "going value," or a "total reproduction cost new, depreciated as of the time of the inquiry," of $3,431,925. The latter considered $250,000 entirely ample for this item, or a total of $2,995,629. Such, it seems to be conceded, fairly represents the reproduction cost new, less depreciation, "at the time of the inquiry." But the witness deducted $290,000, "due to the use of price levels higher than average price levels"; and this is assigned for error. The witness made a further deduction of $433,000, the difference between what he conceived to be the quantum of actual physical depreciation and the accrued reserve for depreciation entered on the Company's books. The Company's engineer estimated the depreciation at $998,819; the City's at $555,000. One of the Board's engineers, whose qualifications are unquestioned, fixed the original cost, less the adjusted depreciation reserve as of December 31, 1939, at $1,923,070.04. He allowed necessary capital additions in the net sum of $152,915.45, or a total of $2,075,985.49.

Ratemaking is essentially a legislative function; and the Board is empowered to fix a "just and reasonable individual" rate whenever it shall determine that the existing rate is "unjust, unreasonable, insufficient or unjustly discriminatory or preferential." R. S. 1937, 48:2–21. While there seems to be contrariety of opinion respecting the scope of the judicial review as respects the fulfillment of this statutory standard, we have deemed it to be our duty to weigh the evidence and resolve the issues of fact on the hypothesis that R. S. 48:2–46 and R. S. 2:81–8 are in *pari materia*. *Penna. R. R. Company* vs. *Public Utility Commissioners,* 83 N. J. L. 67, affirmed 84 N. J. L. 619, 759, 762, 763, 764; *Interstate Telephone, etc., Company* vs. *Public Utility Board,* 84 N. J. L. 184; *Public Service Gas Company* vs. *Public Utility Board,* 84 N. J. L. 463, affirmed 87 N. J. L. 581; *Erie R. R. Company* vs. *Public Utility Board,* 85 N. J. L. 420; *Public Service Ry. Company* vs. *Board of Public Utility Commissioners,* 86 N. J. L. 105, affirmed 87 N. J. L. 250; *N. J. Suburban Water Company* vs. *Board of Public Utility Commissioners,* 123 N. J. L. 303. See, also, *State* vs. *Czarnicki,* 124 N. J. L. 43; *Coles* vs. *Blythe,* 69 N. J. L. 666; *Ryer* vs. *Turkel,* 75 N. J. L. 677.

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The experts were in disagreement as to price factors, the quantum of going value, and the allowance for depreciation; and it is clear that the Company's engineer indulged in certain speculative and unwarranted assumptions respecting construction needs and used excessive unit prices, limited also to the date of his appraisement. His premises rhyme ill with the realities. This is demonstrated by the evidence elicited from expert witnesses familiar from actual experience with the peculiar conditions attending such construction work in the locus and the cost thereof. Moreover, his inventory and appraisement of the collecting system and force mains (aggregating 85 per cent of the total cost of the property on either a book cost or reproduction cost basis) was founded on one made by another engineer in 1921. And it contained items which the Board properly found have no place in the calculation of the reproduction cost. And the witness assumed that the land was worth $118,213. There was no evidence whatever to sustain this valuation. *Per contra,* the City adduced evidence from realty experts fixing the value at approximately $32,000.

The valuation made by the City's engineer is challenged as erroneously based upon "average price levels" over the prior five year period rather than the "prices prevailing at the time of the inquiry." His estimate of the reproduction cost of the physical property was rested upon "spot" peak prices current in October, 1940, which were considerably higher than the average prices over the past ten or five year periods.

But the fair value base is not necessarily confined to the hypothetical depreciated reproduction cost grounded on prices obtaining at the time of the inventory. These are not synonymous terms. Each case is governed in this regard by its own circumstances. The Board is empowered to determine what in the particular situation is a just and reasonable return; and it must needs have a broad discretion in the exercise of that authority, controlled by the statutory standard. Since ratemaking is a legislative process, its exercise involves a range of legislative discretion. *O'Brien* vs. *Public Utility Board,* 92 N. J. L. 587. The rate base is the fair value of the property used and useful in the public service. The depreciated reproduction cost is but a factor to be considered in the fixation of a rate reasonable as regards both the utility and the public. A corporation of this particular class performs a public function; and the public cannot be called upon for

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more than the fair value of the service rendered. The utility is entitled to a just return upon the fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions. *Public Service Gas Company* vs. *Public Utility Board, supra; Smyth* vs. *Ames,* 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819. Such reproduction cost is "a guide, but not a measure." *Dayton Power & Light Company* vs. *Public Utilities Commission,* 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267.

A rate based upon an excessive valuation or upon property not used or useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied. The public is not to be laden with unreasonable or extortionate rates in order that dividends may be provided for the utility's stockholders. The base rate figure of fair value is determined by viewing the plant as an integral and unitary whole, considering all the elements properly entering into the ascertainment of a reasonable return for supplying the public need. It is requisite that there be "an honest and intelligent forecast" of probable future values; and this of necessity includes the making of a fair production of the probable price and wage levels during a reasonable period in the immediate future, and a consideration as well of all other relevant facts and circumstances. *Denver Union Stock Yard Company* vs. *United States,* 304 U. S. 470, 58 S. Ct. 990, 82 L. Ed. 1469; *St. Joseph Stock Yards Company* vs. *United States,* 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033; *Los Angeles G. & E. Corp.* vs. *Railroad Commission,* 289 U. S. 287, 53 *S. Ct.* 637, 77 L. Ed. 1180; *McCardle* vs. *Indianapolis Water Company,* 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316.

There is no formula making for certainty in the exercise of this authority. The estimation of the fair value base is not controlled by arbitrary rules. It is not "a matter of formulas," but rather of "a reasonable judgment" grounded "in a proper consideration of all relevant facts." *Simpson* vs. *Shephard,* 230 U. S. 352, 434, 33 S. Ct. 729, 57 L. Ed. 1511; *Los Angeles G. & E. Corp.* vs. *Railroad Commission, supra; Atlantic City Sewerage Company* vs. *Public Utility Commissioners,* 100 N. J. L. 395. "An arbitrary date is as unlawful as an arbitrary rate." *Hackensack Water Company* vs. *Board of Public Utility Commissioners,* 98 N. J. L. 41, affirmed 100 N. J. L. 177. In the words of Mr.

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Justice Cardozo, "An intelligent estimate of probable future values, and even indeed of present ones, is at best an approximation. The like is true of a forecast of the extent of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Company* vs. *Public Utilities Commission, supra.* Abnormally high prices for labor and material attendant upon an unstable market do not afford a just criterion of the value of property for rate purposes. There is in the continuing supervisory power of the administrative agency a wholly adequate remedy for the correction of inequities flowing from the need of adjustment due to shifting circumstances. *Hackensack Water Company* vs. *Board of Public Utility Commissioners, supra; Public Service Gas Company* vs. *Public Utility Board, supra; Railroad Commission of Texas* vs. *Rowan & Nichols Oil Company,* 311 U. S. 570, 61 S. Ct. 343, 85 L. Ed. 358.

Whether the due process clause of the Fifth or of the Fourteenth Amendment of the Federal Constitution be invoked, the reproduction cost of the property, less depreciation, is not conclusive of value, but is rather an element to be considered with all the circumstances in arriving at the fair value of the property in the particular case. *Smyth* vs. *Ames, supra; Los Angeles G. & E. Corp.* vs. *Railroad Commission, supra.* See, also, *Georgia Ry. & Power Company* vs. *Railway Commission,* 262 U. S. 625, 43 S. Ct. 680, 67 L. Ed. 1144; *Simpson* vs. *Shephard, supra.* And in the recent case of *Federal Power Commission* vs. *Natural Gas Pipeline Company,* U. S. 62 S. Ct. 736, 86 L. Ed., the Federal Supreme Court dealt with a statute investing the Interstate Commerce Commission with power to fix a "just and reasonable" rate. As to the application of this standard, Chief Justice Stone, voicing the majority view, said: "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. * * * The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has

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been given, proper findings made and other statutory requirements satisfied, the Courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's Order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

Here, the valuation fixed by the Board is fair and reasonable as between the utility and the public, and so is unassailable.

II. DEPRECIATION:

And we are of opinion that the Board made a liberal allowance for depreciation. The evidence reveals an excessive annual charge therefor, so much so that, as the Board found, if it be continued at the same rate, "an amount sufficient fully to retire all property now in existence would be accumulated long before the property would reach the end of its useful life." In its general sense, depreciation is "the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence." The cost of producing the service includes "an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered." *Lindeheimer* vs. *Illinois Bell Tel. Company,* 292 U. S. 151, S. Ct. 78 L. Ed. 1182. If the allowance for depreciation be more than sufficient for the replacement of the capital consumed, the excess is not subject to capitalization for rate-making purposes. Here, the Board rested its findings as to the quantum of depreciation largely upon evidence adduced from its own engineer founded upon an inspection and comprehensive study of the property; and this is preferable to "mere calculations based on averages and assumed probabilities." *McCardle* vs. *Indianapolis Water Company* 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316. See, also, *Pacific Gas & Electric Company* vs. *San Francisco,* 265 U. S. 403, 44 S. Ct. 537, 68 L. Ed. 1075. The opinion evidence is not of conclusive force. *Public Service Gas Company* vs. *Public Utility Board, supra; Dayton Power & Light Co.* vs. *Public Utilities Commission, supra.* There rests upon the Company the burden of establishing that the amounts charged to operating expenses for depreciation are not excessive; and it has not been sustained.

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III. GOING CONCERN VALUE:

It is also assigned for error that the Board refused "to consider" the testimony of the Company's expert as to the quantum of "going value," and that "no allowance at all" was made for that as an intangible constituent of the fair value base.

The Board valued the property as a going concern, and thus allowed for this factor in its appraisal. It is not requisite that the going concern value be separately stated and appraised as such. When it has been regarded in the valuation of the business as a whole, the burden rests upon the utility to show that the "item has neither been adequately covered in the rate base nor recouped from prior earnings of the business." *Federal Power Commission* vs. *Natural Gas Pipeline Company, supra; Denver Union Stock Yard Company* vs. *United States, supra.* "Going value is not something to be read into every balance sheet as a perfunctory addition." *Dayton P. & L. Company* vs. *Public Utilities Commissioner, supra.* The opinion of the Company's engineer was properly rejected as "too speculative to be entitled to weight as evidence of the allowance which ought to be made for going value as an element of the rate base." It was based upon a purely theoretical "lag" in obtaining business for a five year period after the commencement of operations; and the premise is without support in the evidence. Nor has the Company sustained the burden of proving nonrecoupment from prior earnings of the business. The evidence of the City's engineer was likewise ignored for the same general reason. His was an allowance for "the development and preliminary expense and the element of value inherent in this property as a going concern, as different from the property reconstruction cost;" and the Board rejected it as a "lump sum allowance without any effort to lend objective support" to the witness's opinion. However, the Board considered that "there is an element of value in an assembled, established and successfully operated property, which is not present in property not so advanced and has recognized this element to the extent which in its judgment is reasonable;" and thus it made such allowance for this item as was warranted by the proofs. There is no showing of arbitrary action.

The ascertainment of the rate base involves sound business judgment. The Legislature has designed that this regulatory function shall be exercised by an agency expert in the intricacies

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and perplexities characteristic of the field; and their conclusions must needs have great weight in the determination of questions that call for specialized knowledge and experience.

IV. OPERATING EXPENSES:

There is no substance to the contention that the Board erred in its disallowance of certain "operating expenses." There is no need to particularize. It suffices to say that thereby practical economies are effected without impairment of the service. Their rejection does not serve to make for injustice and unreasonableness in the rate fixed. And the allowance for annual future depreciation seems liberal in the circumstances. It was not confined to what reasonably appeared to have been the Company's actual retirement experience. Its property is in the main long-lived, and on the basis of past experience and conditions reasonably foreseeable the deduction seems wholly adequate for the maintenance of the integrity of the capital investment. The provisions for operating costs and legal services are sufficient. They are grounded in past experience, and are not fairly susceptible of the criticism that they "utterly ignore the trend of operating costs for the future." True, the future is uncertain, but mere uncertainty does not justify a rate based upon the assumption that there will be "a period of rising prices as to both labor and material as well as a rising trend in taxes." If the prophecy were not fulfilled, a rate calculated on that hypothesis would be unfair to the public. As stated, the continuing supervisory power of the Board may be invoked to deal with extraordinary and unforeseeable conditions. The Board is not under a duty to indulge in speculation as to such matters. It is required only to make an honest and intelligent forecast of probable future values, considering all the circumstances relevant to the particular inquiry. *Vide West Ohio Gas Company* vs. *Public Utilities Commission,* 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761.

V. CONFISCATION:

It follows from the foregoing that the valuation adopted by the Board is not confiscatory in contravention of the due process clause of the Fourteenth Amendment of the Federal Constitution. The rate is sufficient to yield "a fair return upon the reasonable value of the property at the time it is being used for the public," and thus the requirements of this constitutional provision are

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met. *Smyth* vs. *Ames, supra; Los Angeles G. & E. Corp.* vs. *Railroad Commission, supra; Denver Union Stock Yard Company* vs. *United States, supra.* The "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. *Federal Power Commission* vs. *Natural Gas Pipeline Company, supra.*

VI. CORPORATE INCOME TAXES:

The City complains that the Board erred in considering income taxes assessed against the Company as an "operating expense." The point is untenable.

In determining a rate of return that will answer the test of reasonableness, the Federal income tax is deductible. *Galveston Electric Company* vs. *Galveston,* 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678. It was so treated without question in *Federal Power Commission* vs. *Natural Gas Pipeline Company, supra.* The nature of this charge may be a circumstance to be considered in determining what is a fair rate of return in the particular circumstances; but it cannot be said that here it has resulted in an excessive rate.

VII. COSTS OF THE LITIGATION:

The City also challenges the inclusion in the operating expenses of $30,000 to cover the cost of the proceedings, amortized over a period of approximately ten years. This was rested upon "tentative information available to the Board;" and the Company was directed to submit, "as soon as practicable * * * an itemized statement of the actual expenditures" for the purpose. It is said that since the Company sought an increase in rates averaging more than 26 per cent and was granted but 6 per cent, this allowance should not have been made, and that, at all events, it should not have been made without proof of its reasonableness.

The Company did prevail in substantial part; and in the fixation of a rate to yield a fair return upon the value of the property, it was needful that the expense thus incurred be considered. And, in view of the wide experience of the Board in such matters, we are not disposed to disturb its findings in this respect. The Board was fully advised as to the character of the service provided; and it is not suggested that it is unreasonable as to amount. Moreover, the difference, if any, would not affect the rate to such an extent as to warrant interference with the action of the Board.

Judgment affirmed, with costs.

Filed, May 5, 1942.

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NEW JERSEY SUPREME COURT

Atlantic City Sewerage Company, a corporation, **Prosecutor,** **vs.** **Board of Public Utility Commissioners,** **Respondent.**	**On Certiorari**

ORDER DISMISSING WRIT OF CERTIORARI

The above entitled matter coming on for argument at the October Term of this Court, 1941 and the Court having inspected the transcript and proceedings of the Board of Public Utility Commissioners returned with the certiorari in this cause, the reasons for reversing the decision and order of said Board, and heard the argument of counsel thereon, and it appearing to the Court that the proceedings and order of the Board of Public Utility Commissioners under review in this cause should be affirmed;

It is, on this 25th day of May, 1942, ORDERED that the judgment be affirmed with costs in favor of the respondent and against the prosecutor.

Entered May 25, 1942.

On motion of

/s/ JOHN A. BERNHARD,
Attorney for Board of Public Utility Commissioners.

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Decision of Court of Errors and Appeals follows:

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 12. October Term, 1942.

Atlantic City Sewerage Company,
Appellant,
vs.
Board of Public Utility Commissioners,
Respondent.

Appeal from Supreme Court.

On Error to Court.

PER CURIAM:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Heher in the Supreme Court.

Report at 128 N. J. L. 359.

No. 2225

Petition of Shelton Pitney and Walter P. Gardner, Trustees of the Property of the Central Railroad Company of New Jersey, for Approval of Discontinuance of Through Passenger Service Between New York, New York, and Atlantic City, New Jersey.

A. H. Elder and *Walter P. Gardner,* for Petitioner; *Samuel Backer* and *Mayor Thomas D. Taggart,* for City of Atlantic City; Milton Miller, for Township of Lakewood; *Charles S. Straw,* for Public Service Interstate Transportation Company; *Samuel Backer,* for Atlantic City Chamber of Commerce, Atlantic City Real Estate Board, Atlantic City Hotelmen's Association; *Thomas B. Delker,* for Hammonton Chamber of Commerce, Social and Fraternal Organizations.

BY THE COMMISSION:

The trustees of the property of The Central Railroad Company of New Jersey, Shelton Pitney and Walter P. Gardner, filed a petition with the Board "to approve the discontinuance" of operation of a passenger train known and designated as the "Blue

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Comet" which has operated between Jersey City and Atlantic City since February, 1929. The petition describes the "Blue Comet" as "one of the first passenger trains in the country providing special coach train service with up-to-date equipment and appointments available to the public at standard coach fares."

The petition recites the history of the operation and the reasons for the proposed discontinuance: "Beginning in 1930, owing to the drastic decline in all passenger traffic, resulting from the business depression and, in addition, the diversion of such passenger traffic as remained, from the railroads to the highways owing to the multiplication of competing through bus lines between New York City and Atlantic City, the number of passengers carried on the 'Blue Comet' and the revenue therefrom radically declined, as indicated by the following figures:

Year	*Total Passengers Carried*	*Total Revenue*
1930	56,746	$303,043.04
1931	41,845	315,209.65
1932	29,774	210,402.54
1933	17,351	116,144.25
1934	22,690	108,734.60
1935	18,707	90,977.23
1936	28,987	112,839.32
1937	29,821	115,293.81
1938	20,702	95,567.83
1939	13,668	74,919.52
1940	14,045	66,901.73"

The petition further shows that "during the past nine years the operation of debtor's railroad system has resulted in a very large deficit with the result that since 1931 the debtor has paid no dividends on its common stock, and since April 1, 1939, it has been able to pay no interest on its bonds."

One of the factors contributing to this financial condition was the operation of the "Blue Comet" at substantial annual deficits.

A similar application was filed with the Board on October 11, 1939, and denied by the Board on May 21, 1940. In its denial the Board suggested various methods by which it was hoped the volume of business might be increased, and the financial results justify the continued operation of the service.

Testimony was submitted at the hearing on that application that the operation of the "Blue Comet" for the year 1939 resulted in an operating deficit of $48,233.61.

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At the hearing on the present application, it satisfactorily appeared that Petitioner had adopted the suggestions of the Board and also suggestions made by the Chambers of Commerce and had exerted earnest efforts to increase the volume of business and to operate the train without loss. The testimony before us shows, however, that despite these efforts, including the expenditure of $5,218.00 in an advertising campaign, an operating loss of $59,990.60 was incurred for the year 1940. This loss is exclusive of any allowance for taxes, depreciation or interest on investment or equipment.

Preliminary to a further discussion of the matter, it is timely to direct attention, somewhat in detail, to the cost of and the revenue received from the operation.

The following summary of revenues and expenses, supported by the proofs, reflects graphically the substantial loss incurred by the Company for the years 1939 and 1940, almost entirely due to lack of passenger traffic:

RESULTS FROM OPERATION—YEAR 1939

Revenues:		
Passenger revenue, including revenue from express, baggage and newspaper traffic	$67,035.37	
Dining car revenue	7,884.15	
		$74,919.52
Expenses:		
Crew wages, including R. R. Retirement Tax and Unemployment contribution	$29,697.50	
Locomotive operation, including fuel, water, lubricants, supplies, repairs, and engine house expense	50,942.50	
Passenger car expense, including repairs, cleaning and train supplies	18,362.27	
Trackage—P. R. S. L. Winslow Junction to Atlantic City	5,149.60	
Advertising	5,218.54	
Dining car operation, including wages and supplies	13,782.72	
		123,153.13
Net from operation—deficit		$48,233.61

The deficit or loss from operation does not include charges for taxes, depreciation, or interest on investment in equipment, in amounts as follows:

Taxes, on equipment in use	$3,057.35
Depreciation, on equipment in use	6,486.42
Interest at 5¾ per cent per annum	9,100.46
	$18,644.23

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RESULTS FROM OPERATION—YEAR 1940

Revenues:		
Passenger revenue, including revenue from express, baggage and newspaper traffic	$59,104.92	
Dining car revenue	7,796.81	
		$66,901.73
Expenses:		
Crew wages, including R. R. Retirement Tax and Unemployment contribution	$28,944.79	
Locomotive operation, including fuel, water, lubricants, supplies, repairs, and engine house expense	55,623.10	
Passenger car expense, including repairs, cleaning and train supplies	18,144.73	
Trackage—P. R. S. L. Winslow Junction to Atlantic City	4,593.38	
Advertising	6,241.83	
Dining car operation, including wages and supplies	13,344.50	
		126,892.33
Net from operation—deficit		$59,990.60

The deficit or loss from operation does not include charges for taxes, depreciation, or interest on investment in equipment, in amounts as follows:

Taxes, on equipment in use	$2,813.62
Depreciation, on equipment in use	5,902.19
Interest at 5¾ per cent per annum	7,650.58
	$16,366.39

The answer to the reduced operating revenue is clear. The "Blue Comet" in 1930 carried 56,746 passengers, in 1939—13,668 passengers, and in 1940—14,045 passengers, exclusive of passengers for intermediate points between Jersey City and Atlantic City, namely Red Bank, Farmingdale, Lakewood, Lakehurst and Hammonton, all despite the fact that in 1940 the per mile rate of fare was 1.5 cents less than in 1930. Reduced passenger traffic, of course, results in reduced revenue.

The above recital summarizes Petitioner's testimony in support of the application.

We turn now to the objections to the application.

Although the City of Atlantic City, Township of Lakewood, Atlantic City Hotel Men's Association, Atlantic City Realty Board, Atlantic City Chamber of Commerce, Hammonton Chamber of Commerce and a group of citizens entered appearances in opposition to the application, only three witnesses testified in support of the objection to the discontinuance of the train.

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(1) Mr. Robinson, a citizen of Atlantic City, testified at length, but the substance of his testimony is:

> "I don't believe they have given us the best service that is possible for them to give. * * * that a cheaper fare will get the passengers."

(2) Mr. Wharton B. Chew, a resident of Atlantic City and former railroad employee, testified mainly to the well-known fact that Atlantic City is the mecca for many annual conventions and that the discontinuance of this train service or any train would detrimentally affect the hotel business in Atlantic City.

(3) Mr. Edward P. Woehr, a member of the Township of Lakewood Committee and engaged in the hotel business, testified that the withdrawal of the "Blue Comet" would certainly interfere with the hotel trade. This testimony reflects a natural attitude but affords no sound basis for requiring the continuance of the operation at continued substantial loss.

We have considered the testimony of the witnesses for the petitioner and for the objectors, both upon direct and cross-examination. We know, of course, that Atlantic City and Lakewood are resort communities, Atlantic City on the ocean and Lakewood inland. We realize that millions of dollars have been invested in Atlantic City for the construction of some of the finest hotels in the world, and to a lesser extent in Lakewood. Both of these municipalities rely to a large degree upon the revenue of summer and winter visitors and reasonable means of railroad transportation.

On the other hand, we are convinced that not only does the cost of the operation of the "Blue Comet" result in a substantial annual loss indicating a lack of patronage, but we know that the Central Railroad Company of New Jersey is now in the process of Federal Court reorganization due to financial troubles.

It is quite apparent that the declining revenue over a course of years may be attributed to competing railroad facilities from midtown New York, interstate buses direct to Atlantic City and to the use of private automobiles. It is common knowledge that that condition exists in many parts of the country.

Our consideration of the proofs compels the conclusion that there is no legal alternative to the granting of the petition and we therefore do so upon the condition, however, that the petitioner will inaugurate a service between New York and Lakewood and return on about the same time schedule as the "Blue Comet" operation. This approval of the discontinuance of the "Blue

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Comet" is not to become effective until September 28, 1941, the date of change in time table from Daylight Saving Time to Standard Time. The approval is without prejudice to the right of the communities and others served to apply hereafter to the Board for an order to be made, after hearing, upon notice, requiring the restoration of a service should conditions warrant such restoration.

Dated, June 24, 1941.

No. 2226

In the Matter of the Formal Complaint of Public Service Coordinated Transport vs. Eugene Davis, In re Unauthorized Operation Between Nutley, Belleville and Newark, New Jersey.

Charles S. Straw and *J. H. Mulhern,* for Public Service Coordinated Transport; *E. A. Furlong,* for Eugene Davis.

BY THE COMMISSION:

The complaint charges that the respondent on January 30, 1941, February 5, 1941, and February 7, 1941, conducted

> "an unauthorized operation between the Town of Nutley, Town of Belleville and the City of Newark, in that the said Eugene Davis did carry passengers for hire between Nutley, Belleville and Newark without first obtaining the consent of the Board or Body having control of the public streets in said municipalities and without the approval of such consents by the Public Utility Commission of the State of New Jersey."

The gist of the complaint is (1) that the respondent on the dates indicated carried passengers for hire from various points in Belleville and Nutley to Kresge's Department Store, Halsey Street, Prudential Insurance Company Building, National Newark and Essex Building and Bamberger's Department Store, all in Newark, at which points passengers were discharged; (2) that passengers were accepted at Kresge's Department Store, all of whom were discharged at various points in Nutley and Belleville; (3) that the operation of the motor vehicles transporting said passengers (two six-passenger Cadillacs) was in competition

> "with the Broad All-Service Vehicle Route No. 13, Paterson All-Service Vehicle Route No. 17, Summer Avenue Bus Route No. 28, Main-Passaic All-Service Vehicle Route No. 74, Nutley Bus Route No. 92, and the Clifton-Newark Bus Route No. 112, which routes are owned and operated by Public Service Coordinated Transport,"

and (4) that the operations were "illegal."

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Edward A. Furlong, according to his statement on the record, was the actual owner of the two automobiles engaged in the alleged unlawful operation which were registered in the name of Eugene Davis. The registration in Davis's name was a subterfuge to deceive the Board. This conclusion is justified for the reason that Furlong was the respondent in a similar proceeding several years ago, although over a different route. In that proceeding the Board decided that the operation then conducted by Furlong was in violation of the statute. The Board's decision in that case was sustained by the Supreme Court in re *Nutley-Times Square Service, Inc.,* vs. *Board,* 109 N. J. L. 289.

Furlong admitted "taking these passengers who have testified here today to the places that they testified you took them," but asserted that the operation was legal because (1) he holds a public livery owner's license granted by the Town of Belleville for two Cadillac limousines; (2) that the difference between a taxicab operation or a bus operation is an operation whereby you hire, or rather, the car is hired, by the hour, by the day, by the week, by the month or by the individual trip for a stipulated fare, and that is what we do;" (3) "every passenger brought to Newark * * * was as a result of a prior telephone agreement with them"; and (4) "we consider that we are operating strictly as a public livery service."

The fare charged from Nutley to Newark was 50c round trip. Tickets were also sold on a semimonthly basis at $3.50, entitling a passenger to ten round trips per week. Some passengers were carried daily excepting Sunday, others occasionally.

Two six-passenger Cadillac (limousine type) automobiles were used daily, except Sunday, for the transportation of the passengers. Some trips were at scheduled hours, others not. Some were over a regular route, others irregular.

A witness for Complainant was asked by Mr. Furlong on cross-examination:

> "Q. Do we usually cover any specified route between Nutley and Newark?
>
> "A. The 4:45 trip I should say taking passengers from the Prudential has a very regular route. The rest of the trips are not so regular."

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The question is, on the facts as summarized, whether the limousine operations, as complainant asserts, violated R. S. 48:4–1:

> "The word 'autobus' as used in this chapter means and includes, except as hereinafter noted, any automobile or motor bus carrying passengers for hire which is held out, announced or advertised to operate or run, or which is operated or run, over any street or public place in this State and indiscriminately accepts and discharges such persons as may offer themselves for transportation either at the termini or points along the way or route on which it is used or operated or may be running. Nothing herein contained shall be construed to include taxicabs, hotel buses, or buses employed solely in transporting school children and teachers."

This section was construed by the Supreme Court in *Nutley-Times Square Service, Inc.,* vs. *Board, supra.* In that case Nutley-Times Square Service, Inc., Edward A. Furlong, president operated three six-passenger sedans between Nutley and Jersey City. Except for the difference in route, the facts there are for all practical purposes similar to the facts in this proceeding. The Court said in part:

> "The respondent, the Nutley-Times Square Service, Inc., contends that it is operating a taxi service between Nutley, N. J., and New York City and therefore is not within the Board's jurisdiction; and further, that because of the taxi operation the equipment operated by said company is not subject to the requirements of the Board's specifications applying to auto buses operated within the State of New Jersey in interstate traffic; and further, that it is not necessary for said company to file the necessary liability insurance policy with the Board in accordance with its Regulation B-8 and subsequent directions.
>
> "The respondent, the Nutley-Times Square Service, Inc., submitted taxi permits issued to it by the Town of Nutley.
>
> * * *
>
> "Undoubtedly these Lincoln Sedans used as stated as an hourly transportation line between Nutley and New York, charging a cash fare, are 'autobuses' within the statutory definition, and amenable to the regulations of the Board, which by chapter 80 of the laws of 1927 is invested with 'authority to prescribe reasonable rules and regulations with respect to the construction and equipment of any autobus or other buses carrying passengers between points in New Jersey and points in other states.'
>
> * * *
>
> "The regulations as laid before us also clearly include the sedans in question and make them unavailable for this class of service.
>
> * * *
>
> "We have never understood that State regulations looking to proper equipment of public conveyances, speed of trains, maintenance of tracks and crossings, amounted to an unconstitutional interference with interstate commerce."

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These regulations "relate solely to the safety and comfort of passengers."

This decision controls our determination. We find (1) that the Cadillac limousines do not comply with the Board's specifications for autobuses; (2) that the respondent is engaged in the transportation of passengers for hire over public streets in Newark, Belleville and Nutley; (3) that respondent's operation is an autobus service within the meaning of the statute; (4) that respondent has not obtained municipal consents for such operation, and, therefore (5) the operation is unlawful. Respondent Davis and Owner Furlong are hereby directed to forthwith discontinue such unlawful operations.

If, in the future, satisfactory proof is presented that Furlong either directly or indirectly has violated our order to cease and desist, on this or any other route, we will invoke the appropriate statutory procedure to prevent further violations.

An order will issue accordingly.

Dated, August 20, 1941.

No. 2227

In the Matter of the Application of the Monmouth Consolidated Water Company for Increase in Rates.

C. H. Dickey, for Monmouth Consolidated Water Company; *Ward Kremer,* for Asbury Park, City of Long Branch, Boroughs of Bradley Beach, Deal, Eatontown, Fair Haven, Little Silver, Monmouth Beach, Oceanport, Rumson, Sea Bright, Shrewsbury, West Long Branch, Townships of Middletown and Shrewsbury, City of Neptune City and Borough of Neptune City; *Wall, Haight, Carey & Hartpence* (by *Edward J. O'Mara* and *James R. Laird*), for Ocean Grove Camp Meeting Association.

BY THE BOARD:

On November 14, 1940, the Monmouth Consolidated Water Company filed with the Board a schedule of increased rates effective as of January 1, 1941. The Board suspended the proposed rates pending hearing and determination.

At the outset it should be noted that the statute (48:2–21.2d) provides:

> "When any public utility shall increase any existing individual rates * * * charges or schedules thereof, * * * or change or alter any existing classification, the board, either upon written complaint or upon its own initiative, shall have power after hearing, upon notice, by order in

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writing to determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change or alteration is just and reasonable shall be upon the public utility making the same."

HISTORY OF THE COMPANY

Monmouth Consolidated Water Company was formed in 1926 by the consolidation of the Tintern Manor Water Company, the Monmouth County Water Company and the Rumson Improvement Company. The Tintern Manor Water Company was organized in 1899. In 1901 the Long Branch Water Supply Company, the Sea Bright Water Supply Company, the Deal Water Company and the Middletown Water Company were acquired by the Tintern Manor Water Company. The New Jersey Water and Light Company was acquired by the Tintern Manor Water Company in 1925.

The Monmouth County Water Company was formed in 1911 by the consolidation of the East Jersey Coast Water Company, the Neptune City Water Company and the Ocean Township Water Company. The Rumson Improvement Company had no mergers up to the time it was consolidated with the Monmouth Consolidated Water Company in 1926.

TERRITORY SERVED

Monmouth Consolidated Water Company, as now constituted, serves about 22,000 customers in a territory extending approximately 23 miles along the Atlantic Coast from Port Monmouth south to Bradley Beach. A large part of the Company's business is seasonal. This territory has a permanent population of 80,000 and a summer population of 180,000.

The following municipalities are served by the Monmouth Consolidated Water Company: the western part of the City of Asbury Park, the City of Long Branch, the Boroughs of Bradley Beach, Deal, Eatontown, Fairhaven, Interlaken, Little Silver, Monmouth Beach, Neptune City, Oceanport, Rumson, Sea Bright, Shrewsbury and West Long Branch, and the Townships of Middletown, Ocean, Shrewsbury and Neptune which includes Ocean Grove.

There is an emergency connection to the municipal plants of Belmar and Asbury Park. Monmouth Consolidated Water Company also sells water wholesale to the Shark River Hills Water Company and the Port au Peck Water Company.

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DESCRIPTION OF PROPERTY

There are four pumping stations each of which has its own source of supply, namely, Newman Springs Station, West End Station, Jumping Brook Station and Whitesville Station. With the exception of a standpipe at Asbury Park which floats on the line, there is no elevated storage in the system so that the pressure in the mains is maintained by direct pumping.

The total pumping capacity of the four stations is 21.55 m.g.d. of which the largest, Newman Springs, is the base load station. This station has a capacity of 13 m.g.d., obtained from the surface supply flowing into Swimming River Reservoir.

The four stations are operated simultaneously only during the summer months. Because the larger part of the territory served is made up of summer resorts, the demand for water fluctuates widely during the year. During the last few years the hourly peak has reached the capacity of the pumps on several occasions. The distribution system contains 383 miles of mains of varying sizes.

CAPITALIZATION

The Company has outstanding $3,564,000 First Mortgage Five Per Cent Gold Bonds Series A, dated June 1, 1926, and due June 1, 1956. There is outstanding 1,857 shares of $7.00 Series Cumulative Preferred Stock of no par value having a stated value of $185,000, and 26,000 shares of no par value common stock having a stated value of $2,100,000. With the exception of directors' qualifying shares, the common stock is owned entirely by the American Water Works and Electric Company, Inc., of New York.

There is an open account due to American Water Works and Electric Company, Inc., as of March 31, 1941, amounting to $456,000, according to the books of the Company.

REASONS FOR THE APPLICATION

The petition sets forth that the reasons for the proposed increase in rates are:

> "(a) The Company is not now earning and has not for some years past earned a fair return on the present fair value of its used and useful property.

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"(b) Increased investment, and an increased cost of operation due to increased municipal and State taxes.

"(c) Increased operating expenses due to the payment of State and Federal unemployment and Federal social security taxes; increased operating expenses due to the initiation by the Company of group insurance and annuity benefits, and more liberal treatment of labor with respect to hours, work and wages paid."

The Petitioner claims that the value of the property based on its appraisal is not less than $7,000,000, and asserts that for the past four years the returns, based on that value, are as follows:

1937	$232,353	3.3%
1938	236,623	3.4%
1939	268,662	3.8%
1940	196,222	2.8%

The Petitioner further alleges that the proposed increase in rates based on the then existing consumption after giving effect to the increased taxes will produce a return substantially below 6 per cent on the claimed appraised value of $7,000,000.

PRESENT AND PROPOSED RATES

The present general service rates fall into three groups which are the outgrowth of the rate structure of the predecessor companies.

1. In the northern part of the territory, formerly supplied by the Tintern Manor Water Company, Rumson Improvement Company and the New Jersey Water and Light Company, service is provided on both metered and fixture rates, in the City of Long Branch, the Boroughs of Rumson, Sea Bright, Monmouth Beach, Deal, Fairhaven, Little Silver, Oceanport, Shrewsbury, Eatontown and West Long Branch, and the Townships of Middletown and Shrewsbury, and part of the Township of Ocean. Bills are computed under the metered rates on the basis of annual consumption and are subject to annual minimum charges based on the number of fixtures.

2. The southern part of the Company's territory includes the western part of the City of Asbury Park, the Boroughs of Interlaken, Neptune City and Bradley Beach, the Township of Neptune, except Ocean Grove, and a part of the Township of Ocean. This territory was formerly supplied by the Monmouth County Water Company and is entirely on a metered basis. Bills are computed on the basis of quarterly consumption with a service

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charge based on the size of the meter. The service charge does not include any consumption.

3. In the Ocean Grove territory service is furnished on a metered rate with an annual minimum charge based on the size of the meter. There is a special contract with the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, which provides that the Association shall have the right to take water for its own purposes for a flat sum of $1,000 per year payable monthly, and designates the purposes for and points at which water may be taken.

The proposed new schedule of rates is intended to supersede all the above rates and place the entire territory on a uniform metered basis for general service with the exception of Ocean Grove Camp Meeting Association, served under a special contract, and the Water Witch Club District where there is an additional charge for the extra pumping required because of its higher elevation.

The proposed new schedule of rates involves, in general, an increase in existing rates.

RATE BASE

Cost of Reproduction

The Company presented a reproduction cost valuation (Ex. P-2) based on a field inventory made under the supervision of H. C. Milholland of the staff of the American Water Works and Electric Company, Inc. The inventory of the distribution system is as of December 31, 1939, and all other property as of October 1, 1939. No independent inventory was offered by the objectors. The inventory was priced by Mr. Milholland on the basis of prices current about January 1, 1940.

Mr. Loeb, the principal witness for the objectors, indicates in his Exhibit O-3 (pages 24 and 25) that in his opinion the inventory presented by Mr. Milholland correctly represents all of the physical property in existence at the time of the inventory and that, in general, he is in accord with the reproduction cost estimates submitted by the Company for property other than distribution property. He spot checked the unit costs for distribution mains, services, meters and hydrants. In some instances his unit prices are lower than those used by the Company and in others practically identical. He is in "substantial disagreement," however, with the 15 per cent allowance for structural overheads used by the Com-

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pany. He substituted a group of indirect and overhead costs which amount to 7.2 per cent of a tangible fixed capital base of $5,906,464. He obtained this base by subtracting from the Company's tangible fixed capital of $6,355,999, an item of $49,080 for adjustment in unit prices, $170,228 for duplicate property, and $230,227 for what in his opinion is non-used and non-useful property. This resulted in a total deduction by him for tangible fixed capital items of $449,535.

The adjustment of $49,000 by Mr. Loeb is made up of two items relating to the unit prices used in pricing Account 136—Distribution Mains and Accessories, and Account 137—Service pipes and Stops. Mr. Loeb used unit prices which he testified were based on four-year averages. Exhibit P-6 introduced by Mr. Milholland shows steadily increasing prices for cast-iron pipe and water works construction during the four-year period adopted by Mr. Loeb. Mr. Milholland's reproduction cost estimate was based on prices current about January 1, 1940.

The $170,228 deduction by Mr. Loeb in Account 136 Distribution Mains and Accessories, is for duplicate property. That this deduction was for duplicate property was disclosed by the objectors' witness, R. H. Craig, who admitted in his testimony that he arbitrarily deducted all the parallel mains in the system without consideration of the circumstances under which the parallel mains were laid or what the consequences to the consumers' supply would be if these duplicate mains were physically removed. On this witness' admission this deduction is not justified.

The deduction of $230,227 represents eliminations in sixteen accounts for items of non-used or non-useful property, the largest of which is $120,439 from Account 129—Steam Power Plant Equipment. As to this deduction Mr. Craig contended that the Company has excess capacity in pumping equipment. He based this contention on the claim that the peak demand on the system is approximately 8.5 m.g.d. The annual reports to this Board, however, indicate a 24-hour peak of 16 m.g.d. in the summertime, and evidence at the hearings shows that an hourly peak of 21 m.g.d. occurred on several occasions. A further indication of the necessity of the existing capacity is the increasing use of water; particularly at Fort Monmouth where it is due to continued expansion of defense activities. Mr. Loeb recognized this increased demand for water service by making an allowance therefor in his revenue estimate.

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The evidence supports elimination by Mr. Craig of the following items of land which are not reasonably held for present or future use and a camp shack which is not used or useful:

Account		*Amount*
105-1-A	Manasquan Tract	$266.00
105-1-B	Manasquan Tract	50.00
108-3-B	Neptune Township—Asbury Avenue	9,400.00
111-2	Bradley Beach (4 parcels)	8,240.00
112-4	Camp Shack—Swimming River	1,049.00
	Total	$19,005.00

The evidence does not support the other eliminations made by him with the exception of the following items which were also eliminated by the Company's witness, Mr. Berry, as property not in use or useful:

Account		*Amount*
115- 4	No. 3 Well—Jumping Brook Station	$6,492.00
122- 1	12 Filters—Newman Springs Station	3,000.00
122-17	½ Wash Water Tank—Whitesville Station	4,000.00
		$13,492.00

The foregoing reproduction cost estimates, which do not include working capital and going value, are compared below:

Items	*Milholland (for the Company)*	*Loeb (for the Objectors)*
Organization	$50,000	$50,000
Tangible fixed capital	6,355,999	5,906,464
Structural overhead costs	953,400	430,688
	$7,359,399	$6,387,152
Net additions, Oct. 1, 1939, to Dec. 31, 1940	62,581	62,581
	$7,421,980	$6,449,733
Accrued Depreciation	762,701	953,278
	$6,659,279	$5,496,455

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Depreciation

Mr. Berry, a Company witness, testified to a total accrued depreciation of $762,701 on the entire property, correcting an error in his previous testimony which set the accrued depreciation at $759,940. This accrued depreciation is approximately 10.4 per cent of Milholland's $7,309,399 estimate of the cost to reproduce the tangible fixed capital including overheads. This estimate of depreciation was the result of a detailed examination of the specific items constituting the property, with which property witness was thoroughly familiar.

Mr. Craig, objector's witness, made a lump sum estimate of depreciation of 15 per cent. This estimate was based solely on his judgment after a general examination of the property. He made no estimate of the accrued depreciation on the particular items of property.

Original Cost

This Company witness, Sharpe, submitted an original cost estimate (Exhibit P-21), which is based on available books and records of the predecessor companies and other acceptable sources. This exhibit shows a total for the property, exclusive of intangibles, of $5,675,804 as of December 31, 1940.

Objector's Exhibit O-3 includes an original cost estimate of the Monmouth Consolidated Water Company property as of December 31, 1940. It is based on the record of the 1905 Court of Chancery rate case of the Tintern Manor Water Company, the 1916 rate case of that Company before this Board, the rate case of the Monmouth County Water Company before this Board in 1919, and the various annual reports to the Board by the Monmouth Consolidated Water Company and its predecessor companies.

On page 18 of Exhibit O-3 Mr. Loeb states:

> "It is our considered opinion that the original cost of the property of Monmouth Consolidated Water Company, before adjustments, is not more than $5,552,356 and that such original cost less book depreciation at December 31, 1940, was not more than $4,514,761."

The difference of $123,448 between the two estimates is largely accounted for by two items which were excluded by Mr. Loeb in his computation. The first, an item of $70,000, appears from the

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record to have been actually expended for fixed capital purposes by the Tintern Manor Water Company about 1905.

The other major item in this difference results from variations in adjustments by witnesses Sharpe and Loeb for pricing of retirements. The retirements made between 1926 and 1940 were recorded on the Company's books on the basis of the appraisal figures (at the time of the merger) rather than at original cost. In order to adjust the retirements during this period to the original cost basis, Mr. Sharpe reduced the book retirements by $110,000. Mr. Loeb's reduction for the same purpose was $46,573, which is $63,427 less than the amount used by Mr. Sharpe. However, it appears that Mr. Loeb's adjustment relates only to the period 1926-1934. It was admitted by Mr. Loeb that if further adjustment were to be made for the 1935-1940 period then the aggregate adjustment would be $110,000.

The two items referred to above reconcile the difference between Mr. Loeb's and Mr. Sharpe's estimates of undepreciated original cost to within less than $10,000. These estimates are therefore in substantial agreement.

Former Findings of Value Plus Additions

Exhibit O-3 also includes a computation by Mr. Loeb of the value of the tangible property based on the findings of this Board in the 1916 Tintern Manor Water Company rate case; the 1919 Monmouth County Water Company rate case and the 1926 book value of the Rumson Improvement Company. To these base figures are added the net additions to December 31, 1940, resulting in a final amount of $5,853,119.

To say the least, this figure ($5,853,119) so derived is, because of its hybrid nature, of doubtful value in determining a rate base. The findings of the Board in 1916 and 1919 were based on conditions prevailing at that time and are the result of a composite of reproduction and original cost estimates. To these figures are added net additions to date and a book figure at a different date.

Book Value

Exhibit O-3, page 33, sets up the book value of the tangible property undepreciated as of December 31, 1940 at $5,695,545.18. The basis for this figure is the item for fixed capital, $7,375,-079.97, shown on the Company's balance sheet. From this Mr. Loeb subtracts intangibles amounting to $1,679,534.79, which

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appears on the Company's balance sheet for 1931. The Company contends in its brief that this latter amount is incorrect and should be $470,800 as shown on the balance sheet in the Company's annual report to the Board for 1940.

From the $5,695,545 Mr. Loeb subtracts retirement reserve of $991,021.72 appearing on the Company's books which he adjusts by the addition of $46,573.24 used by him in his original cost estimate. This brings his deduction for depreciation to $1,037,-594.97 and his net book value of tangible property before other adjustments as of December 31, 1940, to $4,657,950.21.

Mr. Loeb makes further adjustments of fixed capital and retirement reserve for (a) property not used and useful and duplicate property, (b) alleged excessive engineering fees, and (c) contributions for extensions, thus revising the book value of tangible fixed capital to $5,072,433, the retirement reserve to $957,493, and the net book value of tangible property to $4,114,-940 as of December 31, 1940.

In his reproduction cost estimate Mr. Loeb eliminated $170,-228 as duplicate property and $230,227 as non-used or non-useful property. He also eliminated the corresponding amounts from the book cost and the original cost, but if these items are to be eliminated from the book cost or original cost they should be credited to fixed capital and charged against the retirement reserve. Hence in deducting the full amount of his adjusted book retirement reserve from the original cost estimate and the book value of fixed capital, Mr. Loeb fell in error.

Going Value

The only testimony on going value was submitted by Mr. Biggs for the Company. He claimed a separate allowance of $400,000. The witness testified that the Company not only is entitled to this allowance but that going value is increasing because the Company is continuing to attach new customers. The testimony as to going value is largely hypothetical and speculative.

Going value is not something to be read into every balance sheet as a perfunctory addition. The Board considers that where there is no satisfactory proof of the amount of going value it should be excluded as an item of property to be separately appraised. Therefore the Board will make no separate allowance for going value in this proceeding. It recognizes that there is an element of value in an assembled, established and successfully

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operated property and will consider this element to the extent which in its judgment is reasonable in the determination of the fair value of the property for rate-making purposes.

Working Capital

The Company claimed $122,438.23 for cash working capital, materials and supplies.

Mr. Loeb's allowance for working capital is a negative amount as appears on page 42 of Exhibit O-3. He deducted the amount of consumers' deposits and "unearned revenue," and did not make proper provision for payment of taxes.

In his estimate of materials and supplies and cash balance to be kept in local banks, Mr. Loeb is in substantial agreement with the Company's witness, Mr. Sharpe.

The Board concludes that an allowance of $100,000 for cash working capital and materials and supplies is fair and reasonable.

Summary of Estimates

The estimates and calculations relating to the value of the Company's property submitted by the various witnesses are summarized and compared in Appendices "A" and "B." A condensed comparison of the results is as follows:

Cost of Reproduction—	
Company	$7,181,717
Objectors	5,382,146
Original Cost—	
Company	6,248,242
Objectors	3,973,062
Book Value—Objectors	4,106,097

Conclusion as to Fair Value

After carefully weighing all the evidence and giving consideration to the briefs submitted on behalf of the Petitioner and Objectors, the Board concludes that the fair value for rate-making purposes as at December 31, 1940 of all of the property of the Petitioner used and useful in the service of the public, including working capital and intangible as well as tangible elements of value, is $5,600,000 and that this sum constitutes on the record made, a fair rate base. In reaching this conclusion the Board has considered the property as an assembled operating and going concern.

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OPERATING REVENUES

Mr. Stoney, for the Company, under present rates estimated a normal year's operating revenue at $589,170. This estimate was based on revenues for the year 1940, which the witness considered a normal year.

Mr. Loeb estimated a normal year's operating revenue to be $652,299 under present rates. This amount was based on an average of the operating revenues for the years 1939 and 1940 after applying certain adjustments. His principal adjustments are based on estimates of an increase in revenues from additional metered consumers, additional revenues from Fort Monmouth and from two housing developments in the Company's territory. Mr. Loeb reduced the average revenue from unmetered private service to give effect to a reduction in the number of customers in this class brought about by the Company's metering program. The only remaining adjustment of any consequence was due to extraordinary demands by the municipal water system of Asbury Park during the summer of 1939.

Upon consideration of all the proofs and the Company's regular reports for the first two quarters of 1941, the Board concludes that the amount of $620,786 represents a reasonable estimate of a normal year's operating revenues under the present rates, exclusive of any increased revenues that should have been derived from "free hydrant" service hereafter commented on, and from the expansion of activities at Fort Monmouth. The claim set forth by the Company that these increased revenues from Fort Monmouth are only temporary is not supported by any satisfactory testimony. The Board, in view of defense activities in this territory, is forced to the conclusion that the increased consumption of water at Fort Monmouth will continue for a reasonable period in the future and that consideration must be given to such additional revenues. The only estimate of increased revenue from this source was submitted by Mr. Loeb and was $29,397. A check of Mr. Loeb's estimate indicates that it is not excessive and is likely to be exceeded.

Fire Hydrants

The record shows that there are 57 hydrants which have never been billed to the municipalities. This is the type of discrimination that it was sought to end by the act under which this Board

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functions. This "free service" was not in fact free. Its cost was borne by the other public and private consumers. At an annual fire hydrant rate of $25 this would have produced additional revenues under the present rates of $1,425 per annum, additional revenues uncollected through unjust and unreasonable discrimination unqualifiably forbidden by the laws of the State.

Conclusion as to Estimate of Revenues under Present Rates

To the amount of $620,786 estimated by the Board to represent a normal year's operating revenues should be added the increased revenue from Fort Monmouth ($29,397) and the $1,425 which the Company should collect for the 57 fire hydrants previously unbilled. The result is $651,608 which the Board finds reasonably represents the prospective operating revenues for the year 1941 under present rates.

OPERATING EXPENSES

Mr. Stoney testified that the Company's operating expenses including maintenance and depreciation in a normal year were $256,680. However, Mr. Stoney used in his estimate the actual operating expenses for the year 1940 except for the maintenance accounts, for which he used the average annual expenses for the five-year period ended December 31, 1940.

Mr. Loeb, subject to certain adjustments, averaged expense items for the years 1939 and 1940 to reach his estimate of $245,126 for operating expenses including maintenance and depreciation for a normal year.

After consideration of the exhibits and the testimony relating to this subject, the Board is of the opinion that $250,215 represents a fair and reasonable annual allowance for operating expenses excluding taxes and uncollectible accounts, but including provision for amortization of the costs incurred by the Company in connection with these proceedings. To this amount should be added an allowance to cover the additional pumping and purification expenses resulting from the substantial increase in the consumption of water particularly at Fort Monmouth. A study of the Company's annual reports over a period of years, together with the trend of pumping and purification costs for the first two quarters of 1941 indicates that an allowance of $4,000 is reasonable for these added costs. The Board, therefore, will adopt the amount of $254,215 for annual operating expenses.

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UNCOLLECTIBLE WATER BILLS

The Company's estimate for the item of uncollectible water bills is $3,000 annually. Mr. Loeb's estimate for this item is $1,631. His estimate is based largely upon conclusions reached from a survey of collection experience of other New Jersey Water Companies which, however, do not serve seasonal communities, as well as the collection experience of a number of electric utilities operating in various states along the Atlantic Seaboard. Mr. Loeb apparently did not give adequate consideration to the actual amount of bad debts written off by the Company in recent years. In view of the seasonal character of the territory served and the actual experience of the Company with respect to bad debts, the Board finds that an annual allowance of $3,000 is not unreasonable.

TAXES

On the basis of the evidence and the estimates of revenues and expenses above set forth the Board will adopt an allowance of $147,498 for annual taxes. This allowance gives effect to an increase in local taxes of some $13,000 levied on the property of the Company for the year 1941 by the City of Long Branch. Since certain tax items are related to revenue and income levels this allowance will be subsequently adjusted to conform to the Board's final conclusions.

INCOME STATEMENT

The following schedule sets forth in condensed form an income statement based on the conclusions in the previous sections:

Operating Revenues		$651,608
Operating Expenses	$254,215	
Uncollectible Water Bills	3,000	
Taxes	147,498	
		404,713
Amount Available for return		$246,895

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RETURN

Return Earned Under Present Rates

After full and complete consideration of the evidence in this proceeding the Board finds that the amount of $246,895 represents a fair and reasonable estimate of the annual return under present rates. This is equivalent to a rate of return of 4.40 per cent on a rate base of $5,600,000. In the opinion of the Board this rate of return is inadequate. It therefore follows that the existing rates are unjust and unreasonable and fail to afford an opportunity to earn a fair return on a resoanable rate base.

Return Under Proposed Rates

From Exhibit P-8 it appears that the Company estimates the annual operating revenue from the proposed rates based upon 1940 sales at $725,060. The Company admittedly has not given any consideration to the increase in business during 1941. Giving effect to the already experienced increase in business over 1940 levels, heretofore referred to, it is the opinion of the Board, based upon all the testimony and exhibits relating to this phase of the proceedings, that the proposed rates will produce an annual operating revenue of $805,259 and a return of $354,797 after giving appropriate effect to additional taxes on revenues and income.

This return of $354,797 is equivalent to a rate of return of 6.34 per cent on a rate base of $5,600,000. In the opinion of the Board this rate of return is excessive under present-day conditions.

Amount of Return Requested by Petitioner

The Petitioner submits in its brief that a return in the amount of $309,130 is necessary in order for it to restore its credit and enable it to raise money. This amount represents a rate of return of 5.52 per cent on a rate base of $5,600,000. In the light of the testimony the Board does not consider such a return excessive or unreasonable.

Deficiency of Return

Return requested by Petitioner	$309,130
We find the actual return under existing rates to be	246,895
Deficiency in return	$62,235

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After giving effect to taxes related to revenue and income it is the conclusion of the Board that an increase in annual operating revenues of approximately $86,000 will be required to produce an annual return of approximately $309,130 and that a schedule of rates effecting such an increase of $86,000 will be just and reasonable under all of the circumstances of this case.

From the present posture of the record there is no basis upon which the Board can allow increases in rates for public and private service that will increase annual operating revenue by more than $86,000, an increase that will afford the Company, as before stated, a return of $309,130. An increase of $86,000 in annual operating revenue so affording a return of $309,130 will, in the judgment of the Board, afford the Company the return which it claims its proposed schedule of rates would yield.

CONCLUSION

On the basis of the foregoing considerations the Board finds and determines:

1. That the existing schedule of rates is unjust and unreasonable in that it does not afford opportunity to make a fair return.

2. That the schedule of rates proposed by the Company is unjust and unreasonable in that it will yield an excessive return and that the proposed schedule is therefore hereby disapproved.

3. That a schedule of rates which will increase annual operating revenues on the basis of current sales by $86,000 is just and reasonable.

4. That the Company shall submit for the consideration of the Board within twenty days of the date of this decision a revised schedule of charges for service, to be effective with bills rendered on and after October 1, 1941, and so designed as to produce an increase in annual operating revenue of not more than $86,000 in excess of the amount of annual operating revenue determined by application of present rates to current sales.

Dated, August 20, 1941.

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APPENDIX "A"

SUMMARY OF VALUATION ESTIMATES BASED ON COST OF REPRODUCTION

	Estimated Cost of Reproduction	
	Company Exh. P-27	*Objectors Exh. O-3*
Land	$51,525	$51,525
Structural plant	6,304,474	6,304,474
Total land and structural plant	$6,355,999	$6,355,999
Deductions:		
Plant not used or useful	.....	230,227
Duplicate plant	.....	170,228
Adjustment for unit prices	.....	49,080
Total deductions	.....	$449,535
Land and structural plant	$6,355,999	$5,906,464
Structural and general overheads	953,400	430,688
Total tangible fixed capital	$7,309,399	$6,337,152
Organization	50,000	50,000
Total fixed capital	$7,359,399	$6,387,152
Net additions Oct. 1, 1939, to Dec. 31, 1940 (from books)	62,581	62,581
Total fixed capital Dec. 31, 1940	$7,421,980	$6,449,733
Estimated accrued depreciation	762,701	953,278
Fixed capital less depreciation	$6,659,279	$5,496,455
Going value	400,000	.....
Working Capital:		
Cash	92,677	(38,288)
Materials and supplies	29,761	29,445
Total	$7,181,717	$5,487,612
Adjust for contributions for extensions	.....	105,466
Adjusted total as of Dec. 31, 1940	$7,181,717	$5,382,146

( ) Denotes credit item.

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APPENDIX "B"

SUMMARY OF VALUATION ESTIMATES DERIVED FROM BOOKS AND RECORDS[1]

	Original Cost		*Book Value*
	Company Exh. P-21	*Objectors Exh. O-3*	*Objectors Exh. O-3*
Tangible Fixed Capital	$5,675,804	$5,552,356	$5,695,545
Deductions:			
Contributions for extensions	.....	100,223	100,223
Not used or useful and duplications	.....	338,767	347,788
Excessive engineering fees	.....	175,101	175,101
Total deductions	.....	$614,091	$623,112
Total Tangible Fixed Capital	$5,675,804	$4,938,265	$5,072,433
Deduction for Depreciation	No Exhibit	956,360	957,493
Tangible fixed capital less depreciation	$5,675,804	$3,981,905	$4,114,940
Organization	50,000	.....	.....
Total fixed capital Dec. 31, 1940	$5,725,804	$3,981,905	$4,114,940
Going Value	400,000	.....	.....
Working Capital:			
Cash	92,677	(38,288)	(38,288)
Materials and supplies	29,761	29,445	29,445
Total	$6,248,242	$3,973,062	$4,106,097

[1]Objectors' calculation of value based on former findings by the Board is not shown. For this item see page 10 of decision.

( ) Denotes credit item.

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 228. January Term, 1942.

City of Long Branch, a municipal corporation in the County of Monmouth, et als.,
Prosecutors,
vs.
Board of Public Utility Commissioners of the State of New Jersey and Monmouth Consolidated Water Company, body corporate,
Defendants.

Argued January 1942. Decided February 13, 1942.

On certiorari.

The proofs examined in this case, it is clear that the determination of the Board of Public Utility Commissioners in finding an increased rate for water service reasonable, was proper.

For prosecutors, *Ward Kramer.*

For Monmouth Consolidated Water Co., *Autenrieth & Wortendyke, Joseph F. Autenrieth* (*C. H. Dickey*, of Iowa Bar, on brief).

Before *Justices Bodine, Perskie* and *Porter.*

BODINE, J.

Certiorari was allowed to review a decision of the Board of Public Utility Commissioners permitting the Monmouth Consolidated Water Company to increase its revenues by some $86,000. The utility on November 14, 1940, filed with the Board a schedule of increased rates effective as of January 1, 1941. The Board suspended the proposed rate pending a hearing pursuant to N. J. S. A. 48:2–21.2d, and, after hearing, found the increase reasonable. The rate went into effect and the municipalities adversely affected contend that the proofs do not support the adjudication.

The utility was a consolidation of a number of small water companies serving municipalities in Monmouth County, a county bordering on the Atlantic Ocean and containing many residences used only in the summer. There are 22,000 customers served

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and the territory covered extends along the ocean from Fort Monmouth to Bradley Beach. Emergency connections are maintained with two municipal water plants and water is sold wholesale to two other companies. There are four pumping stations and the demand for water fluctuates seasonally. A population of 180,000 people are provided with water in the summer. In the winter there is less than half that number.

The capital structure is as follows: First Mortgage Five Per Ten Gold Bonds (whatever that term means) Series A due June 1, 1956, $3,564,000; 1,857 $7 cumulated preferred stock stated value $185,000; 26,000 shares no par value common stock, stated value $2,100,000. Open account due American Water Works and Electric Company, the parent company, as of March 31, 1941, $456,000.

The Company placed the value of its used and useful property at $7,000,000, and claimed that by reason of the increased municipal, state and federal taxes it had earned but 3.3 per cent in 1937; 3.4 per cent in 1938; 3.8 per cent in 1939, and 2.8 per cent in 1940.

The Board, after carefully weighing the evidence, placed the value of the property at $5,600,000. The probable operating revenue was fixed at $620,786, a trifle less than the Objector's testimony suggested, and the probable loss from uncollected water bills at $3,000 annually. An allowance for taxes in the sum of $147,498 was made.

The following breakdown shows the result:

Operating revenues		$651,608
Operating expenses	$254,215	
Uncollectible water bills	3,000	
Taxes	147,498	
		404,713
Amount available for return		$246,895

The present return the Board found was 4.4 per cent. The utility desired a return of 6.34 per cent. The Board decided that one of 5.52 per cent was not unreasonable, and awarded an increase of rates to yield $86,000.

The first problem relates to the value of the property as fixed for rate-making purposes. The Board considered cost, reproduction costs and the value as an assembled operating and going concern. Experts testified to all elements and their testimony

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varied on most points. We can hardly say, however, that the Board's findings have no support in the proofs. The Board considered all the proper elements. *New Jersey Suburban Water Co.* vs. *Board of Public Utility Commissioners,* 123 N. J. L. 303. In parallel columns annexed to the decision are to be found the varying estimates of the different witnesses called. The weight of the testimony was for the Board and these findings are supported by the proofs.

Three points were specially pressed at the argument: One, that the Company was paying entirely too much interest for its borrowed money. The answer was made that the utility is not in receipt of sufficient revenue to amortize any part of its debt, and that investors are not anxious to buy securities in companies which are in receipt of insufficient revenue to operate with certainty. The proofs do not show that the Company could refinance its funded indebtedness and the large indebtedness to the parent company on open account would seem to make it unlikely.

Two, that the Company pays the parent company too much for management service. The charge is 4 per cent of its gross operating revenue. Stone & Webster charge for a similar service 1.95 per cent. The management expense of the utility is high, being close to 10 per cent. It is hardly a fair basis for comparison to state the figures of utilities operating in a single municipality where the demand for its services are more constant. The Utility Board could not set aside the contract or reduce the yield thereon. Its function is all the factors considered to determine if the rate fixed is reasonable.

A rate too low results in inability to render efficient service. A rate too high is of disservice to the public. The same applies to the management contract. The officers of a business may, within reason, control its affairs. That other boards have differently viewed such items is no reason why the action under review was not proper. We are not at liberty to accept the Objectors' testimony and reject that offered by the utility.

Three, it is urged that the Board improperly accepted a depreciation theory that was too low. The weight to be given to testimony as to reproduction cost and depreciation depends upon the circumstance of each particular case.

The Board had proof to support the figures taken. In fact, the figures testified to by the witnesses for utility and the Objectors as to depreciation vary by less than $200,000. The substan-

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tial difference in result is caused by the inclusion in the estimate of cost of reproduction of property claimed by the Objectors to be a duplication and not used or useful. The Board did not so find and it does not seem that they were obliged so to do. A utility obliged to give service cannot be required to have its rate based merely upon property in constant use. A degree of duplication in plant facilities is inevitable in any utility, particularly where there is a wide seasonal variation in demand for the service. Suffice it that the Board weighed all the testimony and arrived at a result supported by the proofs.

The writ will be dismissed with costs.

No. 2228

In the Matter of the Application of Pennsylvania-Reading Seashore Lines for Approval of Discontinuance of Certain Passenger Train Service Between All Stations on the Camden-Millville Line and the Discontinuance of Passenger Service on Penns Grove Branch-Woodbury to Penns Grove; Salem Branch-Woodbury to Salem; and Bridgeton Branch-Glassboro to Bridgeton.

Floyd H. Bradley, H. Merle Mulloy and *Windsor F. Cousins,* for Pennsylvania-Reading Seashore Lines; *Robert C. Hendrickson,* for County of Gloucester and all municipalities in the County; *John M. Summerill,* for Penns Grove, Upper Penns Neck Township and Salem County; *Alvin R. Featherer,* for Borough of Elmer; *John G. Shell,* for Gloucester County and Pitman; *Robert G. Howell,* for Cumberland County; *Lewis R. Hogan,* for City of Millville; *Solva Tuso,* for Landis Township; *H. H. Fithian,* for Bridgeton Board of Trade; *Bertram Aitken,* for City of Bridgeton; *George B. Marshall,* for Borough of Glassboro; *Edward C. Waddington,* for Numerous Commuters on the three Branches; *Charles S. Straw,* for Public Service Interstate Transportation Company; *Albert R. McAllister,* on his own behalf; *James Mercer Davis,* for Elizabeth Cole, et al., *Joseph M. Mannix,* for Associated Rail Fans of South Jersey; *F. C. Mooney,* for Brotherhood of Railroad Trainmen.

BY THE COMMISSION:

STATEMENT OF PURPOSES OF APPLICATION

The relief sought is to discontinue passenger service (freight service being continued) between:

1. Woodbury and Penns Grove (Penns Grove Branch), a distance of 29.1 miles, through the municipalities of Woodbury, Redoak, West End, Thorofare, Paulsboro, Gibbstown, Repaupo,

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Bridgeport, Prospect, Centre Square, Jumbo, Pedricktown, Oldman, Perkintown, Friendship and Penns Grove. Two round trips are operated daily by gasoline car, except Sunday.

2. Glassboro and Bridgeton (Bridgeton Branch), a distance of 38.9 miles, with stations at Bridgeton, Commerce Street, Irving Avenue, Finley, Husted, Palatine, Elmer, Monroeville, Aura and Glassboro. Three round trips are operated daily except Sunday by steam engine and gasoline car.

3. Woodbury and Salem (Salem Branch), a distance of 37.5 miles, with stations at Salem, Penton, Alloway Junction, Fenwick, South Woodstown, Woodstown, Swedesboro, Rulon Road, Tomlin, Wolfert, Mickleton, Clarksboro, Mt. Royal, Parkville and Woodbury. Three round trips are operated daily except Sunday by steam engine and gasoline car.

4. (a) Curtailment of service, and (b) rearrangement of passenger train schedule between Camden and Millville on the Camden and Millville line. Seventeen round trips are now operated and the proposal is to discontinue five round trips and readjust schedules.

This request (4) was not opposed at the hearing.

REASONS FOR ABANDONMENT

The application alleges:

> "That private automobiles and motor buses have made serious inroads on the passenger train traffic handled by Petitioner on the three branch lines.
>
> "That as a result of the aforesaid competition from private automobiles and motor buses, as well as other factors, all the passenger trains on the Penns Grove, Salem and Bridgeton Branches, and many of the passenger trains on the Camden-Millville line are being operated at substantial losses, and the present passenger train traffic now handled on said trains does not warrant their continued operation.
>
> "That said reduction in passenger service is necessary in order to effect substantial economies and to permit your Petitioner to continue service required by public convenience and necessity."

For the reasons stated, the Board is asked to approve:

> "(a) The discontinuance of all passenger train service on the said Penns Grove, Salem and Bridgeton branches and (b) the reduction and rearrangement of passenger train service between Camden and Millville on the Camden-Millville line, as shown on Exhibit A herein."

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It is not proposed to withdraw freight service.

The application was opposed by all of the municipalities served and by commuters and casual passengers.

The opposition was rested upon both legal and factual grounds.

I.

The jurisdiction of the Board was challenged.

The challenge proceeded upon the ground that the duty of the Company is to furnish both passenger and freight service; that the duty is, as to both services, absolute and that requirement of rendering both services is inseparable; that the Board's jurisdiction is solely to regulate service, and that the Board is not vested with jurisdiction to relieve the Company of the Company's absolute duty to render both services by approving discontinuance of one of the services.

The Board has considered the briefs submitted and concludes that these objections to its jurisdiction must be overruled.

The judgment of the Board is that the State, in conferring upon the Company authority to carry passengers and freight, did not impose upon the Company an absolute duty.

The position of the objectors that the duty is absolute; that it is to be performed at all hazards, and at any sacrifice and that it is not to be measured by the public wants and exigencies at the time, cannot, in the judgment of the Board, be sustained. Had the Legislature intended the duty of running passenger and freight trains to be absolute, such duty would have been clearly and definitely declared. In *Commonwealth vs. Fitchburg Railroad Co.*, 12 Gray (Mass.) 180, a railroad company had discontinued passenger service over a branch line while continuing freight service. On quo warranto the Company answered that the passenger service was operated at a loss, since operation of a competing street railway. The information was dismissed. There, as here, it was contended that the duty was absolute.

If the duty is held to be absolute, then, as the Court in that case said: "how long; for what period of time is it to be performed? Is it during the life of the charter and this though the expense of running the train is daily and rapidly using up the capital stock of the company? If so, when the capital stock of the Company is exhausted, is the corporation to provide new resources for the purpose * * *?"

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Again, as the Court in the above cited and quoted case said, "it is to be considered that the respondent corporation has under its charter other roads to maintain, and other duties to discharge and the running of passenger trains on these branches might exhaust its resources and render it incapable of discharging these other duties. It would seem, therefore, not only its right but its duty to exercise a sound discretion in the use of its capital, lest by exhausting it upon trains that were not required by the public wants, it should deprive itself of the means of running at reasonable rates those that were."

The State, in conferring upon the Company authority to carry passengers and freight imposed upon it to some extent the correlative duty of carrying them at reasonable times and for reasonable compensation. The existence of such duty is unquestioned. The question is as to its extent and qualification. The question arises, "When and how often is the duty to be discharged? Is a train to be run whenever a passenger shall desire to go; or are there to be fixed times and if so how frequent? To settle these questions you would have to refer to the public wants and these could be measured only by the business done. If trains run at reasonable and moderate fares cannot be supported, it is because they are not needed."

In the judgment of the Board the duty is measured by the requirements of necessity and convenience of the public, as indicated by the business done. In the judgment of the Board the duty requires no more than that public necessity and convenience be adequately and properly met. If under efficient management it appears that the service is not capable of being made self-sustaining, it shows that there is no public want, demand or necessity for the service.

The Board has not overlooked the case of *McCrann* vs. *P. S. Ry. Co.*, 95 N. J. E. 72, in our own courts.

That case does not contravene the conclusion the Board has reached. There, there was total cessation of service and there the service, as the facts showed, was required in public necessity and convenience.

Having determined that a duty as to continuance of service rests upon the Company, though the duty is not absolute, the Board turns to the consideration of the direct challenge to its jurisdiction.

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With the enactment of the Public Utility Act the State embarked upon a new policy.

It imposed and set up general duties and standards to govern all public utilities, as, for example, the duty of furnishing service at just and reasonable rates and that of furnishing safe, adequate and proper service. These general duties and standards replaced the specific duties and standards theretofore imposed and set up by direct legislative acts.

Under the act the completing of the replacement of the specific statutory duties and standards requires action by this Board established by the act.

So rates fixed by contracts with municipalities and other political subdivisions under legislative authority continue in effect until the Board, after hearing upon notice, finds such rates to be unjust and unreasonable and prescribes just and reasonable rates for the future.

So, too, with respect to other duties.

The Legislature set up specific standards for quality and pressure of gas.

These standards continue operative until the Board, after hearing upon notice, determines that other standards are demanded in safe, adequate and proper service.

So, too, with respect to train service, specific legislative prescriptions as to service continue operative until the Board, after hearing upon notice, determines that such requirements exceed, or fail to provide "adequate and proper" service.

The policy embarked upon in the enactment of the Public Utility Act was that of providing for the substitution for directly legislatively declared specific duties and standards, often fixed without technical information and study, and without knowledge of the art involved, without providing for future progress in the same, and without knowledge of varying local conditions and needs, general duties and standards to be enforced by the Board after hearing and notice, by administrative action converting the general duties and standards into specific duties and standards in specific cases before it in the light of the evidence adduced.

In the light of this policy the Board's judgment is that the imposing of the duty upon the utility to provide "adequate and proper service" and the vesting in the Board of the duty and power to enforce such service not only resulted in clothing the

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Board with power to require increases and improvements in service where the public interest, necessity and convenience requires, but also the lessening, and discontinuance of service where the existing service is not reasonably required in the public interest, necessity and convenience. The rendering of service not reasonably required in the public interest, necessity and convenience requires unwarranted expenditures in maintenance and operation, increases such costs unreasonably, which costs ultimately fall upon all those served by the enterprise in increased charges, or results in failure to reduce charges where reductions might and ought otherwise to be made, or may result in rendering less than adequate and proper service to some.

The statute clothes the Board with "general supervision and regulation of and jurisdiction and control over all" public utilities brought within the Board's jurisdiction, "their property, property rights, equipment, facilities and franchises". In *Atlantic Coast Electric Ry. Co.* vs. *Public Utility Board,* 92 N. J. L. 168, the Court of Errors and Appeals said (175): "The scope of the act is very broad. It is evidently meant to give full control of all public utilities to the Board thereby created so far as it could be done by legislation."

The statute specifically provides that the Board may, after hearing upon notice, by order in writing, require every public utility "to comply with the laws of the State * * * and to conform to the duties imposed upon it thereby, or by the provisions of its own charter whether obtained under general or special law of this State."

The Board having concluded that the Company is under a duty as to continuance of service though the duty is not absolute, would, if the Company had discontinued the service without application to the Board, have had the duty under its powers, to set on foot a hearing to determine whether or not such discontinuance of service was warranted in view of the duty the Company is under. If at such hearing the Board determined that the discontinuance was unwarranted and a breach of duty, the Board would then have been obligated to issue the order provided for by the above quoted section.

The statute specifically provides that "if any public utility shall discontinue service and the Board shall after hearing upon notice find and determine that service should be resumed, the Board may

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order that service be resumed forthwith or on such date as it may fix."

If such is the power of the Board where service is discontinued without previous application to the Board, surely there is implicit in such power jurisdiction to entertain in advance an application for approval of discontinuance; an application on which a determination may be made whether or not the proposed discontinuance is warranted and whether or not the proposed discontinuance accords with the duty the Company is under. This view is reinforced by the provision of the act to the effect that: "No public utility shall * * * withhold or refuse any service which *reasonably* can be demanded or furnished when ordered by the Board."

The Board therefore concludes that it has jurisdiction and that the challenge to its jurisdiction should be overruled.

This conclusion accords with the construction which Commissions of other States have given to statutes similar to ours. In *re Stout,* No. 10429, Ind. P. S. C., November 20, 1931, the Commission said: "Although the Commission has no express statutory power to approve the abandonment of a part of an interurban railway system, such power is implied from the general power over services and facilities."

This jurisdiction that the Board finds itself vested with is one that should be exercised with the utmost caution.

Every case invoking it must be determined on the facts established in the record. The factors to be taken into account are many and varying. The determination in one case cannot constitute a precedent for another.

A company invoking this jurisdiction must bear the burden of proof. It must make out a case clearly justifying the invoking of the jurisdiction. It must establish clearly that the service to which the application relates is not at the time required in the public interest, necessity and convenience and that the cause is not temporary and that the service will not in a reasonable period of time be so required.

It must establish that the service is provided at a continuing loss; that the operating and maintenance charges properly chargeable to the service cannot be met by application of the gross receipts from such services, and that such failure is not due to inefficient management.

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It must establish that there is no reasonable probability that such receipts will increase in the reasonable future. It must establish that receipts from other services are not sufficient to make it reasonable to have them absorb such loss.

It must establish that the financial operating results of the system as a whole cannot reasonably be required to and do not suffice to absorb such loss.

In the matter of *Bridgeton and Millville Traction Co.*, P. U. R. (N. J.), Vol. IX, page 6, this Board said: "Mere failure to earn a proper return on a line which is part of a system is not sufficient ground for its abandonment."

A utility cannot expect continuously all fat and no lean.

The question whether the communities will be left wholly without service, or whether other services are or will be made available is one that must be taken into account.

In the judgment of the Board the Company has in this proceeding borne such burden of proof.

II.

The Pennsylvania-Reading Seashore Lines, the applicant herein, was created in 1933 through unification of the facilities of the West Jersey and Seashore Railroad Company and the Atlantic City Railroad Company.

Its operation is under the charter of the Atlantic City Railroad Company, the name having been changed to Pennsylvania-Reading Seashore Lines, after unification, and it is the lessee of the West Jersey and Seashore Railroad Company.

The West Jersey and Seashore Railroad Company was created through the consolidation in 1896 of the West Jersey Railroad Company, Alloway and Quinton Railroad Company, West Jersey and Atlantic Railroad Company, Camden and Atlantic Railroad Company, Chelsea Branch Railroad Company and Philadelphia, Marlton and Medford Railroad Company.

At the time of the consolidation Salem and Bridgeton were served by the West Jersey Railroad Company, organized under an act of this State approved February 5, 1853, which authorized the Company "to construct, maintain and operate a railroad from Camden to Salem and Bridgeton through the counties of Camden, Gloucester, Salem and Cumberland."

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The exact number of commuters does not appear in the record. What does appear is the daily average number of riders per train on the Penns Grove branch from January 1, 1938, to August 31, 1939, was 12.3; Salem branch 13, and the Bridgeton branch 14.3.

The record further shows that the passenger train revenue on the three branches from January 1, 1938, to August 31, 1939 was $30,294.09 and the cost of passenger operation $167,395.61. The cost to transport passengers was, therefore, during this period, five times the revenue received from passengers. Checks made in 1940 and 1941 indicate that this condition has not bettered.

The operating cost for the above indicated period was (Exhibit 90), for the Bridgeton Branch, 1938, $41,861.80; for eight months of 1939, $27,883.91, or a total passenger train operating cost of $69,745.71. The total passenger train revenue for 1938 on the Bridgeton Branch was $11,557.27 and for eight months in 1939, $7,724.07, or a total of $19,281.34; net operating loss, $50,464.37. The passenger revenue items include revenue from the excess baggage, mail, express, milk, etc., just about double the actual passenger revenue.

On the Salem Branch for the same period, the passenger train operating cost (Exhibit 70) for 1938 was $33,368.86; eight months in 1939, $22,239.38; total, $55,608.00. The total passenger train revenue (Exhibit 70) for 1938 was $4,068.66 and for eight months in 1939, $2,659.32, or a total of $6,727.98, resulting in a net operating loss of $48,880.26. The passenger train revenue includes $1,531.15 for excess baggage, mail, etc.

On the Penns Grove Branch, the operating cost (Exhibit 58) for 1938 was $25,238.18; eight months in 1939, $16,803.48; total, $42,041.66. The aggregate passenger train revenue for 1938, $2,697.38; eight months in 1939, $1,587.39; total $4,-284.77, indicating a net operating loss of $37,756.89. The item of $4,284.77 includes an aggregate of $527.07 for excess baggage, etc.

On the Camden-Millville Branch, the proposed discontinuance of some trains and the rearrangement of the time table will result in an estimated saving of $69,302.64, or a total gross saving in operating cost on the four lines of $169,771.48.

These exhibits show conclusively the cost of operation on the Penns Grove Branch, Salem Branch and Bridgeton Branch was

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10, 9 and 3 times the passenger revenue, respectively. These operating costs do not include any contribution toward taxes, maintenance of roadway and structures and obviously do not include any return on the value of the Company's property actually used in providing service.

Two round trips operate daily except Sunday on the Penns Grove and Salem Branches and three on the Bridgeton Branch. In an effort to better the situation, gasoline power for steam was substituted on the Penns Grove Branch and partly on the other two branches. This effort, together with similar efforts, failed of result.

On the entire system the annual deficits from 1933 to 1939 are shown by the record to be as follows:

1933 (6 months)	$1,473,946
1934	2,812,839
1935	2,623,045
1936	2,152,695
1937	2,651,351
1938	3,030,457
1939	2,703,956
Total	$17,448,289

Exhibit 22 shows specifically the loss sustained in 1938.

Revenues:	
Freight	$2,672,436
Passenger	2,414,445
All Other (Mail, express, milk, newspapers, demurrage, etc.)	431,576
Total	$5,518,457
Above Revenue Was Sufficient to Pay the Following:	
Wages	$3,548,798
Locomotive Fuel	620,705
Depreciation and Retirements	193,122
Casualties (Injuries to employees, passengers, and loss and damage to freight en route)	76,871
Other Expenses	107,360
Material and Supplies	573,969
Part payment of taxes from Earnings (All kinds)	397,632
Total	$5,518,457
Deficit in revenue, including balance of taxes and rent of equipment	$3,030,457

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An analysis of these figures shows that $3,548,798 (or 64 per cent of the gross revenue) was paid for wages; $1,104,145 was paid or due for taxes or, in other words, for every five dollars of revenue received, one dollar was due for taxes. Therefore, the wage and tax expense, amounting to $4,652,943, deducted from the gross revenue of $5,518,457, leaves only $865,514 for locomotive fuel, depreciation, retirements, casualties, materials and supplies and other expense amounting to $1,572,027. Annual reports for later years show that this situation continues.

Prior to 1939, when applicant, as a result of unification, began operations, the two unified railroads, Atlantic City Railroad and West Jersey, had operated at severe losses for a number of years. It was anticipated that a unified system could be operated without loss. The annual deficits indicate to the contrary. Many causes contributed to these losses, including the construction of new highways, establishment of bus service, use of private automobiles and perhaps depressed business conditions. The record shows that passenger patronage on the entire system decreased from 21,500,000 in 1920 to 4,700,000 in 1938, and a further decrease of 338,600 in 1939. It is claimed, and there is nothing to disprove the claim, that these deficits which the lessors were obliged to pay have resulted in increasing the debts to a point where the estimated liabilities exceed the estimated assets by $16,500,000, as of December 31, 1939.

The bus competition is illustrated in both Penns Grove and Salem territories. Public Service Bus Route No. 47, operated from Penns Grove to Camden, parallels the Penns Grove Branch. The longest distance from the railroad to any point is 1,500 feet and much nearer at other points. Public Service Bus Route No. 107, from Salem to Woodbury and Camden, parallels the Salem Branch within a distance of a few hundred feet.

Prior to the opening of the Delaware River Bridge in 1936, the Tacony-Palmyra Bridge in 1928, and the Burlington-Bristol Bridge in 1931, the passenger patronage on the two lines, before unification, was nearly 80 per cent greater than at the present time. Just what proportion of this decrease in passenger patronage is due to these changed conditions is not disclosed by the testimony, but the fact of an 80 per cent loss in a period of 14 years is undisputed.

It is contended that the losses asserted by applicant are mythical and not, quoting counsel, "honest to goodness losses."

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In other words, it is claimed that, because the freight revenue for the year 1938 was $2,672,436, and the passenger revenue was $2,414,445, or $257,991 less than the freight revenue, it is apparent that the operating expense for 1938 amounting to $8,548,914 was not equitably assessed against freight operation and that if it had been equitably assessed, the operating cost of the passenger operation would have resulted in a profit, ergo that the passenger service should not be curtailed. The proofs do not substantiate this claim.

Applicant owns practically no equipment. It leases its equipment. The protestants asserted that the rental charge for engines, equipment and station facilities are exorbitant. No evidence in support of that contention was offered by the protestants. Had such testimony been offered it could not have sufficed to reverse the adverse financial results of operation above indicated but would at most have resulted in lessening the deficit to some extent. Certainly allowance substantial in amount for rental would have to be made.

The express object of the application is to insure a saving which will enure to a slight degree to the benefit of the entire system. Exhibit P-136 shows that $132,211.99 will be saved in actual operating expense, exclusive, however, of saving on maintenance of way and other overhead. The record shows that the cost of maintenance of way for freight trains is somewhat less expensive than maintenance of roadbed, over which fast passenger trains operate. We have pointed out the gross savings in operating costs annually, based upon the application, is $169,-771.48. The revenue estimated to be lost is $37,559.49, resulting in an estimated annual saving of $132,211.99.

If the application be granted the communities served will not be left without passenger transportation facilities. As heretofore indicated, some of the communities are already served through competing bus facilities.

Elmer, situated a mile and a half from the main highway, has no such service.

This lack of bus service in Elmer and similarly situated municipalities will, upon abandonment of passenger railroad service, be overcome by establishment by Public Service Coordinated Transport of bus service to these municipalities, either by diversion from its present route or by establishment of a new route from Elmer to Camden-Philadelphia.

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The employees on the four branches who now operate the trains will not lose their positions, but under the law are entitled to seniority rights. In this readjustment of employees to preserve seniority rights, it may be, although it is by no means certain, that a few junior employees may be deprived of their present positions and be required to await the seniority list for re-employment. It should be pointed out that there was no protest by the employees on the three branches though they were represented at some of the hearings by F. C. Mooney, representative of the Brotherhood of Railroad Trainmen.

CONCLUSIONS

Upon the record and the law, and for the reasons herein set out, we have concluded that the application to abandon service on the three branches must be and is hereby granted, effective ninety (90) days from the date hereof; and likewise that the application to rearrange the passenger schedule on the Camden-Millville line must be and is hereby granted, effective January 15, 1942; both effective dates to afford whatever opportunity is available to commuters for readjustment of their transportation facilities. The railroad is directed to post notice of the readjustment of the Camden-Millville schedule and of the abandonment of passenger service on the three branches in all railroad stations and passenger cars operated on the four branches within ten (10) days from the date hereof.

Dated, November 19, 1941.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

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NEW JERSEY SUPREME COURT

No. 231. January Term, 1942.

William H. O'Connor, Emma G. Adamson and T. Earle Reeves,
Prosecutors,

vs.

Board of Public Utility Commissioners and Pennsylvania-Reading Seashore Lines,
Defendants.

Argued January 1942. Decided 1942.

On certiorari.

1. The Board of Public Utility Commissioners has power to discontinue a passenger service little used, when other means of transportation are available.
2. The public has no vested right to ride in trains for short distances, when buses operate in the same region and the train service is unduly costly and patronized by few people.
3. A railroad company is not obliged to waste materials and money on a service which serves no useful purpose.
4. Where the proofs support the findings of the Public Utility Commission, those findings cannot be disturbed in the Supreme Court.

For the prosecutors, *Waddington & Tilton.*

For Board of Utility Commissioners, *John A. Bernhard.*

For Pennsylvania-Reading Seashore Lines, *French, Richards & Bradley, Floyd H. Bradley, Grace Heritage Smith* (*H. Merle Mulloy, Windsor F. Cousins,* of the Philadelphia bar).

Before *Justices Bodine, Perskie* and *Porter.*

BODINE, J.

This case presents two questions for decision.

The first question is the power of the Board of Public Utility Commissioners to authorize a railroad company operating in this State to discontinue all passenger service. The second question is the reasonableness of the action taken in this case. The railroad voluntarily continued the service until May 20 of this year so that we might review the same. If the situation as to the passenger operation changes by reason of the national defense necessity, the road may be taken over or the Utility Board will act as it may be then advised. Nevertheless, we think the questions

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raised should be decided so that the Board may know the extent of its power.

The general Railroad Act N. J. S. A. 48:12–99 requires every railroad to run trains for the transportation of persons and property. This obligation, however, must be measured by public necessity and convenience. The argument to the contrary seems to be that the railroad must run passenger trains at a terrific loss or abandon the franchise, even though the public may travel as easily and reasonably by other conveyances. There seems to be no reason why a railroad must supply transportation for a few passengers who are unwilling to ride in adequate buses paralleling the lines of operation.

Under date of July 23, 1941, Mr. Ralph Budd, Transportation Commission of the Council of National Defense, warned all railroads that troop transportation in 1942 would exceed that of 1941 by 40 to 100 per cent; that unnecessary trains should be discontinued and that there would be no priorities for further passenger equipment. Again he warned, in August of 1941, that there must be elimination of unnecessary competitive services.

If the argument be sound that there is no way for a railroad to discontinue an unnecessary service, except to forfeit its charter, then planning for national defense becomes ineffective and our efforts must be slowed down because of a few wilful people who like to ride short distances in railroad trains.

This Court cannot attribute such meaning to the pertinent legislative enactments. Vice Chancellor Garrison in *Jacquelin* vs. *Erie R. R. Co.*, 69 N. J. E. 432, at page 440 said: "The Supreme Court of the United States has suggested that this subject of the regulation of the operation of carriers, in the matter of stations, frequency of trains and the like, is one for legislation and administration, and that the courts should not originate provisions with respect thereto, but should confine themselves to interpreting and applying them. *Northern Pacific Railroad Co.* vs. *Washington, ex rel. Dustin,* 142 U. S. 492; 35 L. Ed. 1092; and similar reasoning will be found in the case of *Delaware, Lackawanna and Western Railroad Co.* vs. *Central Stockyard, &c., Co.,* 45 N. J. Eq. (18 Stew.) 50 (at page 65 et seq.) (Vice Chancellor Van Fleet, 1889); S. C. on appeal, 46 N. J. Eq. (1 Dick.) 280." And again at page 441: "In this State, where we have no such administrative body, and where hardships and injuries may ensue

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to citizens and properties if railroads are allowed unrestrainedly to conduct their operations in a way to injure the citizen and his property, it is natural that applications should be made to courts of equity to restrain such invasions of what the citizen esteems to be his rights." The determination was that the Court of Chancery could not regulate the business of a common carrier and determine at what time trains should be run and at what stations such trains should be stopped.

The solution of similar questions is to be determined by a balancing of the proofs as to the requirements of the public and the exercise of sound business judgment. To solve such problems, the Legislature created the Board of Public Utility Commissions, N. J. S. A. 48:21. Its powers are enumerated in N. J. S. A. 48:2–13 as follows: "The Board shall have general supervision and regulation of and jurisdiction and control over all public utilities as hereinafter in this section defined and their property, property rights, equipment facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this title." The only limitation in the act is as to taxicabs, hotel buses, etc.

Justice Swayze said for the Court of Errors and Appeals in *Atl. Coast Elec. Ry. Co.* vs. *Public Utility Board,* 92 N. J. L. 168 at page 175: "The Board is given general supervision and regulation of and control over public utilities and over their property, property rights, equipment, facilities and franchises, so far as necessary to carry out the provisions of the act. The Commission is given power, among other things, to fix just and reasonable rates, to fix just and reasonable standards, classifications, regulations, practices, measurements or service, to require railroad and street railways to establish and maintain just and reasonable connections with other lines."

Again he said in *Perth Amboy* vs. *Board of Public Utility Commrs.,* 98 N. J. L. 106, at page 108: "What was said in the case of *Atlantic Coast Electric Railway Co.* vs. *Public Utility Board,* 92 N. J. L. 175, is pertinent. It evidently meant (*i. e.*, the act creating the Board) to give full control of all public utilities to the Board thereby created so far as it could be done by legislation. *Atlantic Coast Electric Railway Co.* vs. *Public Utility Board,* 89 Id. 408; *O'Brien* vs. *Board of Public Utility Commissioners,* 92 Id. 44, 46." And again at page 109: "When a

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State tribunal has, after due hearing, passed on a question within its jurisdiction, and with whose determination it is charged by statute its findings should not be reversed, unless unwarranted in law or unfounded in fact, or unless a discretionary power has been plainly abused, *Borough of Collingswood* vs. *Water Supply Commission,* 84 N. J. L. 112."

N. J. S. A. 48:2–24 is as follows: "If any public utility shall discontinue service and the Board after hearing upon notice shall find and determine that service should be resumed, the Board may order that service be resumed forthwith or on such date as it may fix.

Resumption of an unnecessary service would not be ordered. No Commission would order that to be done which did not serve a sufficient number of the public to justify the expense. The practice of the utility, in petitioning the Board before taking action, was suggested to be the more polite and politic method rather than by arbitrary change, *O'Brien* vs. *Public Utility Board,* 92 N. J. L. 44.

No case, in this State, holds that a railroad must operate both a freight and passenger service. The Board has frequently granted the right to discontinue a little used service and it is inconceivable that the Legislature should mean by the passage of the forward looking Public Utility Act that valued materials, the property of the utility, should be wasted in a little used service when parallel accommodations, of a slightly different sort are available. If buses are not available and the rationing of automobiles becomes a factor in national defense, the discontinued service can be restored by a simple Order of the Commission.

Now, as to the question of the reasonableness of the Order. The Penns Grove Branch from Woodbury to Penns Grove from January 1, 1938, to August 31, 1939, was operated for an average of a few more than twelve passengers per train. On the Bridgeton Branch, Glassboro to Bridgeton, the average number of passengers per train was 14.3. On the Salem Branch, Woodbury to Salem, 13 passengers per train. The revenues were insufficient to cover the cost of operation and the tables show a growing lack of use of the service. All lines were short lines and it is common knowledge that for short distances the public have chosen, to a large extent, to travel by other means than railroads.

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The defendant utility, since unification, has operated at a deficit. If some plan for a more economical management cannot be devised, they will be abandoned with the resulting disruption of all classes of service.

There can be no doubt of the power of the Utility Commission to grant the Order under review. The act creating the Board is clear. It was so contemporaneously construed. It was intended to safeguard the interests of the utilities and the public. The proofs abundantly support the action taken. The utility, unable to increase its rates, cannot be required to operate a service which is exhausting its surplus.

The writ is dismissed with costs.

Decision of Court of Errors and Appeals follows:

COURT OF ERRORS AND APPEALS

No. 24. May Term, 1942.

William H. O'Connor et al.,
Prosecutors-Appellants,

vs.

Board of Public Utility Commissioners and Pennsylvania-Reading Seashore Lines,
Defendants-Respondents.

Argued May 20, 1942. Decided December 3, 1942.

1. The powers conferred by statute on the Board of Public Utility Commissioners that said Board shall have general supervision and regulation of and jurisdiction and control over all public utilities, are limited in the case of any particular utility by the statutes in force respecting that utility.
2. The statutes of this State relating to railroads provide, among other things, that every railroad shall run trains for the transportation both of persons and property; shall furnish sufficient accommodations for the transportation of such passengers and property, and shall take, transport and discharge passengers and property at suitable places on payment of fare. *Held,* that the supervising power of the Board of Public Utility Commissioners does not warrant the granting by that Board to a railroad company of a permit to abandon or discontinue passenger service on its line and at the same time retain its franchise for the carriage of freight.

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On appeal from Supreme Court, whose opinion is reported in 128 N. J. L. 35.

For the appellants, *Edward C. Waddington.*

For the Board of Public Utility Commissioners, *John A. Bernhard.*

For the respondent Pennsylvania-Reading Seashore Lines, *Floyd H. Bradley* (*Grace Heritage Smith* and *Messrs. H. Merle Mulloy* and *Windsor F. Cousins*, of the Philadelphia bar, on the brief).

The opinion of the court was delivered by

PARKER, J.

The fundamental and decisive question to be answered in this case, is whether the Board of Public Utility Commissioners is vested by our statutes with power to permit a railroad company organized and operating under the general Railroad Act (R. S. 48:12–1 to 167) to abandon all passenger train service on certain of its lines, while continuing freight operation thereon.

The petition of the company (verified in November, 1939, date of filing not stated in the printed book) asked for approval of "discontinuance of all passenger train service" on three branch lines, and "reduction and rearrangement of passenger train service" on a fourth. The approval was granted, there being no appearance in the "reduction" case, which is not before us. As to the other three, the Board granted "the application to abandon service on the three branches" over the protest of "numerous commuters" and directed the railroad "to post notice of * * * the abandonment of passenger service on the three branches" in stations and cars. The words "abandonment" and "discontinuance" seem to have been used synonymously, and we discern no material difference. Obviously a total cessation of passenger service was intended and granted, without limit of time.

The Railroad Act, by section 12–99 of R. S., chapter 48, provides that "every railroad company shall start and run trains for the transportation of persons and property at regular times to be fixed by public notice;" and "shall take, transport and discharge such passengers and property * * * on the due payment of the legal fare and freight.* * * ." This requirement is nothing new in our statute law. In the general Railroad Act of 1873 (P. L. pages 88, 102, Rev. of 1877, page 932, section 26 provided "that every such corporation shall start and run their cars (*sic*) for the transportation of passengers and property, at regular times, to be

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fixed by public notice; and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and the junctions of other railroads, and at usual stopping places established for receiving and establishing way passengers and freights for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises." As to this, the late Chancellor McGill remarked, in *National Docks' Co.* vs. *United Companies,* 53 N. J. Law, at page 288: "The design of the law is to subserve the public good. Consequently, every railroad incorporated under it is expressly required to transport such passengers and property as shall be properly offered for transportation at its depots." The language of the 1873 act was repeated without substantial change in the Railroad Act of 1903 (P. L., pages 645, 665: C. S. of 1910, page 4239, section 37) so that for about seventy years the statutory obligation to carry passengers has been in force.

Coming now to the jurisdiction in the premises of the Board of Public Utilities, it is obvious, of course, that the powers of that Board are defined and limited by the statute, the pertinent section being R. S. 48:2–18, which reads as follows:

"The Board shall have general supervision and regulation of and jurisdiction and control over all public utilities as hereinafter in this section defined and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purposes of carrying out the provisions of this title."

The next paragraph, which need not be quoted at length, includes expressly "every * * * corporation * * * that may own * * *, operate, manage or control * * * any steam railroad * * * for public use, under privileges granted * * * by this State * * *".

It is hornbook law that a public service corporation enjoying special franchises as a grant from the public in consideration of service to be performed for the public, having the right of eminent domain, and in the case of a railway, having the right of way at road crossings, must either exercise the franchise as required by law, or surrender it. The Massachusetts case of *Commonwealth*

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vs. *Fitchburg R. R. Co.* cited by the Board, seems plainly distinguishable because the Court said in that case (12 Gray, at page 187): "neither the statutes under which the respondents hold their franchises, nor the general laws regulating railroad companies, in terms impose upon the respondents such duty" (to run regular passenger trains on branch roads).

The present situation of the railroad corporation is one closely connected with the general history of transportation, particularly in this State. In the beginning there were a few Indian trails through an otherwise trackless wilderness, and navigation by boats, larger or smaller, on the rivers and creeks. Prior to the steamboat, the so-called "Durham boat" was an important vehicle on some of the rivers. Later, roads were made, primitive in character and devoid of what is called metal, so that in bad weather they were almost impassable and public transportation over them was by stage coach or stage wagon. The steamboat at the opening of the 19th century was a great step in advance, but, of course, was confined to navigable waters. The canal came into being a few years later, and succeeded for a time, particularly as regards slow-moving freight, but it is now practically extinct. Slightly over a century ago came the railroad; and its value as a means of transportation was immediately appreciated, and to such an extent as to create considerable competition between localities for the privilege of having a railway come to them: as, for example, in Burlington. In many of the towns the railway tracks ran down the middle of the principal street. Railway and steamer transportation was in some cases combined as, for instance, the Camden and Amboy Railroad, a through line between Philadelphia and New York, with a terminus at South Amboy and steamer transportation thence to New York City both through Staten Island Sound and the lower bay of New York. So long as the common roads remained subject to weather conditions because of soft surfacing, and the use of vehicles was confined to horses and sometimes oxen, the railroads were distinctly in the saddle, not only as regards their trunk lines, but with respect to numerous branch lines extending to places not on the main lines. Instances of this in the northern part of the State were the branch line of Rahway to Perth Amboy, a spur to Millstone from the Pennsylvania lines, the High Bridge branch from the Central Railroad of New Jersey, the Chester branch from the Morris and

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Essex, the Trenton branch from the Reading, and the Sussex Railroad itself may be considered as one of these branches. All those branches did both a freight and passenger business, though it may be said to be common knowledge that the freight business was the principal consideration. But with the invention and development of the motor vehicle at the end of the 19th century a radical change of conditions ensued. The speed of a motor vehicle, even at the very outset, discounted that of the horse, and with the increase in the number of motor vehicles there came the insistent demand for better roads on which to use them. The telford and macadam roads were already in use to some extent and more roads of a similar character were imperatively demanded. Some years ago the late Edwin A. Stevens, who was appointed by Governor Woodrow Wilson as Road Commissioner, wrote an article for Scribner's Magazine on the subject of improved roads, and in that article ventured the prediction that in constructing roads in the future it would be necessary for the engineers to anticipate a speed limit of forty miles an hour. Such a predication seems laughable at this day, but was entirely reasonable at that time, which must have been about 1912. The effect of these improved roads and improved motor vehicles on the railroad situation is, of course, known to all. As regards short runs for freight, the motor truck may take on its load directly at the factory and discharge it at the warehouse, miles away. As regards passengers, the motor bus has pervaded the country and, together with the private automobile, has deprived the railroads of vast numbers of passengers formerly carried; and it is precisely this last feature of the situation which prompted the applications to the Public Utility Commissioners that are before us in the present case. It is the case of three branch railroads, alike in character, endowed with the privileges already mentioned, but on terms prescribed in the Railroad Act of performing the double duty of carriage, on the one hand of freight and on the other hand of passengers, and, finding that the carriage of passengers is done at considerable loss, seeking to obtain from the State regulatory agency a release of the obligation to carry passengers while retaining all the franchises that were granted partly in consideration of that obligation.

We are of opinion that the cessation of the carriage of passengers would be clearly a breach of the contract (and indeed this

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seems not to be denied), and further that no power of the Utility Board to waive this contract obligation and erase it from the contract is conferred by statutes either expressly or by implication. See *"Petition of Boston and Maine R. R.,"* 82 N. H. 116, 129 Atl. 880. The statutory requirement in our Railroad Act is specific, and in no wise countervailed by regulatory powers granted in the Utilities Act.

The judgment of the Supreme Court will be reversed, and a judgment entered in this Court setting aside the decision of the Utility Commission and denying the application for a discontinuance or abandonment of passenger service on the three branches. *Hoxsey* vs. *Paterson,* 39 N. J. Law, 489.

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 24. May Term, 1942.

William H. O'Connor, et als.,
Prosecutors-Appellants,

vs.

Board of Public Utility Commissioners and Pennsylvania-Reading Seashore Lines,
Defendants-Respondents.

HEHER, J. (dissenting)

I am in accord with the reasoning and result of the opinion of Mr. Justice Bodine for the Supreme Court.

I do not read section 48:12–99 of the Revision of 1937 as imposing upon railroads an absolute duty to operate trains for the transportation of persons and property. Viewed in the light of the context and the statutes *in pari materia,* it seems to me that, as stated by Justice Bodine, the obligation is measured by the public interest, necessity and convenience; and these considerations do not, in my opinion, lay upon the respondent railroad the duty of continuing passenger train service in the circumstances here presented. From the year 1933 to 1939 (when the instant application was presented to the Utility Commission) the railroad incurred annual deficits varying between $2,000,000 and $3,000,000, and aggregating $17,448,289. The consequence was that, at the close of the year 1939, the Company's liabilities

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exceeded its assets by more than $17,000,000. Passenger traffic has dwindled almost to the vanishing point. The elimination of this service on the branches in question will result in an annual saving of $74,000. And the public need in this regard is well served parallel bus lines. Indeed, the competition thus afforded has been a major factor in the drastic reduction of rail patronage.

The essential question is one of statutory construction. Section 48:2–13 of the Revision invests the Utility Commission with "general supervision and regulation of and jurisdiction and control over all public utilities," as therein defined, "and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions" of that title. The annexed proviso excludes from such supervision and regulation, jurisdiction and control, taxicabs, hotel buses, school buses, and autobuses with a carrying capacity of not more than six passengers operated under municipal consent upon a route established wholly within the limits of a single municipality, which route does not parallel upon the same street the line of a street railway, traction railway, or any other autobus route. Railroads are not within the excepted category. Thus they are comprehended in the general class made the subject of the substantive enacting clause, i. e., *all* public utilities.

As pointed out by the Supreme Court, this provision was long since construed by this Court as designed "to give full control of all public utilities" to the administrative agency thereby constituted, "so far as it could be done by legislation." *Atlantic Coast Elec. Ry. Co.* vs. *Public Utility Board,* 92 N. J. L. 169. This all-inclusive interpretation was reiterated by this Court in *Perth Amboy* vs. *Board of Public Utility Commissioners,* 98 N. J. L. 106. Applying this principle to a case where a traction company's suburban lines were operated at a substantial annual loss, Mr. Justice Swayze said: "whether the railway shall run some parts of its line at a loss, perhaps with a view to future development or future gain, perhaps with a view to greater public service, is a business question to be determined by the railway subject to the control of the Public Utility Commission." *Trenton* vs. *Trenton and Mercer Co. Tract. Corp.,* 92 N. J. L. 61. And several years later, in 1922, in the case of *Borough of Metuchen* vs. *Board of Public Utility Commrs. and Public Service Railway Co.,* Justice Swayze, for the Supreme Court, sustained on certiorari (without

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opinion) an order of the Utility Commission granting to the railway company leave to abandon "its tracks and service" on one of the streets of the municipality.

Moreover, section 18 of the original Public Utility Act (Pamph. L. 1911, page 380; R. S. 1937, 48:3–3) directs that no public utility "shall provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which reasonably can be demanded or furnished when ordered" by the Utility Commission. And by a supplement to the Public Utility Act enacted on March 11, 1924 (Pamph. L. 1924, page 378; R. S. 1937, 48:2–24), it was provided that "if any public utility * * * shall discontinue service," and the Utility Commission "after hearing upon notice shall find and determine that service should be resumed," it "may order that service be resumed forthwith or on such date as" it may fix. Thus the utility is expressly authorized to "discontinue service" subject to the authority of the administrative agency to order its resumption if that course reasonably be in the public interest. And it is of no importance that the consent of this regulatory body is invoked by petition before the contemplated action is taken. That is a mere matter of procedure not at all concerned with the substance of the power. This course has been termed "a method more polite or more politic as we choose to call it." *O'Brien* vs. *Public Utility Board,* 92 N. J. L. 44.

The failure of the Legislature since to exercise its amendatory function is significant of its acquiescence in the interpretation thus given to these jurisdictional clauses. *DiMeglio* vs. *Slonk Construction Co.,* 121 N. J. L. 366, aff. 122 N. J. L. 379. It is the settled rule that whenever the meaning of a statute is ambiguous, "the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the Courts to be the true one." *Commonwealth Roofing Co.* vs. *Riccio,* 81 N. J. Eq. 486. The Utility Commission has time and again over the years exercised, apparently without question, the authority here challenged; and, with knowledge of this judicial and administrative construction, these provisions were reenacted without substantial alteration in the revision of our general public laws adopted in 1937. Such judicial and administrative construction must be deemed to have received legislative approval by the reenactment of the statutory

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provisions without material change. *Central R. R. Co.* vs. *Thayer Martin,* 114 N. J. L. 69, 79; *United States* vs. *Dakota-Montana Oil Co.,* 288 U. S. 459, 53 S. Ct. 435, 77 L. Ed. 893; *Massachusetts Mut. L. Ins. Co.* vs. *United States,* 288 U. S. 269, 53 S. Ct. 337, 77 L. Ed. 739; *New York, N. H. & H. R. Co.* vs. *Interstate Commerce Commission,* 200 U. S. 361, 401; 26 S. Ct., 272, 50 L. Ed. 515.

It is fairly to be presumed that the Legislature purposed to commit to its administrative agency a broad discretion in the superintendence of utilities, guided by the standard of public necessity and convenience, and thus to safeguard them against an arbitrary and unreasonable exercise of the regulatory power. It was no doubt considered that the compulsory performance, at great loss to the utility, of that which does not substantially serve public necessity or convenience, merely because the duty was undertaken in consideration of the grant of the franchise, would be violative of sound principles of economy and inimical to the public interest and a disregard also, depending upon the circumstances, of the constitutional guarantees of the right of property; and that relief from the obligation of wasteful service in the individual case should be the province of the body created to administer the legislative policy. *Vide Colorada* vs. *United States,* 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; *Brooks-Scanlon Co.* vs. *Railroad Commission,* 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; *Mississippi R. Com.* vs. *Mobile & O. R. Co.,* 244 U. S. 388, 37 S. Ct. 602, 61 L. Ed. 1216. The public has an interest in the use of the railroad; and it is axiomatic that that interest is prejudicially affected if such compulsory service would in the particular circumstances reduce the Company's financial resources and necessitate an increase of rates to enable it to function in its quasi-public capacity with a fair degree of efficiency. Certainly, jurisdiction to order resumption of a discontinued service if reasonably grounded in public necessity and convenience connotes authority to sanction the discontinuance of a service when the need, so measured, no longer exists.

The prevailing view is that the power of general supervision and regulation of service necessarily includes authority to permit public utilities "to abandon service." *Railway Commission* vs. *Macon Ry. & Light Co.,* 151 Ga. 256, 106 S. E. 282. The Utility Commission is not confined to the powers expressly

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granted; it possesses also those arising from necessity or fair implication.

The Order of the Utility Commission granted the application to "abandon service" on the branches in question; and appellant distinguishes between "abandonment" and "discontinuance." The Order is read as permitting an abandonment irrevocable by the Commission. So that there may be no doubt as to the legal effect of the Order, I would modify it to permit a discontinuance of the service subject to the continuing authority of the Commission to direct its resumption when essential to the service of public necessity and convenience.

My conclusion, therefore, is that the Order under review, as so modified, should be affirmed.

Mr. Justice Colie and Judge Wells join in this opinion.

Endorsed:

"Filed, December 3, 1942,
J. A. BROPHY,
Clerk."

No. 2229

In the Matter of the Application of the Erie Railroad Company for Permission to Discontinue Trains Nos. 496-407 and 411 Operating Between West Orange and Forest Hill, and

In the Matter of the Application of the Erie Railroad Company for Approval of Discontinuance of Certain Trains on Its New York Division and Branches; Also on the New York and Greenwood Lake Railway Company Branches.

Grover R. James, for Robert E. Woodruff and John A. Hadden, trustees of the property of Erie Railroad Company; *Thomas L. Parsonnet,* for New Jersey State Federation of Labor; *Samuel W. Boardman, Jr.,* for Township of Cedar Grove; *Ronald B. Smith,* for himself and others; *Philip D. Elliot,* for Borough of Caldwell; *J. J. Riley,* for Brotherhood of Locomotive Engineers; *Theodore C. Baer* and *Edward M. Malone,* for City of Jersey City; *Oliver T. Somerville,* for Borough of Rutherford; *Calvin Cook,* for Town of Kearny; *Ronald S. Spittel,* for Borough of Fairlawn and Radburn Association; *Green F. Johnson,* for Group of Commuters from Radburn; *F. B. Belling,* for Brotherhood of Trainmen; *L. M. Deshner,* for Brotherhood of Locomotive Firemen and Enginemen; *J. J. Schreur,* for Brotherhood of Railway Clerks, Freight Handlers, Express and Station Employees; *Edgar L. Keenan,* for Brotherhood of Railway and Steamship Clerks, Freight Handlers and Express and Station Employees; *Charles S. Straw,* for Public Service Co-ordinated Transport,

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et al.; *Clarence Cooke,* for Brotherhood of Locomotive Firemen and Enginemen; *G. Conway,* for Order of Railway Conductors; *P. F. Sale,* for himself and others; *George C. Grillo,* for Borough of Hawthorne; *H. J. Scott,* for Brotherhood of Railroad Trainmen; *J. H. Thompson,* for himself and others; *J. A. Hendry,* for himself and others; *Harvey G. Stevenson,* for Town of West Orange; *J. J. Riley,* for twenty-one Standard Railroad Labor Crafts; *J. J. Riley,* for Brotherhood of Locomotive Firemen; *F. Brown,* for Order of Railway Conductors; *John C. Porter,* for Brotherhood of Railroad Trainmen; *Charles B. Tedesco,* for Town of Belleville; *William Nestor,* for International Association of Machinists; *William Kaiser,* for International Association of Stationary Firemen, Laborers and Engineers; *J. J. Margeson,* for Brotherhood of Locomotive Firemen and Enginemen; *Charles H. Carr* (by *Albert F. Anderson*), for New Jersey State Legislative Board, Brotherhood of Railroad Trainmen.

BY THE COMMISSION:

On March 14, 1941 the Trustees of the Erie Railroad Company advised the Board that "On April 1, 1941, we plan to eliminate the following unprofitable (passenger) trains" on the following branches of The New York and Greenwood Lake Railway Company:

Orange Branch
Caldwell Branch
Jersey City to Wanaque-Midvale

and certain other trains on the New York Division between Jersey City and Suffern.

During the hearing, the request for the discontinuance of trains on the New York Division was withdrawn.

The reasons as stated in the notice "compelling the proposed reduction in service" are:

> "(a) Obligations of the Trustees to curtail non-profitable service, to avoid jeopardizing the service as a whole.
> "(b) Lack of sufficient patronage.
> "(c) The burden created by non-profitable trains on other service.
> "(d) Diversion of patronage to other means of transportation.
> "(e) These non-profitable trains have been continued a long time past the date when it was considered the same should be discontinued, in an effort to give the public every opportunity and to determine if the traffic would return to the scheduled train service, which has not materialized."

As required by the Board's rules, notice of the proposed changes and eliminations were posted in the stations of the respective lines. Immediately after such posting numerous protests were received by the Board. Thereupon, the Board suspended the proposed changes and discontinuances and set the matter down for hearing.

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In substance, the objections to the proposed changes were that commuters "(a) would not be able to reach their work or homes reasonably conveniently," and "(b) that there were no other convenient means of transportation."

A number of municipalities on the various branches whose appearances are above noted, objected to the application. In addition various labor organizations, whose appearances are likewise noted above, also objected upon the ground of probable loss of employee seniority and perhaps of employment. Mr. Johnston, a trustee of the railroad, testified, however, that the rights of seniority would be maintained and that none of the employees will be deprived of their jobs.

Mr. Johnston testified on this subject:

"* * * so that any thought that as a result of this thing there are going to be twenty-five people or any given number of people who are to have no employment is not correct." Page 81.

"* * * for the period January to April, 1941, the Erie Railroad has employed 47 firemen who were not previously in our employ, during this four-month period." Page 174.

Employees in any one division have no seniority rights on another division but "under our agreement with the temporary capacity on these other divisions, we will protect their rights while they are in the temporary capacity on these other divisions, and we are glad to continue that, unless the organizations object." Page 175.

"As to loss of men, I made a statement at the last hearing that since the first of the year we had hired new men in branches of service involved here, far in excess of the number of men that would be involved in this particular case. So, it just becomes a question of whether or not the men released, if this application is granted, continue in productive railroad service, or whether we are required to go out and employ men new to the railroad on account of the situation with which we are faced today." Page 142.

Moreover, while the Commission is fully cognizant of and sympathetic with the economic dislocations that sometimes result from elimination of train service, nevertheless the Board as a regulatory body established for the purpose of requiring safe, adequate and proper service to the traveling public, this Commission cannot justifiably mould its policies and decisions in such a way as to afford special protection to the interests represented by the various trainmen when it fully appears that the traveling public fails to exhibit any interest in certain railroad facilities.

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For clarity, we will consider the applications as related to the respective branches:

ORANGE BRANCH

No. 407—Daily except Sat., Sun. & Hol.	Depart Forest Hill	5:20 P.M.	Arrive West Orange	5:35 P.M.		
No. 411—Daily except Sat., Sun. & Hol.	Depart Forest Hill	6:02 P.M.	Arrive West Orange	6:16 P.M.		
No. 496—Daily except Sat., Sun. & Hol.	Depart West Orange	5:36 P.M.	Arrive Forest Hill	5:49 P.M.		
No. 485—Sat. only	Depart Jersey City	1:40 P.M.	Arrive West Orange	2:15 P.M.		
	Depart Forest Hill	2:01 P.M.				
No. 482—Sat.	Depart West Orange	2:30 P.M.	Arrive Jersey City	2:58 P.M.		
	Depart Forest Hill	2:42 P.M.	Arrive New York	3:14 P.M.		

CALDWELL BRANCH

No. 456—Daily except Sat., Sun. & Hol.	Depart Essex Fells	6:40 A.M.	Arrive Great Notch	6:57 A.M.		
	Passengers transfer at Great Notch to train 506 departing Great Notch 7:00 A.M.					
No. 520—Daily	Depart Essex Fells	11:38 A.M.	Arrive Jersey City	12:27 P.M.		
	Depart Great Notch	11:52 A.M.	Arrive New York	12:44 P.M.		
No. 493—Daily except Sun.	Depart Great Notch	8:08 A.M.	Arrive Essex Fells	8:25 A.M.		
No. 537—Daily except Sun.	Depart New York	7:30 P.M.	Arrive Essex Fells	8:50 P.M.		
	Depart Jersey City	7:47 P.M.				
	Depart Great Notch	8:31 P.M.				
No. 454—Sat. only	Depart Essex Fells	6:29 A.M.	Arrive Great Notch	6:45 A.M.		
	Passengers transfer at Great Notch to train 580 at 6:47 A.M.					
No. 464—Sat. only	Depart Essex Fells	7:50 A.M.	Arrive Jersey City	8:38 A.M.		
	Depart Great Notch	8:05 A.M.	Arrive New York	8:54 A.M.		
No. 589—Sat. only	Depart New York	3:50 P.M.	Arrive Essex Fells	5:09 P.M.		
	Depart Jersey City	4:06 P.M.				
	Depart Great Notch	4:50 P.M.				
No. 511—Sun. only	Depart New York	1:10 P.M.	Arrive Essex Fells	2:21 P.M.		
	Depart Jersey City	1:30 P.M.				
	Depart Great Notch	2:08 P.M.				

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No. 541—Sun. only	Depart New York	9:30 P.M.	Arrive Essex Fells	10:41 P.M.
	Depart Jersey City	9:45 P.M.		
	Depart Great Notch	10:28 P.M.		
No. 554—Sun. only	Depart Essex Fells	7:43 P.M.	Arrive Jersey City	8:40 P.M.
	Depart Great Notch	7:59 P.M.	Arrive New York	8:54 P.M.

JERSEY CITY TO WANAQUE-MIDVALE

No. 524—Daily except Sun.	Depart Great Notch	1:50 P.M.	Arrive Jersey City	2:27 P.M.
			Arrive New York	2:44 P.M.
No. 545—Daily except Sun.	Depart New York	11:30 P.M.	Arrive Wanaque-Midvale	1:04 A.M.
	Depart Jersey City	11:55 P.M.		
No. 486—Sat. only	Depart Great Notch	7:10 P.M.	Arrive Jersey City	7:46 P.M.
			Arrive New York	8:04 P.M.

We have carefully considered the testimony in support of the applications, the objections, the traffic checks which showed that some trains carried an average of 1, 5, 6 and 10 passengers and others an excess of 50 and that in some instances other trains operated within a short time of the trains proposed to be eliminated and to the same destinations, the loss claimed to be incurred by the continued operation and whether or not elimination of certain trains would seriously inconvenience the traveling public.

We are wholly familiar with applicant's financial conditions and the fact that it is now in process of reorganization. We recognize the necessity to drastically reduce expenses on these branches in an effort to maintain the stability of the entire system. We are likewise equally concerned with the maintenance of railroad transportation in the interest of the public served by the railroad. That some of that public will be adversely affected by the withdrawal of some of the present service is conceded. In these days and under current conditions, inconvenience to the lesser number may insure continued convenience to the larger number. The ultimate object to be attained is the preservation of the railroad system. If adjustments are necessary, even though effected with some inconvenience, such adjustments will not only be permitted but will be directed.

It is entirely clear from a survey and analysis of the patronage and resulting revenue that the public over a course of years has gradually failed to avail itself of the railroad transportation with the consequent recurring annual loss in revenue. In other words, from failure to patronize the branches it is obvious that the public necessity and convenience do not require the continued operation

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of all of the present service. The Board, therefore, will and hereby does find and determine that trains Nos. 407 and 496, on the Orange Branch, trains Nos. 456 and 537, on the Caldwell Branch, and train No. 545, on the Jersey City-Midvale Branch, should be continued and the application to discontinue the other trains herein specified should be and hereby is granted. The Board orders that appropriate notice of the change in operation of service as herein indicated, effective January 17, 1942, be posted immediately in all stations and on all trains so affected.

Dated, December 23, 1941.

No. 2230

In the Matter of the Application of Central Avenue Bus Company, Inc., for Approval of Municipal Consent of the City of Jersey City to Consolidate and Merge Present Western Slope Route with Present Main Line Route and to Extend Said Consolidated and Coordinated Routes Within the City of Jersey City—Central Avenue Bus Route, P. U. C. Route-File No. 081-074; Central Avenue Loop Bus Route, P. U. C. Route-File No. 203-074.

Theodore C. Baer, for Central Avenue Bus Company, Inc.; *Charles S. Straw,* for Public Service Coordinated Transport; *Armstrong & Mullen* (by *Thomas J. Armstrong*) and *Pitney, Hardin & Skinner* (by *Mahlon Pitney*), for Lafayette and Greenville Bus Owners and Bergen Avenue Bus Owners; *Morris E. Barison* (by *Fred Riethmuller*), for North Boulevard Transportation Company and Hudson County Bus Owners' Association.

BY THE COMMISSION:

This is an application for approval of municipal consent of the City of Jersey City "to unify and coordinate applicant's present Western Slope Route with its present Main Line Route, and to extend said unified and coordinated routes within the City of Jersey City" as more fully appears in amended application filed October 16, 1940.

Certain litigation ensued between October 16, 1940, and the date of the hearing on June 3, 1941. Pending the determination by the Supreme Court of the litigation further hearings were held in abeyance.

At the opening of the case, which began after the filing of the Supreme Court decision, counsel for the applicant explained for the record that the term "consolidate and merge" was intended

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in a physical sense because while the consent for which approval is sought defines six routes, applicant in fact now operates (except in the so-called extended area), on and over the same streets and highways under authority of consents heretofore approved by this Board from time to time.

For the purpose of clarity, it should be stated that the applicant presently operates a service known as the "Western Slope" route in an area between Hague Street terminal on the north, Liberty Avenue on the west, Hutton Street on the south, and Webster Avenue on the east, in Jersey City.

Applicant further operates a so-called "Main Line" service between the Hague Street terminal on the north and the Grand Street junction on the south, with a leg or branch running southeasterly to the Central Railroad ferries, in Jersey City.

The proposed six routes, which are specifically described in Schedule "A" attached hereto, are described generally as follows:

Route "A"—From "Hague Street terminal along present main line route to Central Railroad ferries." This route was, as of the hearing, and presently is being operated by the applicant. (Exhibit P-5.)

Route "B"—From "Hague Street terminal over Liberty Avenue area to Hutton Street and Central Avenue and thence over the main line route to the Central Railroad ferries". (Exhibit P-5). (Applicant presently operates over the streets with transfer privileges from its "Western Slope" Route to its "Main Line" Route and vice versa.)

Route "C"—From "Hague Street over the Webster Avenue area to Hutton Street and Central Avenue and thence over the main line route to the Central Railroad ferries". (Applicant presently operates over the streets with transfer privileges from its "Western Slope" Route to its "Main Line" Route and vice versa.)

The three above routes, "A," "B" and "C," as proposed, will operate to the Central Railroad Ferries.

Route "D"—From "Hague Street terminal over same route as Route "A" to the Grand Street junction and proceed over the proposed extension of the route along Garfield Avenue, Danforth Avenue and Princeton Avenue to Gates Avenue at the southerly section of the city." This route is also presently operated, *but only as far as* the Grand Street Junction; the remainder is the so-called extension or area not served by any local transportation on the particular streets named in this route.

Route "E"—From "Hague Street terminal over the same route as "B" to Grand Street junction", then over the so-called extension to Gates Avenue.

Route "F"—From "Hague Street terminal over same route as route "C" to the Grand Street junction", and thence over the proposed extended route to Gates Avenue.

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Thus it will be seen that the "Western Slope" and "Main Line" routes are presently operated under heretofore approved municipal consents and that in reality although the consents presented in this case for approval are new in the sense of date of issue, they are in fact confirmatory of the existing operations with the added area south of the Grand Street Junction.

When counsel for applicant sought to explain the confirmatory consents at the opening of this case, counsel for the objectors interposed what in effect was a challenge to the Board's jurisdiction to proceed with the instant application because he insisted "that the law is that this Board must first act upon an application for the abandonment of the present service, because counsel has indicated he wants to institute something entirely different and utterly new." The statutory number of commissioners required to make a determination on this motion being present at the hearing, it was denied.

An examination of the municipal consents submitted on this application clearly demonstrates that the purpose is to eliminate the presently required transfer between applicant's two existing separate services and substitute through service therefor.

The proofs satisfactorily show that public convenience and necessity will be more adequately served if these routes, viz., "Main Line" and "Western Slope" are operated as proposed instead of two separate and distinct services.

The proofs also satisfactorily indicate that public necessity and convenience require service on the "extended route". The extended route is through an area not now served by applicant or by any other bus company so far as the particular streets designated in the "extended route" area are concerned.

An exhibit introduced by applicant shows that approximately 2,300 persons are employed in the section of Jersey City along and adjacent to the proposed extended route. This section has long been without direct transportation to the northerly section of the city. Moreover, it is evident from the testimony that through transportation at a 5c fare from the extended area to Journal Square, the Court House, Christ Hospital, and the Hudson City section of Jersey City will be provided by the approval of the application. At the present time residents in this area are obliged to use other services and then transfer at an additional fare.

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Further, the evidence supports the contention that applicant's contemplated operation will attract a "large reservoir of labor residing north of Journal Square which will be able to reach those industries with a quick, cheap and direct transportation service".

The application was vigorously opposed. The basic objection by the objector operators was that their revenue would be prejudicially affected by the probable loss of the so-called transfer business, viz., passengers who could ride through instead of transferring to the services of the objectors or that some passengers now carried by objectors will change their riding habits and patronize applicant's proposed service.

It is not unlikely that the objectors will lose the trade of some passengers who are now obliged to walk a distance of from 800 feet to 1,100 feet to reach one of the objectors' buses and having reached such buses then to either walk a quarter of a mile to the Medical Center or pay an additional fare by transferring to applicant's buses. This illustration is limited solely to a passenger destined to the Medical Center. That the new through operation will benefit such passengers cannot be denied. Comparable illustrations reflected in the proofs apply with equal force to passengers whose destinations are to points other than the Medical Center.

To the extent just indicated the new service undoubtedly will attract some of the travel from the objectors' lines. However, the testimony does not satisfactorily demonstrate that the objectors' business will be subject to prejudicial competition by the granting of the application. The test which we must apply after consideration of all of the evidence is whether convenience and necessity require the approval of the application.

Upon consideration of the evidence the Board finds and determines that the approval of the municipal consent of the City of Jersey City is necessary and in the public interest and hereby approves the application for the operation of not more than fifteen (15) buses over the routes, for the fares and subject to the restrictions set forth in Schedule "A" attached hereto and made part hereof.

Dated, February 10, 1942.

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SCHEDULE "A"

CENTRAL AVENUE BUS COMPANY, INC.

Central Avenue, Western Slope and Garfield Avenue Bus Route

P. U. C. Route—File No. 496-074

Has approval of municipal consent of the City of Jersey City dated October 15, 1940, to operate a total of fifteen (15) buses over the following routes:

Route A

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, Secaucus Road, to Paterson Plank Road, to Central Avenue, thence over Central Avenue, Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard to Journal Square, thence over Bergen Avenue, to Academy Street, to Baldwin Avenue to Summit Avenue, to Astor Place, to Park Street, to Communipaw Avenue, to Monitor Street, to Johnston Avenue, to the Central Railroad Ferries. Returning over same route to Central Avenue, to Hague Street, to the terminal at Hague Street and Summit Avenue.

Route B

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, to Leonard Street, to Nelson Avenue, to Leonard Street, to Columbia Avenue, to North Street, to Liberty Avenue, to Hutton Street, to Sanford Place, to Hutton Street, to Central Avenue, to Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard, to Journal Square, thence along Bergen Avenue, to Academy Street, to Baldwin Avenue, to Summit Avenue, to Astor Place, to Park Street, to Communipaw Avenue, to Monitor Street, to Johnston Avenue, to Central Railroad Ferries. Return over same route to Summit Avenue, to Secaucus Road, to Paterson Plank Road, to Hague Street, to terminal at Hague Street and Summit Avenue.

Route C

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, to Secaucus Road, to Paterson Plank Road, to Webster Avenue, to Hutton Street, to Sherman Avenue, to Hutton Street, to Central Avenue, to Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard, to Journal Square, thence along Bergen Avenue, to Academy Street, to Baldwin Avenue, to Summit Avenue, to Astor Place to Park Street, to Communipaw, to Monitor Street, to Johnston Avenue, to Central Railroad Ferries. Returning over same route to Paterson Plank Road, to Hague Street, to the terminal at Hague Street and Summit Avenue.

Route D

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, Secaucus Road, to Paterson Plank Road, to Central Avenue, thence over Central Avenue, to Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard, to Journal Square, thence Bergen Avenue, to Academy Street, to Baldwin Avenue, to Summit Avenue, to Astor Place, to Park Street, to Communipaw Avenue, to Garfield Avenue, thence along Garfield Avenue, thence to Danforth Avenue to Princeton Avenue to a terminal at Gates and Princeton Avenues. Return

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trips over same route to Central Avenue, to Paterson Plank Road, to Hague Street to the terminal at Hague Street and Summit Avenue.

Route E

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, to Leonard Street, to Nelson Avenue, to Leonard Street, to Columbia Avenue, to North Street, to Liberty Avenue, to Hutton Street, to Sanford Place, to Hutton Street, to Central Avenue to Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard, to Journal Square, thence along Bergen Avenue, to Academy Street, to Baldwin Avenue, to Summit Avenue, to Astor Place, to Park Street, to Communipaw Avenue, to Garfield Avenue, thence along Garfield Avenue to Danforth Avenue, to Princeton Avenue, to a terminal at Gates and Princeton Avenues. Return trips over same route to Summit Avenue, to Secaucus Road, to Paterson Plank Road, to Hague Street, to a terminal at Hague Street and Summit Avenue.

Route F

Starting at the terminal at Hague Street and Summit Avenue, thence along Summit Avenue, to Secaucus Road, to Paterson Plank Road, to Webster Avenue, to Hutton Street, to Sherman Avenue, to Hutton Street, to Central Avenue, to Booraem Avenue, to Webster Avenue, to Baldwin Avenue, to Newark Avenue, to Hudson County Boulevard, to Journal Square, thence along Bergen Avenue, to Academy Street, to Baldwin Avenue, to Summit Avenue, to Astor Place, to Park Street, to Communipaw Avenue, to Garfield Avenue, thence along Garfield Avenue to Danforth Avenue, to Princeton Avenue, to a terminal at Gates and Princeton Avenues. Return trips over the same route, to Paterson Plank Road, to Hague Street, to terminal at Hague Street and Summit Avenue.

The fare to be charged over any of said routes will be 5c.

Restrictions

1. That the operators shall not accept passengers on Communipaw Avenue for discharge on that street between Grand Street and Whiton Street.

2. That the operators shall not accept passengers on Johnston Avenue for discharge on Johnston Avenue.

3. On trips from the proposed Hague Street Terminal to the C. R. R. Ferries, no passengers shall be picked up between the Hague Street Terminal and the intersection of Secaucus Road and Paterson Plank Road, provided, however, that this restriction shall not prevent passengers from boarding the buses at Hague Street Terminal or at the intersection of Secaucus Road and Paterson Plank Road.

4. That passengers shall not be accepted who begin and end their trips on Newark Avenue, between Hudson County Boulevard and Baldwin Avenue.

5. "Public Service Coordinated Transport, the objector, may, upon notice, apply for modification of restriction No. 3 upon proper proof of undue competition."

6. No passengers shall be accepted or discharged on that portion of the Paterson Plank Road which is in Union City between Central Avenue and Hague Street on northbound service. (No Union City consent.)

7. That the operators will not pick up and discharge the same passengers on Liberty Avenue or along the route between Hutton Street and Leonard Street.

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No. 2231

In the Matter of the Application of Pennsylvania Railroad Company for Approval of the Discontinuance of Certain Passenger Train Service Between Trenton and Long Branch, New Jersey; Between Trenton, New Jersey, and Stroudsburg, Pennsylvania, and Between Trenton and Camden, New Jersey.

Harry V. Osborne, for Pennsylvania Railroad Company; *Leo J. Warwick,* for City of Long Branch; *Charles Frankel,* for City of Asbury Park; *Joseph R. Megill,* for Borough of Bradley Beach; *Max Finegold,* for Borough of Freehold; *Herman W. Shostak,* for Borough of Jamesburg; *Rush B. Van Sickle,* for Borough of Manasquan; *George Gildea,* for Receivers of Trenton Transit Company; *W. D. McCloskey,* for Coast Cities Coaches, Inc; *C. F. Cook,* for Brotherhood of Locomotive Firemen and Engineers; *Frank C. Lonney,* for Brotherhood of Railroad Trainmen; *J. G. Gill,* for Rider College; *Harry S. Pine,* for himself and various passengers; *Horace G. Prall, Andrew Foltz* and *Neilson Rittenhouse,* for City of Lambertville; *H. T. Heisel* and *O. B. Ziegler,* for Borough of Milford; *Hugh Sinclair,* for Borough of Frenchtown; *George M. Shipman,* for Town of Belvidere; *M. Eugene Leffler,* for Borough of Delaware Water Gap; *Dr. Fred J. Baer,* for Stroudsburg and East Stroudsburg; *John F. O'Donnell,* for City of Phillipsburg; *E. R. Wilson* and *Robert Baldwin,* for Stockton.

BY THE COMMISSION:

Applicant requests the Board's approval to discontinue

1. Train No. 2575 between Trenton and Camden;

2. Train No. 362 from Trenton to Stroudsburg, Pennsylvania, and No. 363 between Stroudsburg and Trenton;

3. Trains No. 804 and No. 815, both operated from Long Branch to Trenton, and No. 805 and No. 812 from Trenton to Long Branch.

The application recites that it (Company) "has been informed by the Federal Advisory Commission of the Counsel of National Defense, Washington, D. C., that railroad passenger train equipment not necessary to handle current service is needed to handle prospective passenger traffic, military and civilian, during the present emergency and requests all railroads to check their entire passenger service in order to give consideration to the discontinuance of trains that are not necessary."

It is further stated that the indicated trains "may be discontinued as unnecessary without undue inconvenience to the public in view of the small amount of traffic thereon." * * * that "the highways now provide a more direct and expeditious means of transportation via bus or private automobile" that "traffic has

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been declining for a number of years" that specially as to the Trenton-Long Branch service the "Trenton Transit Company now operates a bus line between Trenton and Asbury Park and stands ready to establish additional bus service in this territory comparable to the present railroad service."

Elimination of the proposed trains, the petition states, will release three (3) locomotives, one (1) rail motor car, nine (9) passenger cars and one (1) baggage car, and will not materially delay the forwarding of mail and express.

There was no opposition to the elimination of train No. 2575, leaving Trenton at 4:55 P. M. and arriving in Camden at 5:52 P. M. Train No. 2577, eight minutes later from Trenton, making all stops of No. 2575 between Trenton and Camden, will provide adequate service.

With reference to trains No. 804 and No. 815 from Long Branch to Trenton and No. 805 and No. 812 from Trenton to Long Branch, we have carefully considered the testimony both pro and con and have concluded to deny the application as to No. 805, leaving Long Branch at 7:15 A. M. and arriving at Trenton at 8:46 A. M., a distance of 60 miles with stops at all intermediate stations, and train No. 812 leaving Trenton at 5:10 P. M. and arriving at Long Branch at 6:39 P. M. with all station stops.

The proofs, however, do not show that necessity and convenience require the continued operation during the winter months of train No. 815, leaving Long Branch at 4:15 P. M. and arriving at Trenton at 5:49 P. M., and train No. 804 leaving Trenton at 8:55 A. M. and arriving at Long Branch at 10:40 A. M. Elimination of both "round trip" trains would result in the discontinuance of all direct train service between Trenton and the seashore municipalities during the winter months. The proofs indicate that one round trip should be retained.

The application to discontinue train No. 362 from Trenton at 3:15 P. M., arriving at Stroudsburg at 5:38 P. M., and train No. 363 from Stroudsburg at 9:00 A. M., arriving at Trenton at 11:28 A. M. (constituting a round trip, the crew staying in Stroudsburg over night), was opposed by many of the municipalities on the line in New Jersey and by the municipalities of Stroudsburg and East Stroudsburg in Pennsylvania; also by an express shipper, postmaster and one or two casual riders.

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The basis of the objection was that delay and resulting inconvenience would ensue. We think, for reasons presently to be stated, that this opposition, if the application were heard today, would materially abate.

The two trains in question operate over a single track system. Freight transportation on the track has increased to such a marked degree in the past few weeks that freight, and not passenger service, now has the right of way.

The test of necessity at the present time is not the same test that we previously applied to similar applications. That test rested almost solely upon the requirements of necessity and convenience of the public. This must now be expanded to include a consideration of the extent to which national defense will be aided by train eliminations so that equipment can be used for the transportation of troops and the way cleared for freight shipments urgently required in government work. Moreover, the objectors will not be deprived of all services by the discontinuance of the two trains. A local train now operates daily between Trenton and Phillipsburg and return and there is also another daily round trip between Trenton and Stroudsburg. These trains we conclude will provide adequate service. These are the reasons which induced us to state "if the case were heard today" the opposition would not persist.

As we have stated, the service extends from Trenton, New Jersey, to Stroudsburg, Pennsylvania. That portion of the service in Pennsylvania is under the jurisdiction of the Public Service Commission of that State. Inquiry has confirmed our understanding that formal application for elimination of a train is not necessary in the State of Pennsylvania.

The result of our conclusion is that equipment will be released for use in government service, and at the same time no substantial inconvenience will ensue to the public.

Accordingly, the application to discontinue trains No. 2575, No. 362 and No. 363 is granted. We also grant the application to discontinue trains No. 815 and No. 804, except during the period between May 15 and September 15 each year.

As to trains No. 805 and No. 812, the application is denied.

The Board directs that appropriate notice of the change in operation of service as herein indicated, effective on the Camden Branch and on the Belvidere Branch on February 28, 1942, and

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on the Trenton-Long Branch service on March 7, 1942, be immediately posted in all stations and in all the trains so affected.

Dated, February 19, 1942.

No. 2232

In the Matter of the Application of Bill's Bus Line for Approval of Municipal Consent for Change and Extension of Route and for the Operation of Two Additional Auto Buses (Making a Total of Six) on the Saddle River, Paterson Bus Route (P. U. C. Route-File No. 287-040).

Charles F. Black, for Bill's Bus Line; *J. H. Mulhern* and *William H. Blake,* for Public Service Coordinated Transport.

BY THE COMMISSION:

Applicant requests

1. Approval of municipal consent of the Borough of Waldwick to extend its present Waldwick service from the Junction of Wyckoff Avenue and Cleveland Avenue, thence via Cleveland Avenue, Prospect Avenue, Maple Avenue, Wyckoff Avenue, Harrison Avenue, Prospect Avenue, Nordham Street, Lincoln Place, Ridge Street to the intersection of Ridge Street and Prospect Avenue.

Returning along prospect Avenue, Harrison Avenue, Wyckoff Avenue, Maple Avenue, Prospect Avenue, Cleveland Avenue, Wyckoff Avenue, Cleveland Avenue to the presently approved route at Wyckoff and Cleveland Avenues, thence along the approved route to Paterson.

This will eliminate service on Wyckoff Avenue between Cleveland Avenue and Maple Avenue.

2. Approval of municipal consents of the City of Paterson, Borough of Prospect Park, Borough of Hawthorne, Borough of Glen Rock, Village of Ridgewood, Borough of Midland Park, Borough of Waldwick, Borough of Allendale and the Borough of Saddle River, for the operation of two additional buses (making a total of six) on the entire operation between Saddle River and Paterson, including the Waldwick service and the extension of the Waldwick service herein proposed.

3. Approval of municipal consent of the Borough of Waldwick for extension of its Waldwick service from the intersection of Cleveland and Prospect Avenues, thence along Prospect Avenue to a school located at Prospect and Hopper Avenues; also extension of its route from the intersection of Prospect Avenue and Franklin Turnpike, thence along Franklin Turnpike to a school located on Franklin Turnpike in the Borough of Hohokus.

These proposed extensions are for the purpose of transporting school children only.

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Application (1) and (2) are granted. The proposed extension and the operation of two additional buses over the regular route and the extension are necessary to properly serve a recently developed section of the Borough of Waldwick north of Prospect Avenue and extending from Nordham Street on the west to State Highway Route No. 2 on the east.

No increase in fares from points on the present route to points along the proposed extension, the extension being entirely within the Waldwick fare zone, will be charged.

Applicant stipulated that a restriction should be imposed on southbound trips at Prospect Avenue and Franklin Turnpike, Waldwick, and that passengers will not be discharged on northbound trips at Prospect Avenue and Franklin Turnpike located on the proposed extension in the Borough of Waldwick. These restrictions were accepted to prevent prejudicial competition.

As to (3), the application will be denied for the reason that (3) seeks approval of the operation of school buses operated under contract, over which the Board does not have jurisdiction.

The Board finds and determines that the municipal consent of the Borough of Waldwick, for the extension of the Waldwick service from the junction of Wyckoff Avenue and Cleveland Avenue, via Cleveland Avenue, Prospect Avenue, Maple Avenue, Wyckoff Avenue, Harrison Avenue, Prospect Avenue, Nordham Street, Lincoln Place, Ridge Street to Prospect Avenue is necessary and in the public interest.

The Board further finds and determines that the approval of municipal consents of the City of Paterson, Borough of Prospect Park, Borough of Hawthorne, Borough of Glen Rock, Village of Ridgewood, Borough of Midland Park, Borough of Waldwick, Borough of Allendale and the Borough of Saddle River, for the operation of two additional buses (making a total of six) over the route, for the fares and subject to the restrictions set forth in Schedule "A" attached hereto and made a part hereof, is necessary and in the public interest and APPROVES the application for the proposed operation over the route, for the fares and subject to the restrictions set forth in Schedule "A" attached hereto and made a part hereof.

Dated, February 19, 1942.

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SCHEDULE "A"

BILL'S BUS LINE

SADDLE RIVER BUS ROUTE, P. U. C. ROUTE-FILE NO. 287-040

Has approval for the operation of not more than six (6) buses in the City of Paterson, Borough of Prospect Park, Borough of Hawthorne, Borough of Glen Ridge, Village of Ridgewood, Borough of Midland Park, Borough of Waldwick, Borough of Allendale and the Borough of Saddle River over the following routes:

(A) *Regular Service:*

Beginning on Washington Street at Broadway in Paterson, thence via Broadway, Bridge Street, Arch Street, Water Street, Holsman Street, East Main Street through Prospect Park to Hawthorne, Goffle Road, Diamond Bridge Avenue, Lincoln Avenue in Hawthorne and Glen Rock and into Ridgewood, Godwin Avenue, Wilsey Square, West Ridgewood Avenue, North Monroe Street, West Glen Avenue into Midland Park, Prospect Street to Waldwick, Crescent Avenue to Allendale, West Crescent Avenue, Brookside Avenue, Park Avenue, Station Plaza, West Allendale Avenue, West Crescent Avenue, Myrtle Avenue, West Allendale Avenue, East Allendale Avenue into Saddle River and to West Saddle River Road; returning via the same route in the reverse direction to Bridge Street in Paterson, thence via Bridge Street, Fair Street, Washington Street to Broadway, the place of beginning.

(B) *Waldwick Service:*

Same as Route "A" service to Crescent Avenue and Wyckoff Avenue, Waldwick, thence via Wyckoff Avenue, Cleveland Avenue, Prospect Avenue, Maple Avenue, Wyckoff Avenue, Harrison Avenue, Prospect Avenue, Nordham Street, Lincoln Place, Ridge Street to Prospect Avenue; returning via Prospect Avenue, Harrison Avenue, Wyckoff Avenue, Maple Avenue, Prospect Avenue, Cleveland Avenue to the presently approved route at Cleveland and Wyckoff Avenues, thence via "A" Service route to the place of beginning.

The fares to be charged for these services are as follows:

Zone Area Within:	*Bet. Zone No. and Zone No.*	1 *c*	2 *c*	3 *c*	4 *c*	5 *c*	6 *c*	7 *c*	*Approx. Zone Miles*
Paterson and Prospect Park ..	1	R	5	10	10	15	15	20	1.3
Hawthorne or Glen Rock south of Rock Road	2		5	5	10	10	10	15	3.3
Ridgewood or Glen Rock north of Rock Road	3			5	5	10	10	15	2.8
Midland Park	4				5	5	5	10	1.4
Waldwick	5					5	5	10	1.8
Allendale	6						5	5	3.1
Saddle River	7							5	0.8

R—Restricted.

Subject to the following restrictions:

(1) That the operators of said buses shall not accept or discharge passengers who begin and end their trips between Diamond Bridge Avenue at Lincoln Avenue and the Paterson Terminal with the exception of those areas on Dia-

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mond Bridge Avenue which are between Goffle Road and Buena Vista Avenue and between Forest Avenue and Hawthorne Avenue.

(2) That passengers shall not be accepted on southbound trips at Prospect Avenue and Franklin Turnpike. On northbound trips passengers shall not be discharged at Franklin Turnpike and Prospect Avenue in Waldwick.

No. 2233

In the Matter of the Application of the Long Dock Company and the Erie Railroad Company for Approval of the Sale and Conveyance of Two Parcels of Land Situate in the City of Jersey City, Hudson County, New Jersey, to Housing Authority of the City of Jersey City.

The Long Dock Company and the Erie Railroad Company, by petition filed with the Board on April 13, 1942, request the Board's approval of the sale and conveyance of two parcels of land situate in the City of Jersey City, Hudson County, New Jersey, to the Housing Authority of the City of Jersey City for a consideration of forty thousand dollars ($40,000). The first of these parcels, designated No. 24 in the petition, contains fourteen thousand one hundred ninety-seven and six-tenths (14,197.6) square feet, more or less; the second, designated No. 56, contains fifty-four thousand three hundred fifty-seven and five-tenths (54,357.5) square feet, more or less. The aggregate area of these parcels is sixty-eight thousand five hundred fifty-five and one-tenth (68,555.1) square feet, more or less; they are more specifically indicated in red outline on the plan attached to the application and are described in Schedule "A" attached hereto.

Certified copies of (1) a resolution of the Board of Directors of the Long Dock Company, adopted March 25, 1942, and (2) a resolution of the Board of Directors of the Erie Railroad Company, adopted March 20th, 1942, authorizing the sale and conveyance of these parcels have been filed with the Board, which petition, plan and resolutions are made part hereof.

The record title to the property to be conveyed is in the name of the Long Dock Company. The Erie Railroad owns all of the capital stock of that company and leases a large part of the property. It appears from the petition that "there is some question as to whether the property is subject to the terms of the leases made between the Dock Company and Erie Company and its predecessors * * *. The Authority insists that the Erie Company release or quit-claim any interest which it may have in said company" hence this application.

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The Board of Public Utility Commissioners, after investigation and hearing, now determines and concludes that the property to be conveyed by the Petitioners, as described in the petition and plan annexed thereto, is neither presently nor prospectively necessary for the corporate use of the applicants, and no reason to the contrary appearing,

HEREBY APPROVES of the sale and conveyance of the property in accordance with the prayer of the Petitioners.

Petitioners are directed to file with the Board within sixty (60) days after date of settlement with the purchaser, certified copies of the releases of the lands herein described from the liens of mortgage encumbering said premises.

Dated, April 30, 1942.

SCHEDULE "A"

LAND SITUATE IN JERSEY CITY, HUDSON COUNTY, NEW JERSEY, TO BE CONVEYED BY THE LONG DOCK COMPANY AND ERIE RAILROAD COMPANY TO HOUSING AUTHORITY OF THE CITY OF JERSEY CITY, N. J.

PARCEL 24

Beginning at a point in the southerly line of Court House Place, distant one hundred thirty-two and twenty-four hundredths (132.24) feet northwesterly as measured along said southerly line of Court House Place, from the intersection thereof with the westerly line of Palisade Avenue;

(1) Thence South thirty-four degrees fifty-two minutes five seconds West (S. 34° 52′ 05″ W.) eighty and sixty-seven hundredths (80.67) feet to a point;

(2) Thence North fifty-five degrees seven minutes fifty-five seconds West (N. 55° 07′ 55″ W.) parallel to the southerly line of Court House Place, a distance of one hundred seventy-six (176) feet to a point;

(3) Thence North thirty-four degrees fifty-two minutes five seconds East (N. 34° 52′ 05″ E.) eighty and sixty-seven hundredths (80.67) feet to the southerly line of Court House Place;

(4) Thence South fifty-five degrees seven minutes fifty-five seconds East (S. 55° 07′ 55″ E.) one hundred seventy-six (176) feet along the southerly line of Court House Place to the point or place of beginning, containing fourteen thousand one hundred ninety-seven and six tenths (14,197.6) square feet, more or less.

PARCEL 56

Beginning at the point of intersection of the westerly line of Palisade Avenue, and the southerly line of Washburn Street, said point being also six hundred sixty-five and seventy hundredths (665.70) feet measured northerly along the westerly line of Palisade Avenue from the intersection thereof with the northerly line of Newark Avenue:

(1) Thence South forty-five degrees fourteen minutes fifty seconds West (S. 45° 14′ 50″ W.) one hundred fourteen and seventy hundredths (114.70)

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feet along said westerly line of Palisade Avenue to the northerly line of Court House Place;

(2) Thence North fifty-five degrees seven minutes fifty-five seconds West (N. 55° 07′ 55″ W.) three hundred forty-one and twenty-three hundredths (341.23) feet along the northerly line of Court House Place to a point;

(3) Thence North thirty-four degrees fifty-two minutes five seconds East (N. 34° 52′ 05″ E.) one hundred seventy-five and eighty-five hundredths (175.85) feet to a point in the southerly line of Washburn Street;

(4) Thence South fifty-five degrees seven minutes fifty-five seconds East (S. 55° 07′ 55″ E.) one hundred four and forty hundredths (104.40) feet along said southerly line of Washburn Street to an angle point therein;

(5) Thence South forty-one degrees twenty-two minutes forty seconds East (S. 41° 22′ 40″ E.) still along said southerly line of Washburn Street two hundred sixty-five and eight hundredths (265.08) feet to the point or place of beginning, containing fifty-four thousand three hundred fifty-seven and five tenths (54,357.5) square feet, more or less.

No. 2234

In the Matter of the Application of Public Service Coordinated Transport for Approval of Municipal Consents to Operate Eight (8) Auto Buses Between Passaic Avenue and Division Avenue and Heckel Street and Bloomfield Avenue on the Belleville-Silver Lake Bus Route No. 37 (P. U. C. Route-File No. 331-348).

J. H. Mulhern and *W. H. Blake,* for Public Service Coordinated Transport; *Maurice J. Cronin,* for Garden State Bus Lines; *W. Eugene Turton,* for Trackless Transit Company.

BY THE COMMISSION:

This is an application to approve the municipal consents of the City of Newark, Town of Bloomfield and Town of Belleville for the operation of eight (8) auto buses on the Belleville-Silver Lake Bus Route No. 37, P. U. C. Route-File No. 331-348, over the highways described in Schedule "A" hereto attached, practically all of which route is within the Town of Belleville. The purpose of the proposed operation was testified to by one of the Commissioners of the Town of Belleville, viz.: to provide service from the center of Belleville and West Belleville to the Silver Lake section where there are located a large number of industrial plants, some of which are 60 per cent engaged in defense work. In order to reach the industrial center from Belleville and West Belleville, it is necessary "to go through part of Newark to get to the Silver Lake section." The proposed route will likewise provide convenient service from the areas just indicated to the

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town hall, banks, post office, theatres and town stadium. There was other testimony to the same effect.

The application was opposed by the Garden State Bus Lines and the Trackless Transit Company. The objections, we conclude, are without merit.

It is clear from the testimony that the proposed service is not only necessary but will be convenient in sections not served to transport residents of such sections to the center of Belleville and to the various industrial plants, including Jergens, Isolantite and Wallace & Tiernan, in the Silver Lake section.

Upon consideration of such proof, the Board finds and concludes that public necessity and convenience require the approval of the municipal consents of the City of Newark, Town of Belleville and Town of Bloomfield, and such consents are, therefore, approved.

Dated, May 7, 1942.

SCHEDULE "A"

PUBLIC SERVICE COORDINATED TRANSPORT

BELLEVILLE-SILVER LAKE BUS ROUTE No. 37, P. U. C. ROUTE-FILE No. 331-348

Has approval for the operation of not more than eight (8) auto buses in the City of Newark, Town of Belleville and the Town of Bloomfield on the following route:

Beginning at Passaic Avenue and Division Avenue and thence via Passaic Avenue, Emmet Street, Forest Street, Greylock Parkway, Linden Avenue, Joralemon Street, Washington Avenue, Mill Street, Belleville; Mill Street (Parkway), Newark; Mill Street, Franklin Avenue, Belleville; Franklin Avenue, Heller Parkway, Newark; Franklin Street, Belmont Avenue, Lawrence Street and Heckel Street to Bloomfield Avenue, Belleville.

Returning via Bloomfield Avenue, Belleville; Bloomfield Avenue, Belmont Avenue, Bloomfield; Belmont Avenue, Franklin Street, Belleville; Heller Parkway, Franklin Avenue, Newark; Franklin Avenue, Mill Street, Belleville; Mill Street (Parkway), Newark; Mill Street, Washington Avenue, Joralemon Street, Linden Avenue, Greylock Parkway, Forest Street, Emmet Street and Passaic Avenue to Division Avenue.

This route is 5.5 miles in one way length.

The fare to be charged is five cents (5c) per passenger in each direction.

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No. 2235

In the Matter of the Application of Essex County Park Commission for Rehearing in the Matter of the Application of Public Service Coordinated Transport for Approval of Municipal Consents to Operate Eight Auto Buses Between Passaic Avenue and Division Avenue and Heckel Street and Bloomfield Avenue on the Belleville-Silver Lake Bus Route No. 37 (P. U. C. Route-File No. 331-348).

Harry V. Osborne and *E. S. Sanford,* for Essex County Park Commission; *J. H. Mulhern,* for Public Service Coordinated Transport; *Lawrence E. Keenan,* for Town of Belleville.

BY THE COMMISSION:

On May 7, 1942, the Board approved municipal consents of the City of Newark, Town of Bloomfield and Town of Belleville for the operation of eight auto buses on the Belleville-Silver Lake Bus Route No. 37 (P. U. C. Route-File No. 331-348) over highways described as follows:

> Beginning at Passaic Avenue and Division Avenue and thence via Passaic Avenue, Emmet Street, Forest Street, Greylock Parkway, Linden Avenue, Joralemon Street, Washington Avenue, Mill Street, Belleville; Mill Street (Parkway), Newark; Mill Street, Franklin Avenue, Belleville; Franklin Avenue, Heller Parkway, Newark; Franklin Street, Belmont Avenue, Lawrence Street and Heckel Street to Bloomfield Avenue, Belleville.
>
> Returning via Bloomfield Avenue, Belleville; Bloomfield Avenue, Belmont Avenue, Bloomfield; Belmont Avenue, Franklin Street, Belleville; Heller Parkway, Franklin Avenue, Newark; Franklin Avenue, Mill Street, Belleville; Mill Street (Parkway), Newark; Mill Street, Washington Avenue, Joralemon Street, Linden Avenue, Greylock Parkway, Forest Street, Emmet Street and Passaic Avenue to Division Avenue.
>
> The one-way distance of the route is 5.5 miles.

After such approval and on the 28th day of May, 1942, the Essex County Park Commission filed a petition with the Board for a rehearing and vacation of the Board's decision of May 7, 1942. The petition alleged that the Essex County Park Commission on August 27, 1931, "acquired from the Town of Belleville the care, custody and control of Mill Street in the Town of Belleville from Union Avenue west to the railroad crossing of the Greenwood Lake Branch of the Erie Railroad Company"; that in 1940 the Essex County Park Commission laid out and opened an entrance to the Branch Brook Park Extension Driveway, which entrance is partly in the City of Newark and partly in the

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Town of Belleville, and that the consents for so much of the route granted by the City of Newark and the Town of Belleville were invalid for the reason that the said City of Newark and the Town of Belleville did not own and had no control of the portion of the route hereinabove indicated, which portion is more particularly described as follows:

> Mill Street west of Union Avenue in the Town of Belleville to the Commission's Bridge No. 5 over the Second River; thence across said bridge to the park driveway in the City of Newark and along said driveway to a point in the center line thereof approximately 2,200 feet northwest of said bridge; thence over the recently constructed driveway extending in a northerly direction generally parallel to the Second River to Franklin Avenue in the Town of Belleville at a point opposite Mill Street as recently constructed on its new alignment southwest of the Second River and northwest of Franklin Avenue.

The petition further alleged that the Essex County Park Commission was not notified of the issuance of such consents by Belleville and Newark to Public Service Coordinated Transport nor of the application to this Board for approval of such consents, and that the said Essex County Park Commission "did not and has not consented to the operation of buses over Route No. 37 through and over any part of Mill Street under its care, custody, and control, or through and over any of its park driveways or the entrance to its park driveway at Franklin Avenue."

Upon consideration of the petition and argument of counsel representing the respective parties to the proceeding, the Board granted the application to reopen and set the matter for hearing on Thursday, June 25, 1942.

At the rehearing on June 25th, 1942, the applicant for rehearing, Essex County Park Commission, produced proof satisfactory to the Board that the City of Newark and the Town of Belleville were entirely without authority to grant municipal consent to the use of so much of the said route as has been and is under the control of the Essex County Park Commission.

Public Service Coordinated Transport conceded at the rehearing that the consents of the Town of Belleville and the City of Newark, insofar as such consents purported to grant approval of the operation over roadways, parkways or park driveways within the exclusive jurisdiction of the Essex County Park Commission were invalid and ineffective but contended that the consents were valid over all other portions of the route and to that extent the Board's approval of May 7, 1942, should not be revoked and

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rescinded, and that in any event the municipal consents of the Town of Belleville and the City of Newark should be preserved for further consideration and that the Public Service Coordinated Transport should be permitted to apply for a temporary certificate under chapter 49, laws of 1942, to operate eight buses over the route heretofore approved by the Board's decision of May 7, 1942, subject to such conditions and limitations as this Board may impose.

It further appeared that the Essex County Park Commission, though denying any jurisdiction in this Board to grant temporary permits to use roadways, etc., within the jurisdiction of the Park Commission had, nevertheless in recognition of the national emergency, adopted a resolution authorizing the issuing by the Park Commission to Public Service Coordinated Transport of a temporary permit or license to operate its buses over and through said park roadway above described on the express condition, among others, that the Public Service Coordinated Transport shall not be permitted to accept or discharge passengers from its auto buses "within the following park limits, to wit:

> "Union Avenue in the Town of Belleville on the southeast and Franklin Avenue in the Town of Belleville on the northwest."

The license so given was specifically coupled with the following contention:

> "The Essex County Park Commission contends that the Board of Public Utility Commissioners is without jurisdiction to issue a permit for the use of any of the roadways, parkways, or park driveways throughout the Essex County Park System and over which the Essex County Park Commission has jurisdiction, whether such jurisdiction results from the ownership in fee by The Essex County Park Commission of the lands over which the roadways, parkways, or park driveways are laid out, or from the transfer of the care, custody and control of any park, public place, or street by any Essex County Board or municipality having control of any street, avenue or road within the county."

On consideration of the record the Board:

1. Rescinds the approval of municipal consents given by the Board, May 7, 1942, above referred to.

2. In such rescission the Board does not pass upon the contention of Public Service Coordinated Transport that approval should be given the municipal consents insofar as such consents extend to highways under the jurisdiction and control of the City of Newark, Town of Bloomfield and Town of Belleville, and

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reserves to Public Service Coordinated Transport the right, should occasion hereafter require, to make new application to the Board for such approval.

3. Grants the application of Public Service Coordinated Transport for a temporary permit under chapter 49, laws of 1942, to operate over the route above described.

In so doing the Board does not pass upon the contention of the Essex County Park Commission as to this Board's jurisdiction to grant such temporary permit for the operation through and over roadways, etc., under the jurisdiction and control of the Park Commission, because such determination is made unnecessary by the issuance by the Park Commission of its temporary permit or license.

4. The Board recognizes the reasonableness of the restriction imposed by the Park Commission against the acceptance or discharge of passengers from Union Avenue in the Town of Belleville, on the southeast and Franklin Avenue in the Town of Belleville, on the northwest, because the purpose of the operation is to provide direct transportation for workers employed in industrial plants engaged in war work, the location of which plants is beyond the limits set out in the Essex County Park Commission temporary permit or license. Therefore, a like restriction will be imposed in the Board's temporary permit to Public Service Coordinated Transport for operation on the same route for which municipal consents were granted.

Dated, July 2, 1942.

No. 2236

Informal Complaint—Clarence E. Lovejoy vs. New York and Long Branch Railroad Company—In re Inadequate Protection at Leonard Avenue Grade Crossing.

Major Clarence E. Lovejoy, for himself; *E. J. Harrington,* for New York and Long Branch Railroad Company; *Charles W. Jones,* for Borough of Oceanport; *Captain Gilbert N. Wiggins,* for Commanding General at Fort Monmouth; *John E. Bailly, Jr.,* for himself.

BY THE COMMISSION:

This matter is before the Board on the complaint of Clarence E. Lovejoy, a resident of Oceanport, N. J., for himself and other

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residents of Oceanport, requesting the Board to direct the respondent railroad to install flashing lights at the crossing of Leonard Avenue and the tracks of the New York and Long Branch Railroad Company in the Borough of Oceanport.

Leonard Avenue is a public highway, crossing on a slight skew two main line tracks and a side track of the Railroad Company which run in approximately a north and south direction. On the westerly side of the crossing, Leonard Avenue runs through Fort Monmouth where 12,000 to 15,000 soldiers are located. Across the tracks, the highway extends in an easterly direction to a dead-end on a promontory of land known as Horse Neck Point or Bailly Point, projecting into the South Shrewsbury River. Present protection at the crossing is afforded by two standard wooden crossing signs and a watchman from 7 A. M. to 7 P. M. during the summer months from June 15 to September 15. East of the railroad, this highway serves fifteen to twenty houses, eight or nine of which are occupied all year round—the remainder being used only as summer residences.

Except for a distance west of the crossing on the Fort Monmouth side of less than 100 feet, the views of the track on each side of the crossing are very limited, being obstructed by the Fort buildings. The views approaching the crossing from the east are good in the southeast quadrant but limited in the northeast quadrant by hummocks of land, trees and brush.

Certain residents living along Leonard Avenue on the east side of the crossing, a representative of the Borough of Oceanport, and an officer representing the Commanding General of Fort Monmouth appeared at the hearing in support of Mr. Lovejoy's request for flashing lights. The officer from Fort Monmouth, Captain Gilbert N. Wiggins, testified that the crossing is used almost daily by soldiers from the wire school at the Fort who are instructed in laying wire on the side of the crossing opposite Fort Monmouth.

The installation of flashing lights was opposed by the Railroad Company on the ground that there is insufficient highway traffic over the crossing to justify the necessary expenditure for flashing lights, which are estimated by the Railroad Company to cost $6,048. The Railroad Company caused a 24-hour check of highway traffic to be taken on March 14, 15 and 16, 1942, which showed that during the 24-hour periods there were 76, 71 and 90

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automobiles which passed over the crossing on these days, respectively.

The volume of highway traffic is not the sole criterion by which the hazardous nature of a grade crossing should be determined. There are other factors which must be taken into consideration, including the views of the track and the speed of the trains. The record shows that the views from the Fort Monmouth side are very restricted and that the speed of trains across the highway is approximately 40 miles an hour. Four accidents have occurred at the crossing since 1935.

The Board concludes and determines that

(1) This crossing should be protected by the installation of two standard flashing lights with backlights, equipped with the customary standard reflector crossing signs and reflectorized signs indicating the number of tracks at the crossing;

(2) the installation of flashing lights be completed on or before August 1, 1942;

(3) upon completion of the installation of flashing lights, the services of the crossing watchman may be dispensed with.

A representative of the Railroad Company testified that, due to the war, difficulty might be encountered in obtaining the necessary materials for flashing lights. In that event the Railroad Company, of course, may formally present the matter to the Board for consideration.

An Order in accordance with the above shall issue.

Dated, May 21, 1942.

No. 2237

In the Matter of the Application of the Borough of Glen Rock for Further Consideration of a Petition Filed by the Borough for Elimination of the Rock Road Grade Crossings in Said Borough Where Said Road Crosses the Main Line of the Erie Railroad and the Bergen County Short Cut Line.

MODIFICATION OF ORDER

The Board of Public Utility Commissioners, on July 27, 1938, ordered the Erie Railroad Company to alter certain crossings of the railroad where the Main Line and the Bergen County Short

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Cut Line intersect Rock Road at grade in the Borough of Glen Rock, County of Bergen, State of New Jersey, in accordance with the plan attached to said Order. Construction was ordered to start on October 1, 1938. Subsequent modifications of this Order were dated November 30, 1939, and February 27, 1941, which latter modification provided that the work be started May 1, 1942, and be completed April 30, 1943.

Applicant, Erie Railroad Company, now requests an extension of time for beginning the work to May 1, 1943, and the completion thereof to April 30, 1944.

At the hearing counsel for applicant represented to the Board that because of war priorities materials necessary for the project cannot be obtained. For that reason the application, which was not opposed, will be granted. The other reasons urged for the extension have not been and need not now be considered.

Because of war priorities, the Board

HEREBY ORDERS AND DIRECTS that its Order of July 27, 1938, shall be and the said Order is hereby modified so that the Erie Railroad Company shall begin the actual work of construction in the performance and execution of said Order on or before May 1, 1943, and shall complete the work within twelve (12) months thereafter, or by the 30th day of April, 1944, unless in the meantime, for good cause shown, after hearing upon notice, said beginning date may be advanced. The Order in all other respects to remain as previously determined.

Dated, May 28, 1942.

FURTHER MODIFICATION OF ORDER

The Board of Public Utility Commissioners, by Order dated July 27, 1938, directed the Erie Railroad Company to alter certain crossings of the Railroad where the Main Line and the Bergen County Short Cut Line intersect Rock Road at grade in the Borough of Glen Rock, Bergen County, New Jersey, in accordance with the terms of said Order and plan attached thereto. This Order was subsequently modified on November 30, 1939, February 27, 1941, and May 28, 1942, which last modification provided that the work be started on or before May 1, 1943, and be completed by April 30, 1944.

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The Erie Railroad Company, by petition dated April 16, 1943, now requests that the Board's Order be further modified to postpone the actual start of construction for the elimination of these grade crossings. In support of this request, counsel for the Petitioner represented to the Board at the hearing that wartime restrictions prevent the construction of any projects for elimination of grade crossings at the present time.

The Board of Public Utility Commissioners, therefore, recognizing that it is impossible to obtain labor and material for the elimination of these grade crossings,

HEREBY ORDERS AND DIRECTS that its Order of July 27, 1938, shall be and the said Order is hereby modified so that the Erie Railroad Company shall begin the actual work of construction in the performance and execution of said Order on or before June 1, 1945, and shall complete the work within twelve (12) months thereafter or by May 31, 1946, unless in the meantime, for good cause shown, after hearing upon notice, said beginning date may be advanced. The Order in all other respects to remain as previously determined.

Dated, May 26, 1943.

Commissioner Boswell did not participate in this Modification of Order.

No. 2238

In the Matter of the Resolution of the Borough of Mendham Dated February 11, 1942, Requesting Approval of the Revocation of Municipal Consent Granted to the Mendham Bus Company to Operate Buses in That Municipality on the Morristown-Chester Route Along State Highway Route No. 24, and Failure of Mendham Bus Company to Operate Service Since January 5, 1942, on the Mendham Bus Route, P. U. C. Route-File No. 219-285 and on the Mt. Freedom Bus Route, P. U. C. Route-File No. 178-285.

Elden Mills, for Borough of Mendham and Township of Morris; *W. H. Blake* and *J. H. Mulhern,* for Public Service Coordinated Transport.

BY THE COMMISSION:

On February 11, 1942, the Borough of Mendham adopted a resolution purporting to revoke a municipal consent granted by the Borough to the Mendham Bus Company for the operation

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through the Borough of buses on a route designated as the Morristown-Chester Bus Route. The Borough thereupon applied to the Board for approval of the purported revocation. The matter was set by the Board for a hearing on April 23, 1942. At the hearing it was conceded by the Borough of Mendham that the Mendham Bus Company was not notified of the proposed Borough action to rescind. Therefore, the Respondent was not afforded an opportunity to answer and defend the complaint.

Because of failure of notice by the Borough to the Respondent the purported rescission by the Borough cannot properly be the basis for the application of the Borough of Mendham to the Board for approval of the purported rescission of the municipal consent. However, because of the failure of the Respondent to operate subsequent to January 5, 1942, the Board, on its own motion, instituted a proceeding for the revocation of municipal consents and set the matter for hearing on April 23, 1942. Both proceedings were heard at the same time. The Respondent was duly served with notice of the Board's action but did not appear.

At the hearing, testimony was submitted to the effect that the Defendant had ceased operations without the Board's consent. That is ground for revocation of the Board's approval of a municipal consent. Since the day of the hearing, however, the Respondent has represented to the Board that it has acquired equipment and desires to resume operations on the Morristown-Mt. Freedom Route via Brookside, which route is specifically described in Schedule "A" hereto attached. The equipment has been inspected and meets with the Board's rules and regulations. The reason for the cessation of service, as stated by the president of the Respondent Company, was that a son who had operated one of the buses had been inducted in the Army and that, in addition, the business in the territory during the winter months was not sufficient to pay operating expenses.

Although this is a second offense, the Board will accept the reasons offered by the Respondent for failure to operate and afford the Respondent another opportunity to resume operations on the Morristown-Mt. Freedom Route via Brookside.

This conclusion results in the rescission of all municipal consents heretofore approved by the Board with the exception of the consents of the Town of Morristown, Morris Township and the Township of Randolph.

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This approval is subject to the following conditions, that:

1. All of the Board's rules and regulations are fully complied with.

2. Full operation be commenced within ten (10) days from the date hereof.

3. Respondent file with the Board on or before June 14, 1942, a time-table covering operations from 10:00 A. M. to 10:00 P. M., with a headway of not less than one (1) hour.

4. Failure to fully comply with these conditions will result in a proceeding to revoke approval of municipal consents on this route.

Dated, June 4, 1942.

SCHEDULE "A"

MENDHAM BUS COMPANY

MENDHAM BUS ROUTE (P. U. C. ROUTE-FILE No. 219-285)

Has approval for the operation of not more than two (2) buses in Morristown, Morris Township and Randolph Township over the following route:

Beginning at the D., L. & W. Railroad Station in Morristown, thence via Morris Street, Park Place North, Park Place West, Washington Street, Mendham Avenue to Mendham Township, Mendham Road through Mendham Township and Mendham Borough, thence via Main Road, Main Street, Woodland Avenue, Brookside Avenue, to Sussex Avenue (Morristown-Succasunna Road) to intersection of Sussex Avenue and Calais Road, Mt. Freedom. Returning via the same route to Washington Street, Morristown, thence via Park Place South, Park Place East, Morris Street to D., L. & W. Railroad Station, Morristown.

Fares

The fares to be charged for this service are as follows:

Between the terminal in Morristown and Washington Valley Road	10c
Between Morristown Terminal and the Terminal in Randolph Township	20c

Subject to the following restrictions:

1. That the operators of said buses shall not accept passengers who begin and end their trips in the Town of Morristown.

2. That the buses shall operate with closed doors on that portion of the route in Mendham Township and Mendham Borough

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No. 2239

Inquiry In Re Accident at Exchange Place Station on Hudson and Manhattan Railroad Company on April 26, 1942.

Upon the derailment of the Hudson and Manhattan train near Exchange Place Station, Jersey City, on April 26, 1942, resulting in five deaths and many injuries, this Board proceeded with its usual investigation. The facts disclosed led to the calling of a public hearing. The purpose of the hearing was to examine into the circumstances surrounding the accident to determine two things: first, the cause of it; and, second, whether the cause was the result of failure to provide adequate precautions for the safety of the public.

Upon the completion of the hearing the Board felt the circumstances warranted further exploration. It has, therefore, during the past weeks caused physical inspections of the railroad to be made by its staff and has examined into other matters having to do with the finances, control and operation of the road. This further exploration showed conditions which the Board does not consider unrelated to the fatal accident.

I.

AS TO THE ACCIDENT ITSELF

While a great deal of testimony was adduced with reference to the accident little need be said here.

It is clear that the wreck was caused by the enormously excessive speed at which the train was operated over a dangerous curve. This, of course, was contrary to the regulations of the road and apparently in violation of signals visible to the motorman. From that aspect the accident was the result of "man failure."

Primary and uncontradicted evidence was adduced to the effect that the motorman was intoxicated at the time. It is not necessary for the Board to determine this as a final conclusion of fact, and it does not undertake to do so. None of the witnesses was cross-examined and there was no attempt to examine all of them. However, for the purpose of this investigation, and in accordance with the testimony before it, the Board assumes the fact to be that the motorman was intoxicated at the time he undertook

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to operate the train from the Newark Station at 10:32 P. M. and at the time of the wreck some sixteen minutes later.

No useful purpose would be served by further discussion of the accident itself. What concerns this Board is how and why the motorman in question could have been entrusted with the operation of a train while in an intoxicated condition. This question brought the Board to inquire into the general practices of the road with reference to its personnel, supervision, equipment, operating outlay, and maintenance. It cannot but conclude that the accident was the result of the manner of operating the road—a result that might reasonably have been anticipated. The fact stands out that the system of supervision is so ineffective that a drunken motorman would not with any degree of certainty be prevented from operating a train.

The motorman of the train involved in the accident reported for duty at 4:42 P. M. He was to operate trains from Newark to Cortlandt Street from 4:52 P. M. to 12:20 A. M. No attention was paid to him by any of his superiors throughout his tour of duty. Apparently the management—or at least their employees who testified—considered there was sufficient physical inspection of him when at 4:42 P. M. he walked up to a window and signed a time sheet for a clerk who was at a desk inside a cage and some feet away. He failed to report to operate a train from Newark at 9:32 P. M. but such failure did not seem to be considered of any importance; it was not followed up by any inquiry as to the cause.

As a matter of fact, no one at the Newark Station seemed to have been charged with any real responsibility under the circumstances presented, and unless the regulations in effect are completely revised and enforced through effective supervision, the same kind of an accident could happen in the same way at any time. There was no "man failure" in the aspect of supervision. No reasonable supervision had been provided by the management.

II

GENERAL CONDITIONS AFFECTING OPERATION

The following are some of the circumstances surrounding the general operation of this road which the Board concludes result in inefficiency, lack of supervision, lack of morale, and consequently failure by the management to furnish safe, adequate and proper service to the public.

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1. *Equipment and Operation*

The road does an extensive business between Newark, Jersey City, Hoboken and New York during twenty-four hours a day.

The following is an analysis of the Company's equipment.

The Company began operations in February of 1908 and in its first annual report to the Board for the year 1912 indicated that it owned 226 passenger cars. The Company subsequently added the following cars to its services:

1921.....	25 cars
1922.....	25 cars
1923.....	12 cars
1924.....	13 cars
1927.....	4 cars
1928.....	20 cars
Total	99 cars

In the years 1931 and 1938 one car per year was retired, or two cars during 34 years of operations.

At the close of 1941 the Company owned 323 passenger cars, with an average age per car of 29.24 years.

The following table shows the number of years each age group of cars has been in service:

224 cars	for 34 years
25 cars	for 21 years
25 cars	for 20 years
12 cars	for 19 years
13 cars	for 18 years
4 cars	for 15 years
20 cars	for 14 years

The Company in its report to the Board for the year 1941 indicates in its schedule for depreciation that the expected life for its passenger cars is thirty years. Under the Company's own estimates of the expected life of its passenger cars, 69.3 per cent, or 224 cars have been in service thirty-four years, and it is assumed that they can be retained in service only by an extraordinary degree of maintenance.

The Company owns the rights-of-way only east of Journal Square. It operates on the tracks of the Pennsylvania Railroad from Newark to Journal Square. This joint operation between Pennsylvania Railroad and the Hudson & Manhattan Railroad is carried on by virtue of a contract made between the two com-

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panies on April 18, 1906, under which the Pennsylvania Railroad receives 60 per cent of the net revenues and the Hudson and Manhattan Railroad receives 40 per cent.

The Pennsylvania Railroad cars are operated over the tracks of the Hudson & Manhattan, as are Hudson & Manhattan cars operated over the Pennsylvania tracks.

Typical of the provisions of the contract is the following complex clause with reference to the employees:

> "5. In proportion to the length of their respective lines used for said service through electric train service, the P. R. R. and the H. & M. respectively shall employ the motormen, conductors and other joint employees required in connection with the operation of such joint through electric train service. Such employees while upon the railroad of the Pennsylvania Company or the H. & M. shall be subject to the regulations and to the orders of their respective superintendents or other proper officers, and to secure uniformity in time and rules the tunnel companies agree to adopt a standard time," etc.

This dual responsibility causes confusion in the operation of the trains in and out of the Newark Station and to and from Journal Square. The movement of the trains originates from the South Street Yards of the Pennsylvania Railroad. The trains are brought to the Newark Station by employees of the Pennsylvania Railroad. At the Newark Station crews of the Hudson & Manhattan Railroad take charge of the trains. At the Newark Station there is a divided responsibility between the employees of the Pennsylvania Railroad and the Hudson & Manhattan Railroad. The two railroads operate under separate sets of employees' rules. While these rules are similar to a great degree, it appeared that in most cases the employees of the Pennsylvania Railroad were not familiar with the rules of the Hudson & Manhattan Railroad, nor were the employees of the Hudson & Manhattan Railroad familiar with the rules of the Pennsylvania Railroad.

2. Signal System

Considerable testimony at the hearing bore upon the efficiency of the signal system on the road. The Board will make no comment on that testimony for two reasons: there was no indication that the signal system had any causal relation with the accident, and in addition representatives of the Interstate Commerce Commission sat with the Board at the hearing and, it is understood, will consider that phase of the matter. Any comment here would be repetitious.

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3. *Executive Direction*

It appears from the facts adduced at the hearing, as well as examination into the records of the Company, that the Hudson & Manhattan Railroad is operated by a corporation which was formed simultaneously in the State of New York and in the State of New Jersey on December 1, 1906, and is controlled by a board of directors from the New York offices at 30 Church Street, New York City. It appears that the only executive who for some years past has had any direct administrative supervision over the operation of the railroad is the President and General Manager, Mr. C. S. Klumpp. Under him are three supervisors, to wit, a Superintendent of Transportation, a Superintendent of Ways and Structures, and a Superintendent of Maintenance and Equipment. These three superintendents receive salaries commensurate with their positions, but not commensurate with positions of executives charged with the efficient supervision, direction and operation of a road. Mr. Klumpp has been confined to his home with illness since November, 1941, since which time the whole management of the road has been put upon the three superintendents.

The Board is not to be considered as disapproving the attitude of the railroad in allowing Mr. Klumpp a leave of absence during his illness, nor is it critical of the integrity and ability of the three superintendents, who, in fact, performed their duties as well as could be expected. However, it is perfectly clear that for at least the last six months the road has been operated without any centralized authority and responsibility or any proper executive and administrative head. A fair conclusion to be drawn from these circumstances is that the inefficiency in the operation and the lack of supervision of employees and the lack of morale among the employees is due to lack of executive direction from the management of the road.

4. *Newark Station*

Upon reporting for duty, the members of the crews sign a register in a room near the bus terminal on the main floor level of the station. There is practically no supervision of the members of the crews, the registry being handled by a subordinate clerk. After the crews have registered for their day's work, they are not required to register again between runs of trains to which they have been assigned. The normal time between runs is generally

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about thirteen minutes but there is what is known as a swing period at about the middle of the respective daily assignments when the men have about two hours for eating and relaxation.

When a westbound train reaches Newark, it is turned over to an engineman or hostler who takes it to the South Street Yard or tail track, the operating crew disembarking at the Market Street Station. An eastbound train, originating at Newark, is brought from South Street into the west end of the station where usually one member of the crew boards the train and walks through, opening some of the doors and usually lighting only the forward car, leaving the others in darkness. When the train is brought into the station to load passengers, the remaining trainmen board the train. Frequently the destination signs are not properly posted when the train leaves Newark. During the period when the train waits in the station loading passengers, there are rarely any cars lighted except the head car. When an eastbound Pennsylvania train arrives in the Newark Station to transfer passengers to a Hudson & Manhattan train, there are frequent occasions when no one calls out or directs transferring passengers to the Hudson & Manhattan train.

Responsibility for everything in the Newark Station having to do with the operation of the trains, including the crews of Hudson & Manhattan trains, resides with the Assistant Station Master of the Pennsylvania Railroad who is on duty at the time. Clearly, there is far too much work required of an Assistant Station Master. He is supposed to travel from one platform to another at the train level as well as supervise other personnel except the ticket sellers and information clerks.

5. *Journal Square Station*

This is a very important station. It is a terminal for uptown and downtown Hudson & Manhattan trains and an intermediate station for trains to and from Newark. There is no responsible person in charge of the station, trains and railroad personnel. A uniformed policeman in the employ of the Hudson & Manhattan Railroad Company claims to be nominally the Station Master but his responsibility does not extend to the crews of the trains. He sometimes relieves the ticket examiner and takes care of disorderly people but appears to have no supervisory responsibility other than that of policing the station, nor has he any authority under the printed rules.

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The train crews who start their day's work at this station are not required to register. Their names are posted on a bulletin board in the trainmen's room, showing their assignment for the day. When the time comes for the respective crews to make their runs, they appear down on the platform and are verbally recognized by a train starter, whose duty it is to see that they are properly equipped and that they board the train entering the westbound part of the station. One member of the crew, namely, the motorman, checks in with the dispatcher whose office is located at the west end of the eastbound platform. The dispatcher is nominally responsible for all of the train crews, but it is physically impossible for him to do much more than remain in his little office dispatching trains. He can have little if any opportunity to inspect members of the crew, a function which, of course, should not be performed in a superficial or casual manner.

As above stated, the dispatcher's office for eastbound trains is at the westerly end of the platform. He is the man who rings a signal for train departures, one bell for the downtown trains and two bells for the uptown trains. Both the downtown and the uptown trains, while on separate tracks in the station, must travel over the same track after leaving the station for an eastbound trip, which, of course, necessitates track signals for the respective trains. Due to a lack of coordination between the signals given for the train departure and the track signals, there is a constant irritation to the traveling public to find a train which has been signalled to depart standing in the station with its doors closed for a considerable time. This condition could be prevented if arrangements were made so that the doors remained open until departure time.

6. *Hoboken Station*

This, likewise, is a station where train crews originate. The dispatcher, whose office is at the leaving end of the platform, is supposed to check in the train crews other than the motormen but this is not done by any system of registry and it is doubtful that the dispatcher at this point has sufficient time aside from the dispatching of trains to inspect train crews properly. The motormen starting their work at this station have no responsible supervisory officer to whom they report. In contrast with the dispatcher's duties at Journal Square, it appears that the dispatcher at this point has nothing to do with the motormen, nor has anyone else.

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Coordination between the Delaware, Lackawanna & Western Railroad and the Hudson & Manhattan Railroad should be improved. As at Journal Square, there is the irritating condition of a passenger arriving on the platform for either an uptown or a downtown train and finding the doors closed while the train remains in the station for a period of time thereafter. This could be prevented by coordinating the track signals with the train departure signals so that the doors would remain open until the train is actually ready to depart.

7. Financial Status

As a part of its inquiry into the causes of the accident, the Board requested its staff to examine into the financial status and affairs of the Company as set forth in the Company's annual reports on file with the Board so that it might be determined whether there was any indication that the unsatisfactory operation of the road is related in any way to its financial position. This examination has been completed, and from the information at hand, the Board is forced to the conclusion that there is some such relationship.

It is not feasible within the scope of these findings to make a complete analysis of the reports in question, but an exposition of a few of the figures will lead at least to a prima facie presumption that the affairs of the Company have gradually come to a state where they are not conducive to safe and adequate service.

Some of these figures are as follows:

(a) The Company's combined operating revenues and non-operating income declined from $8,369,436 for the year 1932 to $6,489,622 for the year 1941, a reduction of $1,879,814 or 22.46 per cent. It appears that the Company's major loss in revenue resulted from the decline in the income from the rentals of the Hudson Terminal Buildings and its miscellaneous real estate holdings. The income from this source amounted to $1,673,706 in the year 1932, as compared with $617,470 in 1941, an indicated reduction of $1,056,236 or 63.1 per cent.

(b) The Company's revenue from passenger fares declined from $8,461,954 in the year 1927 to $5,461,858 in 1941, a decline of $3,000,096 or 35.5 per cent.

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(c) The Company has outstanding securities and deferred interest in the total face amount of $113,327,388, i.e.:

4½ per cent First Mortgage Bonds	$944,000
5 per cent First Lien Bonds	32,918,705
5 per cent Adjustment Income Bonds	28,453,000
Deferred Interest	5,761,733
Total Debt	$68,077,438
Preferred Stock	5,242,939
Common Stock	39,995,385
Stock Liability for Conversion	11,626
Total Stocks	45,249,950
Total Securities	$113,327,388

(d) The Company's fixed charges on its funded debt for the year 1941 amounted to $3,111,065, or 47.93 per cent of its combined gross revenues and nonoperating income of $6,489,622.

(e) The Company's expenditures for the maintenance of its ways and structures were $4,737,502 or 4.376 cents per revenue car mile for the ten-year period from 1922 to 1931, inclusive, as compared with $3,445,396 or 4.288 cents per revenue car mile for the ten-year period from 1932 to 1941, inclusive. This indicates that in the second period the Company reduced its expenditures for maintenance by $1,292,106 or to 72.7 per cent of its expenditures in the first period. In this respect the effect of the decrease in car miles and of the increase in age of equipment should be made the subject of further study.

(f) The Company's expenditures for the maintenance of its equipment was $3,502,326 or 3.234 cents per revenue car mile for the first ten-year period, as compared with $2,400,084 or 2.986 cents per revenue car mile for the second ten-year period. This indicates that in the second period the Company reduced its expenditures for maintenance by $1,102,242 or to 65.8 per cent of its expenditures in the first period.

(g) The Company's expenditures for additions to its property were $3,936,442 for the first period as compared with expenditures of only $334,888 for the second period. This indicates that in the second period the Company reduced its expenditures for the betterment of its property, as compared with the first period, by $3,601,554.

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(h) The Company, in the first period, retired $363,370 of its property, as compared with its retirements in the second period of only $19,040. It would be proper to assume that retirements would be accelerated as the property grows older, instead of being reduced in amount as the Company's reports indicate.

(i) The Company's annual report to the Board for the year 1925 showed "Fixed Capital December 31, 1908" amounted to $91,929,048 and was unclassified. During the period 1925 to 1941, or sixteen years, only $600 of this property was retired. It is noted that in the year 1929 over $1,000,000 of the property was sold.

(j) The statement made above with reference to the lack of purchase of new equipment should also be noted.

III

RECOMMENDATIONS

1. The executive management of the road should be reorganized so as to furnish adequate direction to the operation.

2. Adequate provision should be made and sufficient salaries paid for the necessary executive and supervisory personnel.

3. Proper supervision of motormen, trainmen and equipment should be available at all stations at all times. This supervision should be by capable men who have sufficient time and facilities to perform this function.

4. At stations such as Journal Square and Hoboken, where transfer of passengers is an integral part of the operation, efforts should be made to synchronize the movement of trains so that the public may not be unduly delayed.

5. The financial structure of the road should be examined by the proper officials of the road. In this respect there should be considered particularly the passenger revenues, the expenditures for maintenance and equipment, the large sums presently required to pay interest on its outstanding bonded indebtedness, and the possibility that the effort to carry an indebtedness not warranted by the earnings of the road is jeopardizing safe and adequate service.

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IV

CONCLUSION

The foregoing conclusions and recommendations are based upon an ex parte hearing, the examination into the records of the Company filed with the Board, and observations of the physical plant and the operation of the road. Consequently they are made without opportunity having been given to representatives of the road to present their views to the Board.

Therefore, the Board directs that the Company submit to it within thirty days its written comments and a statement as to the action it will take in reference to the recommendations herein made. It is expected that the cooperation of the Company in this respect will be of such a nature as to obviate the need for any further formal action by the Board.

Dated, June 11, 1942.

No. 2240

In the Matter of the Application of the Pennsylvania Railroad Company for Permission to Discontinue the Part-Time Agency at Ocean Gate Ocean County, New Jersey.

John A. Hartpence, Esquire, for the Pennsylvania Railroad Company; *John Lamping, Esquire,* for Ocean County Business Associates.

BY THE COMMISSION:

This is an application to discontinue a part-time agency from 5:50 A. M. to 7:00 A. M.; 9:40 A. M. to 11:00 A. M.; and 3:00 P. M. to 5:50 P. M., at Ocean Gate, Ocean County, New Jersey. On April 22, 1929, the Board authorized the discontinuance of a full-time agency at the station except for the period from May 1 to September 30, annually. The present application is based upon the ground that "the volume of business has decreased during the Summer months so that there is an exceptionally large percentage of expense compared with revenue in maintaining an agent at said Ocean Gate station during said period and that the maintenance of an agent is no longer warranted."

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Ocean Gate is located two miles west of Toms River and it is contemplated to conduct the Ocean Gate business under the supervision of Toms River full-time agency. During the past two years, the gross receipts from freight traffic in less than carload lots, averaged about $7.00 per month. The revenue from carload lots during 1939 was $260.00; 1940, $62.00; and 1941, $113.00, or an average for the past three years of $217.00 per month. The average cost of maintenance of the agency on a yearly basis is $95.00 per month, or $380.00 for June, July, August and September.

The passenger revenue at the station for 1939 was $700.00; 1940, $502.00; and 1941, $602.00. These revenues, according to Exhibit 6, were for June, July, August and September. There are no exhibits showing the revenues for the other months of the year. The number of passengers using the station does not appear either in the testimony or in any exhibit. It does appear, however, that the gross annual revenue substantially exceeds the annual maintenance cost.

The application was opposed by a business association in that locality.

The burden is on the applicant to satisfactorily prove that necessity and convenience do not now require the maintenance of the station. Because it is clear that the station is not maintained at a loss and, from an analysis of the revenues, both freight and passenger, that the station serves a necessary convenience to the public, the application is denied.

Dated, June 11, 1942.

No. 2241

In the Matter of the Application of Gick and Bingemann, Inc., for Approval of Municipal Consent of the Township of Delaware for Extension of Route for Six of the Nine Buses Presently Operated on the Camden, Marlton, Medford Bus Route No. 54 (P. U. C. Route-File No. 071-162),

In the Matter of the Application of Gick and Bingemann, Inc., for Approval of Municipal Consents for the Operation of Twelve Additional Auto Buses (Making a Total of Twenty-one) Between Camden and Medford on the Camden, Marlton, Medford Bus Route No. 54 (P. U. C. Route-File No. 071-162), and

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In the Matter of the Application of Gick and Bingemann, Inc., for Approval of Municipal Consents for the Operation of Six Additional Auto Buses (Making a Total of Nine) on the Camden, Mapleshade, Lumberton Bus Route No. 70, Between Camden and Mapleshade (P. U. C. Route-File No. 069-162).

C. W. Rotzell, for Gick and Bingemann, Inc.; *Harry V. Osborne,* for the Pennsylvania Railroad Company; *William H. Blake,* for Public Service Coordinated Transport and Public Service Interstate Transportation Company; *George Landis,* for Pennsauken Township.

BY THE COMMISSION:

At the hearings on the above applications for approval of municipal consents the testimony indicated clearly that the purpose of the proposed service which would be provided by the approval of the applications was to transport workers to and from war industries in Camden, and, by interchange with other facilities, to war industries in Philadelphia.

The testimony disclosed that the claim of alleged public convenience and necessity for the proposed operation rested almost entirely upon transportation of workers to industrial plants engaged in war work.

On May 14, 1942, in view of the enactment of emergency permit statutes, the Board announced the adoption of the following policy:

> "Unless the circumstances incident to the application for approval of municipal consents for the operation of buses discloses definitely the public convenience and necessity of the proposed operation, divorced from any condition created by war emergency, the approval of such municipal consents will hereafter be denied by the Board and the applications considered only for emergency permits under a recently enacted law."

At the conclusion of the hearings on the above applications the Board announced that:

> "This expressed policy is in keeping with the establishment of similar rules by the Office of Defense Transportation, in which Director Joseph B. Eastman described the following prohibitions: 'Extensions of existing bus routes and inauguration of new routes should be made only to places of defense employment and military and naval establishments or to meet similar situations where failure to provide such additional service will have a definitely unfavorable effect on the war effort.'
>
> "The present applications are alleged to be for the establishment of emergency service and therefore, the applications for the approval of the municipal consents are denied. The denial is without prejudice and the applicant's rights in the existing municipal consents will be preserved to it.

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"The applicant may apply for temporary permits under P. L. 1942, chapter 49, and if it appears that the proposed operations are primarily for service to war industries, the applications will be disposed of promptly without formal hearing."

This decision is filed to formally record the conclusion announced orally by the Board at the conclusion of the hearings.

Dated, June 25, 1942.

No. 2242

In the Matter of the Application of Dover-Mt. Hope-Picatinny Bus Company for Approval of Reduction in Fares and the Issuance of Weekly Commutation Tickets, Under Conference Ruling No. 15 Revised, Between Dover and the Picatinny Arsenal, on the Mt. Hope Bus Route (P. U. C. Route-File No. 103-301).

Harry Silverstein, for Dover-Mt. Hope-Picatinny Bus Company; *J. H. Mulhern* and *William H. Blake,* for Public Service Coordinated Transport.

BY THE COMMISSION:

When the Board approved municipal consents of the Town of Dover, Borough of Wharton and Township of Rockaway for the operation of two buses from Dover to the Picatinny Arsenal, the fares were fixed as follows:

From Dover to Union Turnpike and Dewey Avenue, Wharton	5c
From Dewey Avenue and Union Turnpike to Richards Mine Road	5c
From Richards Mine Road to Mt. Hope Avenue	5c
From Mt. Hope Avenue to Picatinny Arsenal, Rockaway Township	5c

At the hearing September 23, 1941, on the application to approve the municipal consents, in reply to an inquiry by Mr. Straw for the Public Service Coordinated Transport,

"Q. Will there be any change in the fare? At the present, Dover to Mount Hope is 20c."

to which Mr. Silverstein, then and now attorney for applicant, replied, "No there will be no change to the Arsenal."

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Mr. Straw then stated for the record, "Then I am not entering any objection in that proceeding."

The reason for the waiver of objection was that applicant's fare would be 20c, and that of the Public Service Coordinated Transport, 10c, between practically the same termini, although via a different route for a portion of the distance.

Applicant about six months later filed the present proposed revision of fare "to 10c from any point in the Town of Dover to the Picatinny Arsenal for employees working at the Arsenal, who ride on said bus from the terminal point in Dover to the said Arsenal, or from the Arsenal to the terminal point in Dover, which passengers use the buses of the said company on trips made to meet the 'shifts' of employees at the Arsenal, and which 'shifts' do not ordinarily interfere with the normal and usual passenger traffic on said line," and "to issue weekly tickets for a period of seven days to be used on said buses from the terminal point in Dover to the terminal point at the Picatinny Arsenal." * * * "the cost of such weekly tickets to be $1.25" for a seven-day week.

The reason for the change of intentions as to fares was not explained. However, the fares proposed represent a 50 per cent reduction from the fares fixed by the Board and a reduction to the 10c fare charged by Public Service Coordinated Transport between Dover and the Arsenal. The result is direct competition between practically the same terminal in Dover and the Picatinny Arsenal, with the Public Service Coordinated Transport.

According to the fares proposed, a passenger who now pays and will be required to pay in the future for transportation from Dover to Mount Hope Avenue, 15c, will be charged 5c more than a passenger who rides from Dover to Picatinny Arsenal about 1.9 miles beyond Mt. Hope Avenue.

Conversely, a passenger who now pays and in the future will be required to pay 10c from Dover to the intersection of Richards Mine Road and Mount Pleasant Avenue, will pay for less than half the distance, the same rate of fare from Dover to Picatinny. Such a schedule of rates is obviously discriminatory.

A further objection was interposed and supported by proof that the Wharton Bus Route No. 10, operated by Public Service with a maximum of five buses, affords sufficient seating capacity for passengers destined from Dover to Picatinny and in the op-

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posite direction. The route is divided into two zones, one from Union Avenue and Government Road for a 5c fare, and two, from Union Avenue and Government Road to the Arsenal, for a 5c fare. The headway is approximately twenty minutes and the running time approximately half an hour, but all buses meet the shifts of the Arsenal.

It is obvious that the proposed schedule is inequitable and except for the weekly tickets, good only between Dover and the Arsenal, and creates a discriminatory fare. Passengers in the same bus not destined for the Arsenal would be required to pay a greater fare than passengers to the Arsenal. Either the Arsenal fare is unreasonably low or the intermediate fares are unreasonably high.

For these reasons the application is dismissed.

Dated, June 25, 1942.

No. 2243

In the Matter of Application for Temporary Permit to Operate Under Chapter 49, P. L. 1942, by Gick and Bingemann, Inc., 111 Marlton Avenue, Camden, New Jersey.

ORDER TO SHOW CAUSE

Whereas, heretofore Gick & Bingemann, Inc., applied to the Board of Public Utility Commissioners of the State of New Jersey under chapter 49 of the laws of 1942, for a temporary permit to operate six additional auto buses on the Camden-Marlton-Medford Bus Route No. 54 between Medford and certain specifically named war plants in Camden, and

Whereas, the said Board on the 9th day of July, 1942, granted said application and authorized said Gick & Bingemann, Inc., to operate six additional auto buses between Medford and the said war industries in Camden, and

Whereas, the said temporary permit was granted subject to certain conditions, among which are the following:

> "This is a temporary certificate to expire within six months of the expiration of the present emergency or sooner at the will of the Board and is given subject to all of the restrictions and conditions set forth in chapter 49, P. L. 1942.

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"2. All six (6) buses shall be clearly marked 'Camden and Philadelphia War Plants.'

"3. This permit is issued exclusively to afford transportation of employees to and from the plants mentioned in the petition filed herein, to wit:

"Warren Webster Co.; R. C. A.; Camden Forge Co.; N. Y. Shipbuilding Corporation; Mathis Ship Co.; Penn-Jersey Shipbuilding Corp.; also Philadelphia Navy Yard; Frankford Arsenal; S. K. F. Co.; Budd Wheel Co.; and other war industries that may now or hereafter be located along the route or in the Camden or Philadelphia area.

"No other passengers shall be accepted, except as may hereafter be permitted by formal order of the Board.

"4. No passengers shall be accepted who begin and end their trips between the Pennsylvania Railroad Ferry and the intersection of 21st and Federal Streets in Camden.

"The proofs indicate that the buses presently operated by the applicant by virtue of the approval of municipal consents heretofore granted by the Board are inadequate to meet the transportation demands created by the war emergency, and that in addition to the present service, the use of the six (6) buses covered by the permit hereby granted is required to furnish adequate transportation facilities to the employees of war industries along the applicant's route."

Whereas, it appears from public complaint and from investigation by the employees of the said Board that in particular on the third day of August, 1942, and since that date the said Gick & Bingemann, Inc., has repeatedly violated said conditions and particularly has

(a) Failed clearly to mark all such buses "Camden and Philadelphia War Plants."

(b) Failed to use said six buses exclusively for the transportation of employees to and from the plants specifically mentioned in said temporary permit.

(c) Has without formal order of the Board accepted other passengers than those being transported to and from the plants aforesaid.

(d) Has operated auto buses over said route in excess of six auto buses so authorized without the authority and approval of the said Board.

Now, therefore, it is on this 6th day of August, 1942, ORDERED by the Board of Public Utility Commissioners of the State of New Jersey that said Gick & Bingemann, Inc., show cause before said Board on the 11th day of August, 1942, at 11 o'clock in the forenoon (Eastern War Time) at its offices, 1060 Broad Street, Newark, New Jersey, why the temporary permit heretofore granted to it should not be revoked for violation of the

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conditions attached thereto and of the laws of the State of New Jersey and the rules of the said Board, and why Gick & Bingemann, Inc., should not be directed to cease operation of other buses now being operated without the Board's authority or approval.

Dated, August 6, 1942.

ORDER

This matter comes before the Board upon the return of an Order to Show Cause issued by the Board, which Order, among other matters, alleged that Gick & Bingemann, Inc., had, without the authority and approval of the Board, operated auto buses on its Camden-Marlton-Medford Bus Route No. 54 between Medford and certain war plants in Camden in excess of the six auto buses authorized by the Board through the issuance of a temporary permit dated July 9, 1942, under chapter 49 of the laws of 1942, and which order, among other matters, required said Gick & Bingemann, Inc., to show cause why an Order of the Board should not issue requiring said Gick & Bingemann, Inc., to cease and desist from the operation without the authority and approval of the Board, of auto buses in excess of the six so authorized and approved by said temporary permit.

The Board after hearing finds and determines that said Gick & Bingemann, Inc., has operated, and does operate, auto buses in excess of the six so authorized and approved; that such excess operation was and is without the authority and approval of the Board and therefore unlawful, and

Therefore, hereby, on this 11th day of August, 1942, ORDERS AND DIRECTS said Gick & Bingemann, Inc., forthwith to cease and desist from operating over said route without the authority and approval of the Board more than the six auto buses so authorized and approved by the temporary permit issued to it by the Board under date of July 9, 1942.

Dated, August 11, 1942.

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No. 2244

In the Matter of the Application of the Salem Gas Light Company for Approval of Increase in Rates.

George B. Pidot, for the Petitioner.

BY THE COMMISSION:

The Salem Gas Light Company, by petition filed June 2, 1942, asked approval of a proposed schedule of increased rates attached to the petition as Schedule B, to be effective for the duration of the war and for one year thereafter. The proposed increases approximate 15 per cent over the present rates.

The Board suspended the proposed increases pending hearing and determination and gave notice of hearing to the officials of Salem and Penns Grove, the Chamber of Commerce of Salem and the local press, following wide publicity of the proposed increases given by petitioner.

At the hearing no objection to the proposed increases was raised.

The Board, in accordance with a request made by the Office of Price Administration, gave that Federal Agency notice of the pendency of the proceeding.

After review of the record made at the hearing, the Board determines that under the *special circumstances* of this application the increased rates proposed by Schedule B attached to the petition should be permitted to go into effect and that their suspension should be terminated.

This conclusion can only constitute a precedent on the special facts of this application. It does not constitute a basis for inferences as to the action of the Board on other applications for approval of increased rates involving facts that differ.

The findings of fact on which the Board rests its conclusion follow:

The petitioner, the Salem Gas Light Company, one of the oldest gas companies in the State, was organized in 1854 and has had a continued existence since that time without merger or consolidation with any other company.

The Company serves the City of Salem, having a population of 8,618, and is the sole source of gas service to the community.

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As of March 31, 1942, the capitalization of the Company stands as follows:

	Amount	*Per Cent*
Common Stock	$61,840.00	35
Notes Payable	46,000.00	25
Capital Surplus	84,770.00	47
Earned Surplus (deficit)	(12,304.00)	(7)
Totals	$180,306.00	100

From the Company's 1941 annual report the net book value of its utility plant (not including allowance for working capital) as of December 31, 1941, appears as $198,726, made up as follows:

Utility Plant	$251,580.00
Less depreciation reserve	52,303.00
Net Utility Plant	$199,277.00
Less Customers' Contributions for Extensions	551.00
Net Book Value of Utility Plant	$198,726.00

The Company claims as "the original cost of the property of the Company used and useful in rendering gas service on a depreciated basis as of December 31, 1941, the sum of $251,580.48. This claim it is unnecessary to pass upon on this application.

The Company introduced exhibits, without supporting testimony, claiming as the value of the property on a cost to reproduce basis, using 1940 price levels, $405,094.00. These exhibits can be given no weight. They are of interest only as indicating on 1940 price levels a marked difference between book value and estimated cost to reproduce the utility plant at this time.

The Company's gross revenue under present rates for the year ending March 31, 1942, was $57,355. For that period the Company's operating expenses, including taxes and provision for depreciation, were reported by the Company as $63,925.00.

While some items of operating expenses might be subject to question, as herein later indicated, the Board, for the purposes of this application, finds it unnecessary now to determine these questions.

It would appear that the present rates have not been sufficient to meet operating expenses, including taxes and reasonable provision for deprecation.

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According to the Company's testimony and reports "For the year 1939 the operating revenues were $54,777; gross income a red figure of $2,104, and net income a red figure of $6,665. For the year 1940 the operating revenues were $56,144; gross income a red figure of $4,480, and net income a red figure of $5,065. In 1941 the operating revenues were $56,611; gross income a red figure of $4,382, and net income a red figure of $4,685. For the 12 months ended March, 1942, the operating revenues were $57,355 and gross income a red figure of $6,540."

Of the gross revenue for the year ending March 31, 1942, approximately 83 per cent represented revenue from residential users. In view of the limited amount of commercial and industrial business and the present restrictions on the manufacture and sale of gas-burning appliances for residential users, little, if any, expansion in sales can be expected in the near future.

Heretofore, by intensive and progressive merchandising as well as the introduction of promotional rate schedules, the Company has gradually increased gas sales and revenues.

Proper and necessary expenses have, however, increased at a faster pace than revenues. The payroll of the Company alone increased in 1941, $6,124 over the payroll in 1938. This resulted "largely from reducing the work week to 40 hours and paying overtime compensation thereafter at one and one-half times the hourly rate." Fuel costs, too, have increased approximately 5 per cent.

If, for the 12 months ending March 31, 1942, an item of $500 charged to provide for a reserve for maintenance of the water gas set representing the estimated cost of overhauling the set, which work the Company expects to undertake as soon as necessary labor is available, is eliminated because not properly chargeable, as to total cost in any one year, and because over-accrual in coal gas maintenance reserve appears sufficient to cover provision for both coal and water gas sets, and if the composite depreciation rate is reduced from 2½ to 2 per cent (a matter that is yet to come before the Board as to the year 1943 and subsequent years), as to the propriety of which possible elimination and reduction the Board now makes no determination, the operating expenses, including taxes and provision for depreciation, would for the period ending March 31, 1942, fall to a lower figure as indicated in the following schedule. This schedule shows the return for

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the 12 months ended March 31, 1942, under present rates and the estimated return from proposed rates, accepting the company's estimate that the proposed rates will produce an increase in revenue of $7,802, which estimate is reasonable.

	Present Rates	*Proposed Rates**
Revenues	$57,355.00	$65,157.00
Operating Expenses†	$50,449.00	$50,449.00
Taxes	7,216.00	7,981.00‡
Depreciation†	4,608.00	4,608.00
Total Operating Deductions	$62,273.00	$63,038.00
Operating Income	($4,918.00)§	$2,119.00

The estimated operating income under the proposed rates is equivalent to 1.06 per cent of the net book cost of the property set forth above, namely, $198,726. This result is reached by using as a rate base for the purposes of this application a figure that is probably and perhaps clearly below the "fair value" on which the company is entitled to an opportunity to earn a fair return. It is at all events the lowest base rate figure available and includes no allowance for working capital. The rate of return is reached by resolving all doubts as to operating expenses against the Company. The Company has declared no dividends on its capital stock since January, 1938, nor has it paid anything by way of principal or interest on a note of $46,000 approved by the Board.

With due regard to the national policy against general increases in prices and to prevent inflation, the Board, nevertheless, on this record, cannot do other than find that the present rates are unjustly and unreasonably low and that the proposed rates are not unjustly nor unreasonably high and that the denial of the proposed increases might put in jeopardy ability to render safe, adequate and proper service.

* On assumption that sales and revenue deductions, excluding taxes, will continue at the same level as for the year ended March 31, 1942.

† As adjusted.

‡ After adjustment for taxes related to revenues.

§ Deficit.

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This conclusion is rendered further inescapable by the increases in costs of operation that have taken place since March 31, 1942, which will in all probability reduce the rate of return to the Company to substantially less than 1.06 per cent as found above, of the net book value of the property of the Company, $198,726, which figure does not include an allowance for working capital.

In passing it should be noted that the Company, in explanation of why it did not propose higher rates than the proposed increased rates, asserted that it recognized that there are limits to rates that could be exacted, and in explanation of delay in seeking approval of increased rates asserted that it had hoped through promotional devices and economies, to pull through its emergency without making such application and that such hope had been disappointed.

The Company shall file with the Board, in the regular manner, new rate schedules setting forth the proposed increased rates and the terms and conditions of service proposed in its application which are hereby approved. Such rates shall remain in effect for the duration of the war and until one (1) year thereafter, unless sooner terminated by the action of the Company or the Board.

The Company having consented to intervention by the Director of Economic Stabilization in this proceeding, the increased rates so approved, when filed, as before provided, may go into effect at any time after the expiration of thirty (30) days subsequent to the giving by the Company to and receipt by the Office of Price Administration, of notice of the increased rates hereby approved, unless the said Administration within such period of thirty (30) days shall take action to stay such increased rates under powers vested in it. Said increased rates may go into effect at any time prior to the expiration of said thirty (30) days upon approval thereof by the Administration or signification by the Administration that it interposes no objection thereto.

Dated, November 19, 1942.

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No. 2245

In the Matter of the Revocation of Municipal Consents Granted to the Mendham Bus Company on the Mt. Freedom Bus Route (P. U. C. Route-File No. 178-285) for Failure to Operate Since Monday, September 15, 1942, and to File Proper Insurance.

BY THE COMMISSION:

The matter of the failure of the Mendham Bus Company to operate auto buses on a route between Morristown and Mt. Freedom, New Jersey, and the failure of said Mendham Bus Company to file the necessary liability insurance for the operation of auto buses, as required by law, was heard by the Board on November 5, 1942.

By its decision of October 20, 1938, the Board approved of municipal consents of the Township of Morristown, Township of Morris and Township of Randolph for the operation of not more than two auto buses by the Mendham Bus Company on the following route:

> Beginning at the D., L. & W. Railroad Station in Morristown, thence via Morris Street, Park Place North, Park Place West, Washington Street, Mendham Avenue to Mendham Township, Mendham Road through Mendham Township and Mendham Borough, thence via Main Road, Main Street, Woodland Avenue, Brookside Avenue, to Sussex Avenue (Morristown-Succasunna Road) to intersection of Sussex Avenue and Calais Road, Mt. Freedom. Returning via the same route to Washington Street, Morristown, thence via Park Place South, Park Place East, Morris Street to D., L. & W. Railroad Station, Morristown.

On April 23, 1942, the Board on its own motion instituted a proceeding for the revocation of the above municipal consents because of the failure of the Mendham Bus Company to operate subsequent to January 5, 1942. Although that had been the Respondent's second offense the Board granted it another opportunity to resume operations on the aforesaid route.

It appeared at the hearing in this matter that the Respondent, Mendham Bus Company, ceased operation of buses on the aforementioned route on Monday, September 15, 1942. Since that date no apparent effort has been made by the Respondent to restore service on this route. It appeared further that on October 5, 1942, when the effective liability insurance on Respondent's equipment expired, Respondent failed to renew said insurance as required by law.

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The Mendham Bus Company was given notice of the hearing before this Board but failed to enter an appearance.

The Board finds in the instant case that the Mendham Bus Company is not now and has not been for some time rendering service on the route in question and that the said Mendham Bus Company has failed to maintain and keep in force the necessary liability insurance.

The Board, therefore, hereby revokes its approval of the consents granted by the Township of Morristown, Township of Morris and Township of Randolph for the operation of two auto buses on the Morristown-Mt. Freedom Bus Route.

Dated, December 17, 1942.

No. 2246

In the Matter of the Application of Inter-City Transportation Company, Inc., for Rehearing in the matter of the Application for Approval of Municipal Consents for Intrastate Operation on an Existing Interstate Line and for the Operation of Fifteen (15) Auto Buses Between Ridgewood and Union City, New Jersey (P. U. C. Route-File No. 498-062).

Thomas J. Armstrong and *Ralph Messano,* for Hudson Bus Transportation Company, Inc.; *J. H. Mulhern* and *William Blake,* for Public Service Coordinated Transport; *A. Harry Moore,* for Inter-City Transportation Co., Inc.; *H. F. Banta,* by George Winne, for the City of Hackensack.

BY THE COMMISSION:

This is an application by The Hudson Bus Transportation Company, Inc., for reopening, vacating and rehearing, in the above-entitled matter. The applicant contends that it is aggrieved by the decision dated October 22, 1942, and petitions that said decision be vacated and set aside to the extent that all rights and privileges granted thereunder be dissolved.

Inasmuch as a rehearing has been had and testimony has been offered in support of the petition of The Hudson Bus Transportation Company, Inc., the Board, after full consideration of all the facts, testimony and exhibits, finds and determines that the application to vacate the Board's previous order and decision should be denied but that the decision dated October 22, 1942, should

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be modified, for the purposes of clarification, and therefore the following revised restrictions are imposed and made part hereof:

1. No intrastate passengers shall be accepted between the intersection of North Monroe Street at Fairmount Road and the intersection of East Ridgewood Avenue at North Maple Avenue in Ridgewood, whose destination is within the same area.

2. No intrastate passengers shall be accepted or discharged (closed doors) on any portion of the route which is within the municipalities of Paramus, Rochelle Park, Secaucus, North Bergen and Weehawken.

3. Intrastate passengers may be accepted in Ridgewood for discharge in Maywood, Hasbrouck Heights, Woodridge, Carlstadt, East Rutherford, and Union City.

4. Intrastate passengers may be accepted in Union City, East Rutherford, Carlstadt, Woodridge, Hasbrouck Heights and Maywood for discharge in Ridgewood.

5. Intrastate passengers may be accepted at the intersection of Hoboken Road and Washington Place, East Rutherford, for discharge at the intersection of Bergenline Avenue and Marginal Highway, Union City.

6. Intrastate passengers may be accepted at the intersection of Bergenline Avenue and Marginal Highway, Union City, for discharge at the intersection of Hoboken Road and Washington Place, East Rutherford.

7. Intrastate passengers may be accepted in Hackensack for discharge in Ridgewood, Maywood, Carlstadt (along Paterson Plank Road), East Rutherford (east of Hackensack Street) and Union City, and on return trips intrastate passengers may be accepted in Union City, East Rutherford (east of Hackensack Street, Carlstadt) (along Paterson Plank Road), Maywood and Ridgewood for discharge in the City of Hackensack.

8. No local passengers will be picked up or discharged who begin and end their trips in the area extending from the intersection of Central Avenue and the Esplanade near the Hackensack-Maywood boundary line to the intersection of Hackensack Street and Paterson Avenue, East Rutherford.

The Board will not undertake at this time to pass upon the provisions of the report and order recommended by C. T. Mayo, Examiner, Interstate Commerce Commission, which involves an investigation of the activities and practices of the Inter-City Transportation Company., Inc., and the practice of picking up and discharging passengers on Marginal Street in North Bergen, Union City and Weehawken, until such time as a final adjudication is made by the Interstate Commerce Commission.

Dated, March 25, 1943.

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 236. January Term, 1944.

The Hudson Bus Transportation Company, Inc., a Corporation of New Jersey,
Prosecutor,
vs.
The Board of Public Utility Commissioners of the State of New Jersey, Inter-City Transportation Company, Inc., a Corporation of New Jersey, and Public Service Coordinated Transport, a Corporation of New Jersey,
Defendants.

Submitted January Term, 1944. Decided

On writ of certiorari.

Before *Justices Case, Donges* and *Porter.*

For prosecutor, *Thomas J. Armstrong, Messano & Messano.*

For Inter-City Transportation Company, Inc., *A. Harry Moore.*

The opinion of the court was delivered by

CASE, J.

Prosecutor questions three decisions by the Board of Public Utility Commissioners with respect to the approval of municipal consents for intrastate bus operation by the Inter-City Transportation Company, Inc. The original application for approval appears to have been filed on December 2, 1941. Hearings were held thereon and on May 21, 1942, the Board denied the application upon the ground of policy. On application of Inter-City a reargument of the case was had July 2, 1942, following which, on October 22, 1942, the commission modified its earlier decision and approved seven municipal consents (Ridgewood, Woodridge, East Rutherford, Carlstadt, Maywood, Hasbrouck Heights, Union City) for the operation of fifteen buses subject to restrictions and conditions. Later, September 24, 1942, an application was filed for approval of an eighth municipal consent, that of the City of

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Hackensack, and on December 23, 1942, approval was granted. Meanwhile, early in December, 1942, the present Prosecutor, the Hudson Bus Transportation Company, Inc., applied to the commission alleging itself to have been aggrieved by the decision of October 22, 1942, and asking that the decision of that date be vacated and that the matter be reheard. The commission heard such witnesses as prosecutor produced and on March 25, 1943, filed a decision wherein it declined to vacate the earlier finding.

The writ of certiorari, as printed in the record, bears no allocatur. There is a notation which we understand is intended by counsel to carry the information that there had been an opinion to the effect that the writ should be allowed. No opinion is submitted or referred to. We express our view that, supposing the circumstance to be as we have assumed, the writ should nevertheless have been submitted to the court or a justice for formal allowance.

We have before us the respective decisions of May 21, 1942, October 22, 1942, December 23, 1942, and March 25, 1943, with the various proceedings leading to those several decisions. The refusal by the Board to disturb its earlier decisions appears to be the excuse for an attempted review of them, the one against which main dissatisfaction is expressed, namely, that of October 22, 1942, having been made a year before the issuance of the writ.

Prosecutor's chief contention is, as we have said, that the Board's decision of October 22, 1942, for one reason or another, was unlawful. We believe that Prosecutor was in laches in seeking a writ to review the decisions of October 22 and December 23, 1942, and that it may not, having omitted its suit for review in season, apply for discretionary reconsideration by the tribunal of original jurisdiction and, failing therein, make that refusal the ground of attack. The Public Utilities statute, R. S. 48:2–43, provides that no certiorari shall be allowed unless application therefor be made within thirty days from the date upon which the order becomes effective. Whether or not a statutory limitation upon the time within which certiorari may issue is reasonable will be determined upon the facts of each case. *Red Oaks, Inc.,* vs. *Dorez, Inc.,* 117 N. J. L. 280; *Owen* vs. *Atlantic City,* 125 N. J. L. 145. It does not appear when the application for the present writ was made, but it was of necessity some time after, and if the date of the writ is a criterion a long time after, March 25, 1943. We see no reason why an application to the Board of

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Public Utility Commissioners to reconsider a decision should be in a status different from a like application to any other tribunal. An appeal to the reviewing jurisdiction of a higher court should be directed at the decision in which the error is said to lie and not at the refusal of the trial tribunal to reconsider, or upon reconsidering to change that decision. Cf. *Pink* vs. *Deering,* 129 N. J. L. 552; *In re Whittier,* 115 N. J. Eq. 563. The decision of March 25, 1943, does two things: (1) it denies prosecutors' request to vacate the decision of October 22, 1942, and (2) it modifies certain of the restrictions appended to the earlier decision. Prosecutor does not complain of the modifications. Its alleged grievance lies in the refusal to vacate. We find no such abuse of discretion in that determination as within our decisions (*Nelson* vs. *Eastern Air Lines, Inc.,* 128 N. J. L. 46, 58) is ground for reversal of a discretionary order. It seems, therefore, on procedural grounds, that none of the official acts complained of should be disturbed. We are led to these observations by the lack of an allocatur.

Nevertheless, we have considered the merits as presented. The initial refusal by the Board on May 21, 1942, to approve certain municipal consents and so to authorize Inter-City to operate a limited intrastate bus service was not an adjudication of legal rights. It was not such a judgment as would have been res judicata against a later renewal of the application for affirmative action. It went on a question of public convenience and public policy, control over which had been reposed by the legislature in the Board, R. S. 48:2–14. Hudson Bus Transportation Company, Inc., was represented at all hearings on Inter-City's original application. The jurisdiction of the Board to rehear, and to extend, revoke or modify an order is statutory, R. S. 48:2–40. When the request by the latter company for a rehearing on its application came on to be heard the Hudson Bus Company had full notice. It was clear that the moving party and the Board purposed to review the testimony already taken, and no objection was voiced to the procedure. Inter-City had brought and offered witnesses but their examination seems to have been considered unnecessary. Prosecutor was granted and presumably availed itself of the privilege of filing a brief. On the record as it stood and on the new arguments the Board made its decision of October 22, 1942, approving the consents mentioned *supra* and thus, to that extent, modifying its former decision. Our attention is

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called to no dissent from the procedure until January 7, 1943, two and one-half months after the Board's decision, when the commission was in its second sitting on Prosecutor's application for a further rehearing.

It is said that the proofs fail to establish that the proposed facilities would serve public convenience and conserve the public interests. We consider that these matters are sufficiently established by the testimony. The determination of the Board was reasonable. It will gain nothing to review the voluminous proofs. When a State tribunal has, after due hearing, passed on a question within its jurisdiction, and with whose determination it is charged by statute its findings should not be reversed, unless unwarranted in law or unfounded in fact, or unless a discretionary power has been plainly abused. *Perth Amboy* vs. *Board of Public Utility Commissioners,* 98 N. J. L. 106; *O'Connor* vs. *Board of Public Utility Commissioners,* 128 N. J. L. 35; *Borough of Collingswood* vs. *Water Supply Commission,* 84 N. J. L. 104, aff. 85 N. J. L. 673.

It is further said that the Board had no jurisdiction to entertain the application which led up to the decision of October 22, 1942, for the reason that one of the three members who constituted the board on the giving of the May 21st decision had meanwhile died and been replaced by another. *Rospond* vs. *Decker,* 109 N. J. L. 458, and *Dorman* vs *Usbe Building and Loan Association,* 115 N. J. L. 337, are cited in support, but those cases are clearly distinguishable. The Board of Public Utility Commissioners consists of three members, R. S. 48:2–1, and acts through a majority. Its proceedings in the instant case, including the testimony, were recorded at length. Under the statute, R. S. 48:2–32, it is not necessary for all of the members to hear and observe the witnesses; even a single member may sit for the taking of testimony. There were rehearings at which any litigant who so desired could present new testimony and new arguments and at which it was thoroughly understood, without objection discovered by us in the record, that the testimony already taken would be reconsidered. A majority of the Board that rendered the earlier decision sat and constituted a majority on the reconsideration and voted for the changes therein. The vote in each instance was the unanimous vote of the commission.

Prosecutor further argues that because Inter-City operated an interstate bus service under the authority of the Interstate Com-

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merce Commission the Board of Public Utility Commissioners of the State of New Jersey may not lawfully confer upon it the authority to do an intrastate business. We do not so understand. Our statutes do not prohibit a company which does an interstate business from also, under proper restrictions and with the necessary consents and approvals, doing an intrastate business. Cf. *Nutley-Times Square Service* vs. *Board of Public Utility Commissioners,* 109 N. J. L. 289. Prosecutor cites, as indicating contra, R. S. 48:4–14 which imposes a gross franchise tax of five per centum upon intrastate operation, payable to the municipalities whose streets are traversed, and R. S. 48:4–20 which imposes a tax of one-half cent on interstate operation for each mile an auto bus shall have been operated over the highways of this State; and the suggestion is that these two classes of operation with different forms of taxation are incompatible. But whatever superficial force accompanies that statement is quite nullified by the further provision in section 48:4–20 that no excise shall be payable thereunder for the mileage traversed in any municipality to which the owner or operator has paid a gross franchise tax under section 48:4–14. The inference seems to be that an interstate bus coming within the scope of 48:4–20 may also be permitted to operate in such fashion as to be within the scope of 48:4–14. Many railroad companies do both an intrastate and an interstate business. Other forms of public utilities likewise. Whether or not the intrastate business of this utility will, in actual operation, prove to be incompatible with its interstate business remains to be seen. Further, we do not interpret the use of the word "termini" in R. S. 48:4–1 to mean, as Prosecutor seems to contend, constructed terminal facilities which shall mark the beginning and the end of the physical movement of a bus. The termini are the limits of the area wherein a passenger may be both picked up and discharged, in other words, wherein a local or intrastate business may be done.

Prosecutor advances as a further contention that the Board erred in permitting Inter-City to operate buses pursuant to its decisions of October 22, 1942, December 23, 1942, and March 25, 1943, without any judgment or order to that effect having been made or entered. We regard the decisions as orders in the sense that they carry the Board's effective direction. R. S. 48:4–3 provides that no auto bus shall operate without the consent of the Board or body having control of the public streets over which the

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auto bus is operated. R. S. 48:2–14 provides that no privilege or franchise granted to any public utility by a political subdivision of the State shall be valid until approved by the Board, and that the Board, in granting approval, may impose such conditions as the public interest may reasonably require. Without information from counsel as to what statutory procedure was being followed we assume that the proceedings were under R. S. 48:2–14. The decisions, so named, contained the active and immediately effective approval of the municipal consents and, further, such conditions of operation as the Board deemed proper. They seem to meet the statutory requirement. If they are to be counted as mere opinions and not as orders or determinations, it is difficult to understand why Prosecutor is here on this branch of the case. *Newark* vs. *Fordyce,* 88 N. J. L. 440. If the complaint is that Respondent is operating without authority, Prosecutor's relief should have been sought by some other form of remedy. The question before us is not whether Respondent is pursuing an unauthorized course of conduct but whether the specified official acts of the Board are legal.

Finally, it is said that the Board exceeded its jurisdiction in that it sought to enlarge an interstate operation restricted by the Interstate Commerce Commission. If the respondent is acting contrary to the rulings of the Interstate Commerce Commission, that commission may be relied upon to assert its authority. We have no supervision thereover. The effect upon intrastate operation was considered above.

The decisions of October 22, 1942, December 23, 1942, and March 25, 1943, are approved and the writ dismissed, with costs.

No. 2247

Public Service Coordinated Transport—Application Under Chapter 49, P. L. 1942, for Certificate of Temporary Permit to Operate Ten Auto Buses Between West Orange and Newark over the following Route: Beginning at Park Avenue and Main Street in West Orange, thence via Park Avenue Through West Orange, Orange, East Orange and Park Avenue in Newark, to the City Subway Station at Park Avenue, Newark.

William H. Blake, for Public Service Coordinated Transport; *Harrison & Roche* (by *E. S. Sanford*), and *Harry V. Osborne,* for Essex County Park Commission; *Morris E. Barison* (by *Fred Reithmuller*), for Wohlgemuth Bus Company; *Cyrus H. Vail,* Chairman of Transportation Committee, for City of East Orange.

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BY THE COMMISSION:

This is an application under the provisions of chapter 49 of the laws of 1942 (R. S. 48:4–2.4) for a temporary permit to operate ten auto buses during the war emergency on Park Avenue in the Cities of Newark, East Orange, Orange and Town of West Orange, from the City Subway near First Street in Newark to Main Street in the Town of West Orange. It is based upon the contention that the proposed operation is essential to transport workers in war industries to and from their places of employment. Under the statute the Board might, in its discretion, have considered the application without a hearing. By reason of the unusual interest evinced by the public, a formal hearing was had and testimony consuming most of two days was heard.

The Essex County Park Commission opposed the application upon the ground, among others, that the Board had no jurisdiction in the premises. It appears that Park Avenue is a county road and consequently within the jurisdiction of the Essex County Board of Chosen Freeholders. It was contended that, inasmuch as the care, custody and control was delegated to the Essex County Park Commission by virtue of statutory enactments with power to limit and prevent the operation of public omnibuses on parkways (R. S. 40:31–152), and in view of the fact that the Park Commission, in pursuance of that statute, enacted an ordinance on January 13, 1920, precluding the operation of buses on Park Avenue from Roseville Avenue in the City of Newark to Main Street in the Town of West Orange, this Board has no power to grant its temporary permit under the emergency statute. The Park Commission also claimed that neither the Essex County Board of Chosen Freeholders nor the Essex County Park Commission is a "municipality" under the emergency statute.

Article 2 of Title 48 of the New Jersey Statutes Annotated pertains to the jurisdiction, powers and duties of the Board. R. S. 48:2–11, captioned "Approval of Grants by Municipalities of Franchises and Privileges to Public Utilities," provides as follows:

> "No privilege or franchise granted after May first, one thousand nine hundred and eleven, to any public utility by a political subdivision of this state shall be valid until approved by the Board."

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We take the view that the word "municipal" as used in the 1942 act covers not only municipal corporations in the strict sense of towns and cities, but that it has a general meaning applicable to public bodies, political subdivisions of the State, and bodies organized to undertake or accomplish public purposes. However, it is not necessary to determine whether the County of Essex or the Park Commission is a "municipality" under the Public Utility Act since the emergency statute provides that no municipal consent is necessary for the granting of an emergency permit.

Under the original Bus Act enacted in 1921 (R. S. 48:16–23) this Board was given jurisdiction over the operation of buses on parkways. It is not necessary to decide whether or not this act superseded the Park Commission Act which was passed in 1914 (R. S. 40:31–152). The only question before us is whether or not the Board has jurisdiction under the emergency statute to authorize the operation of buses over the parkway for the transportation of war workers. This statute specifically recites that the object and purpose of the act is to provide transportation requirements created by the war conditions, and further provides, among other things, as follows:

> "12. This act shall be broadly and liberally interpreted and construed to effect its declared object and purpose, and any doubt as to whether a power has been conferred hereby upon the board shall be resolved in favor of the conferring of such power where such power is reasonably required to effect the general object and purpose of this act."

As a matter of physical fact, Park Avenue can no longer be considered a "parkway" in its narrower sense. Through most of its length, its roadway is 50 feet wide with an 8-foot plantation strip in the middle. Hence each of the two roadways is 21 feet wide. The avenue runs through a built-up residential section in which there are retail stores.

It would be inconsistent with the provisions of the emergency statute to hold that, because of the provisions of the Park Commission Act, this Board could not, under its regulatory powers, authorize the use of this particular street for bus tarnsportation if it appears that such transportation is essential to the war effort. It was clearly the intent of the Legislature in enacting the statute to vest in the Board for the duration of the war emergency, jurisdiction and authority to provide for the use of all streets and public places in "auto bus" operation where in the judgment

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of the Board such use is necessary in furthering the war effort, and to suspend during such period, where the Board determines that such necessity is present, the existing statutory limitations upon the Board's general jurisdiction, as, for illustration, the requirements of initial consents by other public bodies. The Board, therefore, finds and determines that it does have jurisdiction over this application.

The Park Commission also opposed the application on the ground that Park Avenue was not designed for heavy traffic, and that the pavement is not such as will absorb bus traffic. The testimony in this regard is not persuasive. It appeared from the testimony that trucks, moving vans and other vehicles much heavier than the light type buses proposed to be operated by the applicant are now permitted on the avenue for the purpose of making deliveries and collections. Testimony was offered by the applicant that within the past month 90 trucks were counted on Park Avenue during a six-hour period. The applicant's witness testified that it proposed to operate its smallest type buses which have a capacity of 21 passengers. Much heavier vehicles than these have been using the streets crossing Park Avenue, which, according to the testimony, are paved with the same pavement as are the main roadways, and no special reinforcement has been installed. One of the objector's witnesses testified that in any case the pavement should be resurfaced at the present time or as soon as it can be done after the war.

The Park Commission also opposed the application on the grounds that the operation was not necessary to the war effort and that it would result in traffic congestion and consequent increased danger to the public. The governing body of the City of East Orange passed a formal resolution urging the denial of the application. The City of Orange passed a similar resolution urging the granting of it. Communications were presented by hundreds of persons indicating their approval or disapproval. One petition, signed by 906 persons living in the vicinity of Park Avenue (91 of whom actually lived on Park Avenue) was in favor of the application. Letters were received from several plants engaged in war work in the vicinity urging the approval of the operation. The testimony disclosed that in one plant some 225 persons indicated an intention to use the service.

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The objectors presented two general contentions—first, that the proposed service was unnecessary; and second, that if it did nearly the business contemplated by the applicant, the operation of so many buses would create undue traffic congestion. Of course, these contentions are not consistent.

Upon consideration of all of the evidence the Board finds that the proposed operation is necessary to facilitate the transportation of war workers. One of the difficulties encountered in bus transportation at the present time between Newark and its suburbs is the dearth of main arteries that may be used. Those that are presently being used are already overtaxed. It is not reasonable, during the emergency, to forego the use of Park Avenue merely for the convenience of a relatively small number of persons.

Undoubtedly the installation of buses on Park Avenue will result in some traffic congestion. The traffic lights on the street are now operated so that drivers of private cars may maintain a fixed speed of 30 miles an hour and travel over most of the avenue without meeting a red light. This is a great convenience to that class of driver and it is to be regretted that it may be interfered with. However, it is a convenience that does not exist on any other street in Essex County and is not of sufficient importance to warrant curtailment of reasonable service to the general public, the use of whose cars is made impossible by war time rationing.

Such traffic congestion as may be created by the operation of the buses may very properly be minimized by proper policing, parking regulations, skip-stops and by the operation of the buses to the end that they may be stopped only at the curb for the boarding or discharging of passengers.

The Board's jurisdiction over the operation is continuous, and it will, of course, cooperate with the Park Commission to regulate such operation from time to time so as to reduce as far as possible congestion and inconvenience to others using the avenue.

The application is granted and an appropriate temporary permit will issue.

Dated, April 28, 1943.

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An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 268. May Term, 1943.

Essex County Park Commission,
Prosecutor,
vs.
The Board of Public Utility Commissioners and Public Service Coordinated Transport,
Defendants.

Submitted August 1, 1943. Decided 1943.

Order by the Board of Public Utility Commissioners permitting operation of motor buses on Park Avenue in Essex County, a highway under the general control of the Essex County Park Commission, *held* a valid exercise of powers conferred by chapter 49 of P. L. 1942.

On certiorari.

Before *Justices Parker, Heher* and *Perskie.*

For the prosecutor, *Abram H. Cornish.*

For the defendant the Board of Public Utility Commissioners, *Frank H. Sommer.*

For defendant Public Service Coordinated Transport, *William H. Speer.*

The opinion of the court was delivered by

PARKER, J.

This writ of certiorari brings up an Order by The Board of Public Utility Commissioners, dated April 28, 1943, granting permission to Public Service Coordinated Transport to operate ten motor buses from Newark to West Orange via Park Avenue, substantially "for the duration" and subject to the conditions of P. L. 1942, page 273 (chapter 49), which is a war emergency act, enabling the Board (section 3) "without hearing and without municipal consent (to) issue * * * temporary permits for autobus operation and * * * prescribe the termini * * * route, * * * and conditions of such operation."

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This statute is connected with chapter 390 of P. L. 1941, extended for the duration, P. L. 1942, page 361, enabling autobuses on a specified route to digress so as to connect with war industries.

The gravamen of the case for the Prosecutor is that Park Avenue is not an ordinary highway, but by law is under the special jurisdiction of the Essex County Park Commission, which hitherto has by "ordinance" lawfully forbidden trucks, business vehicles and busses to traverse it longitudinally, except that delivery vehicles may enter from a cross street, and then must leave Park Avenue at the next cross street. Park Avenue has been essentially a double east and west highway for private non-business vehicles, with a grass plot down the middle, the roadway on the north side westbound, on the south side eastbound, with traffic lights adjusted to a continuous speed of 30 miles per hour from Roseville Avenue, Newark to West Orange. Germane to the application is the fact, among others, that the Edison Works at the West Orange end employ, as claimed, 3,500 or more operatives, a large percentage of whom live in Newark. At the Newark end there seem to be several other war industries. There are parallel routes, as the map shows; but we have no difficulty, notwithstanding a conviction of the desirability in ordinary times of restricting this great driveway to a limited use, in holding that as a matter of public policy, in wartime that desirability, like any other special privilege, should yield to the needs of war. As we understand the case, no question is raised as to the constitutional power of the Legislature to modify or even revoke the rights and privileges of the Essex County Park Commission. The question before us is whether as a logical result of chapter 49 of the laws of 1942 it has effectively done so, by bestowing upon its creature the Public Utilities Board, powers which, when exercised, override for the time being, the powers and privileges of the Essex County Park Commission. It seems clear to us that the power conferred on the Utility Commission is comprehensive, not only over highways generally under the control of the municipalities through which they run, but also over exceptional highways ordinarily controlled by agencies other than municipalities, as for example the present Prosecutor. It should be borne in mind that the statute, chapter 49 of the laws of 1942, is not in terms an amendment of or supplement to the Utility Acts, or to our municipal legislation, but is an act applicable to all highways,

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relating to the great increase in autobus transportation thereon, and designating the Utility Commission as a State agency to issue temporary permits for autobus transportation "without hearing and without municipal consent, * * * and * * * prescribe the termini of such operation, the route, time, fares, terms and conditions of such operation." Such is the language of section 3. In fact, however, the Commission did not act "without hearing." It held a hearing, which the parties attended and produced evidence which covers 185 pages of the printed case before us, and filed a careful written decision.

The case is submitted on briefs without oral argument. For the Park Commission, Prosecutor, the first main point, shortly stated, is that prior to the act of 1942, the Board of Public Utility Commissioners had no jurisdiction over streets and public roads. This, for present purposes, and without general admission of its correctness, may be conceded. It may also be conceded for present purposes that until the act of 1942, chapter 49, jurisdiction over Park Avenue for purposes of traffic regulation was exclusively vested in the Essex County Park Commission. The next point for Prosecutor is the crux of the case, viz. that chapter 49 of the laws of 1942 did not impair the previous exclusive jurisdiction of the Park Commission, and consequently the Order now under review was invalid as affecting that jurisdiction. This point we deem wholly without substance. The statute under consideration is broad and sweeping. No constitutional informity is even suggested. It is avowedly an emergency war measure; drastic perhaps, but the wisdom or reasonableness of a statute is not for the courts. As a matter of construction or interpretation we think the 1942 act clearly does impair the former jurisdiction of the Park Commission, to the extent of empowering another State agency, the Utility Commission, to regulate autobus traffic on any highway within the purview of the legislation.

So much for the legal questions involved. It is argued that the Board reached a wrong result on the evidence before it. One answer, and perhaps a sufficient one, is that by the express language of the statute the Board may act "without hearing." However, we have considered the evidence, and conclude that there was sufficient to support a finding that the permit should be granted. Some point is made of the claim that the existing road

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surface is not suitable for bus traffic. As to this it seems sufficient to say that the exigencies of war must disregard mere questions of economy and conservation.

The writ will be dismissed.

No. 2248

In the Matter of Informal Hearing Under Chapter 49, P. L. 1942, on the Board's own initiative, for Consideration of the Removal or Modification of Restriction No. 1, Imposed upon the Operation of G. R. Wood, Inc., Between Camden and Woodbury on Its Philadelphia-Pitman-Clayton Route.

BY THE COMMISSION:

In response to public complaints, and in accordance with a Legislative Resolution, the Board, acting on its own initiative, has proceeded under chapter 49, laws of 1942, to consider the removal or modification during the war emergency of restriction No. 1 imposed upon the present operation of G. R. Wood, Inc., between Camden and Woodbury on the Philadelphia-Pitman-Clayton Route.

The restriction in question, heretofore imposed by the Board, reads as follows:

> "That passengers shall not be accepted who begin and end their trips between the Bridge Plaza in Camden and a point located on Barber Avenue 1300 feet east of Broad Street and Barber Avenue, Woodbury."

The specific question presented was whether or not the lifting of the restriction would adversely affect the public whose trips originate or terminate south of the restriction point in Woodbury to a greater extent than it would benefit persons who would be allowed to use the service within the presently restricted area. As was announced by the Board at the opening of the hearing, this question was to be determined without regard to the competitive interest of the Public Service Interstate Transportation Company.

G. R. Wood, Inc., originally operated six auto buses on this route between the Pennsylvania Railroad Ferries in Camden and Pitman. At the time that service was inaugurated, Public Service Interstate Transportation Company and its predecessors operated a street railway line between Camden and Woodbury. Public Service and its predecessors also operated auto buses between

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these points over the same route presently traversed by G. R. Wood, Inc.

Restriction No. 1 was imposed upon the operation of the Wood buses because the limited number of vehicles, then available for service on the original Wood route south of Woodbury, was not sufficient to accommodate local transportation needs and at the same time retain space for passengers south of Pitman for whom the service was originally designed.

Subsequent to the opening of the Delaware River Bridge in 1926 and prior to the effecting of Federal regulation under the Motor Carrier Act of 1935, G. R. Wood, Inc., engaged in interstate commerce. Under its present authority, it is now obligated to furnish adequate service on all of its buses between Philadelphia and all points on its route in addition to its obligation to furnish local service in New Jersey on ten of its buses, subject to the provisions of restriction No. 1 heretofore imposed by the Board.

There was injected into the proceeding a representation that during the morning and evening rush hours buses operated by G. R. Wood, Inc., had capacity for additional passengers to and from the New York Shipbuilding Corporation (within the limits of restriction No. 1), but that shipyard workers were prohibited from using this service through the imposition of the restriction described above.

In order to determine whether or not G. R. Wood, Inc., in addition to its present obligations, could furnish such additional service as to warrant the Board to modify or remove restriction No. 1, the Board directed a traffic survey of the Wood operation and other operations having relation to this service. This survey was made by the operators themselves under the direction of the Board. It consisted of five separate traffic counts taken at the Delaware River Bridge Plaza, Camden; Broadway and Kaighn Avenue, Camden; Broadway and Kings Street, Gloucester; and Broad Street and Barber Avenue, Woodbury. The fifth traffic count taken at Broadway and Kaighn Avenue, Camden, was limited to local service on Broadway, which does not pass over the Delaware River Bridge to Philadelphia.

The traffic check indicates that during the morning rush hours when transportation is most essential for employees of war industries in Camden and Philadelphia, G. R. Wood, Inc., operated six trips in a northbound direction. The complete capacity of four

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of the buses both seated and standing was absorbed upon arriving in the City of Camden. The other two trips had almost seated capacity, leaving available on these two buses capacity for standing passengers, which is very limited in the type of equipment operated by G. R. Wood, Inc. During the evening rush hour period buses arrived in Camden from Philadelphia in most instances with standing passengers and for the most part the other buses had seated loads. The only available space on the buses was the standing space and additional space that may be made available by the discharge of passengers in Camden who boarded the buses in Philadelphia. The space so afforded on these buses was fully utilized as indicated by traffic check taken at Broad Street and Barber Avenue, Woodbury, contiguous to the southerly point of restriction, which shows that between 3:35 P. M. and 5:00 P. M., seven buses were operated in a southerly direction. Five of the seven buses were still carrying a considerable number of standing passengers. The point of restriction is approximately twelve miles from the Delaware River Bridge Plaza in Camden.

It must be presumed that a large number of the passengers on southbound buses during the evening rush hour period were accepted for transportation in Camden and destined for points south of Woodbury, which is solely served by G. R. Wood, Inc. It is apparent, therefore, that if local passengers were accepted in Camden for discharge within the presently restricted area, space would not be available for those passengers dependent upon the Wood service for transportation south of Woodbury.

It may be readily understood that persons using bus facilities on this route—congested as they are during the present unusual conditions—may be irritated by the sight of any bus passing a given point with even a small amount of available space. However, orderly operation must be maintained. A railroad could not improve its service by running all its trains as locals. A witness for G. R. Wood, Inc., stated that they could not maintain their present operation and at the same time do a local business in the City of Camden. The same principle controls their operation to Woodbury and points south. No material space is available in the Wood buses at the times during which the Public Service buses are filled. Without giving consideration, therefore, to the element of competition with Public Service Interstate Transportation Company's operation, we are forced to the conclusion that the lifting of restriction No. 1 will not produce any material

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additional facilities to local riders in the restricted area. On the other hand it would seriously impede the service of the long distance riders, and in fact would result in deprivation of service to persons solely dependent upon the Wood operation south of the restriction point in Woodbury. It was for the service of those persons that the line was originally designed.

It developed during the hearing, however, that the parallel duplicated services operated by G. R. Wood, Inc., and Public Service Interstate Transportation Company on the Philadelphia-Pitman-Clayton Route is susceptible of more economical and efficient service to the public. To that end the Board directs that both of these operators submit within fifteen days a coordinated operating schedule which should improve operating conditions and make for better service to the public.

Dated, May 6, 1943.

No. 2249

In the Matter of the Application of Public Service Coordinated Transport for Approval, Under Chapter 40, P. L. 1942, of the Resumption of Street Railway Service Between Exchange Place, Jersey City, and the Federal Shipbuilding and Dry Dock Corporation Plant and the Western Electric Company Plant in Kearny, New Jersey.

William H. Blake, for Public Service Coordinated Transport; *Thomas J. Armstrong,* for Independent Operators on Montgomery and Westside Avenue Route.

The applicant requests approval, under the provisions of chapter 40 of the laws of 1942, of the resumption of street railway service between Exchange Place, in Jersey City, and the plants of the Federal Shipbuilding and Dry Dock Corporation and the Western Electric Company, in Kearny, New Jersey. This application also embraces the right to do all intermediate business between the terminals. It is proposed to operate street railway cars from Exchange Place and Pennsylvania Railroad Private Right-of-Way, thence on Exchange Place, Montgomery Street, West Side Avenue, Communipaw Avenue, Lincoln Highway and Private Right-of-Way of The Central Railroad Company of New Jersey to Gate No. 4 of the Federal Shipbuilding and Dry Dock Corporation in Kearny; returning over the same route to Mont-

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gomery Street and Gregory Street, thence on Gregory Street, York Street and Private Right-of-Way of Pennsylvania Railroad Company to Exchange Place, Jersey City.

The fare is five cents per single trip between terminals.

There is attached to the application, agreement between the Town of Kearny and Public Service Coordinated Transport, dated December 28, 1938, and agreement between the City of Jersey City and Public Service Coordinated Transport, dated July 15, 1938, providing for the reconstruction of its tracks and resumption of street railway service on the route proposed in this application.

The applicant submitted in its testimony that there is a necessity for the resumption of street railway service on this line in order to serve war industries within the City of Jersey City and between Jersey City and the war industries in Kearny, New Jersey. It is set forth that the resumption of street railway service will effect a saving of approximately 458,000 bus miles per year by the elimination of at least 24 auto bus units presently operated on the Newark All-Service Route No. 1. These units would thus be released for essential service in other sections of the State. Applicant's testimony includes reference to other industries in Jersey City which would be served by the proposed street railway service.

The independent operators on the Montgomery and West Side Avenue route objected to the application. First, upon the ground that the service proposed in the application was not within the provisions of chapter 40 of the laws of 1942; and second, that necessity and convenience did not warrant the operation of additional local service within the City of Jersey City. The necessity for the proposed service from the territory within the City of Jersey City to the war industries in the Town of Kearny was not questioned by the objectors.

It was shown by the objectors that the territory along Montgomery Street and West Side Avenue between Exchange Place and the intersection of West Side Avenue and Communipaw Avenue in Jersey City is presently served by 23 buses of the independent operators and 11 buses of Public Service Coordinated Transport. In addition thereto Public Service Coordinated Transport is authorized to operate 164 trips on its Montgomery All-Service vehicle route, of which only 127 trips are presently operated. The objectors submitted traffic records of passengers

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carried on the route in local service which indicated the sufficiency of the service during both peak and off peak periods of travel.

It is apparent to the Board that the resumption of street railway service is necessary to serve persons traveling between points along the route and several war industries in Kearny. This is evidenced by the fact that the savings in bus miles will be effected by the removal of bus units on the Newark Route No. 1 which extends from Exchange Place, Jersey City, to Newark, passing the war industries on the Lincoln Highway in Kearny. This route and the proposed street railway line commonly serve the Exchange Place area in Jersey City and the industrial area in Kearny. In all other respects the route serves different territory. The specific purpose of this route is further evidenced by the fact that the applicant does not propose to remove service from its bus routes serving Montgomery Street and West Side Avenue in Jersey City, where it is proposed to operate street railway cars over the same streets.

Upon consideration of the evidence the Board finds and determines that the resumption of street railway service is necessary and in the public interest solely in the transportation of passengers between points in Jersey City and industries in Kearny in the vicinity of the plants of the Federal Shipbuilding and Dry Dock Corporation and the Western Electric Company and the resumption of the service applied for, so limited in extent is approved, subject to all of the provisions of chapter 40 of the laws of 1942.

Dated, May 26, 1943.

No. 2250

In the Matter of Formal Complaints of Lincoln Transit Company, Inc., Against David Greenfield, Bernard Chustckie, Ben Friedman, Philip Rothberg, Morris Greenberg, Alfred Koopman, George Greenberg, Sol Bershadsky, Ambrosio Costobello, Lloyd Mertine and Meyer Friedman, Alleging Failure to Comply with the Board's Rules and Regulations.

George M. Eichler, for Lincoln Transit Company, Inc.; *Davis Brodsky*, for Bernard Chustckie, Ben Friedman, Alfred Koopman, George Greenberg and Sol Bershadsky; *Charles L. Apfel*, for David Greenfield; *Max S. Mahler*, for Ambrosio Costobello and Lloyd Mertine; *Morris Greenberg* appeared in his own behalf; *William H. Blake*, for Public Service Interstate Transportation Company.

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BY THE COMMISSION:

Lincoln Transit Company, Inc., has filed formal complaints against the above-named Respondents, alleging that during the season extending from November 1, 1942, to the filing of the complaints on January 28, 1943, the respondents transported passengers and their baggage in auto buses which did not comply with and were incapable of conforming to the Board's Regulation B7 relating to the construction and equipment of auto buses. The facts constituting the bases of the complaints in all essentials are undisputed.

The substance of the defense is that the Respondents are operating a special service, under Order of the Interstate Commerce Commission, Division 5, certifying to the convenience and necessity for the Respondents' operations; that this Board has no jurisdiction over the Respondents' operations and that the matters in issue are res adjudicata.

The Order issued to the Respondents by the Interstate Commerce Commission is a matter of record and is contained in a report of the Commission on common carrier application of Hyman Reuben and David Greenfield (No. MC-942081) which embraces authority for the operations herein considered, on applications of Morris Greenberg and David Greenfield (No. MC-95819), Herbert Luker and David Greenfield (No. MC-95820), and Samuel Ikenson (No. MC-95937). All of the Respondents are either those to whom authority was granted by the Interstate Commerce Commission or who are performing service under the authority through operating arrangements.

Pursuant to the authority granted by the Interstate Commerce Commission the Respondents are engaged in the operation of sedan type automobiles for transportation for hire of passengers and their baggage, in interstate commerce between Lakewood, New Jersey, and New York, New York. The Respondents' sedan type automobiles do not comply with the Board's requirements as set forth in Regulation B7 above referred to.

Respondents contend that in a hearing had before the Interstate Commerce Commission, the same operations and some of the identical vehicles were considered, and that the present operations are under, by virtue of, and strictly in conformance with certificates of convenience and necessity issued by the Interstate Commerce Commission; that all the evidence before the Inter-

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state Commerce Commission was, in substance and significance, identical with the evidence now presented; that this Board was represented at the hearing before the Interstate Commerce Commission as a party and, therefore, this Board is now bound by the decision of the Interstate Commerce Commission.

Two questions were thus raised: First, did the decision of the Interstate Commerce Commission exclude the jurisdiction of this Board and make Regulation B7 inapplicable to Respondents' operations; and, second, are these Respondents, in fact, operating in accordance with the certificates issued by the Interstate Commerce Commission?

On the question of the Board's jurisdiction, the report of the Interstate Commerce Commission, Division 5, Commissioners Lee, Rogers and Alldredge, states as follows:

> "With respect to the Board's prescribed specifications for certain types of motor vehicles, the fact that a sedan-type vehicle may be included within the term 'auto bus,' as specified by the Board's regulations, and the further fact that we have issued no dimensional regulations, does not necessarily mean that we may not issue certificates of Public convenience and necessity to applicants. * * * *Whether the Board's regulations now under discussion are such as it can validly promulgate notwithstanding Part II of the Interstate Commerce Act it is not our province to decide. That is an issue between applicants and the State. We shall, therefor make such findings as to the need for the proposed services as we deem appropriate in the premises and will leave to the respective parties in interest the question of compliance with State regulations.*" (Italics by Board.)

According to the decision of the Interstate Commerce Commission the question of compliance with the State's regulations is an issue between these Respondents (applicants before the Interstate Commerce Commission), and the State.

As to the Respondents' operation being in accordance with the certificates issued by the Interstate Commerce Commission, the Interstate Commerce Commission, Division 5, in the Order hereinbefore referred to, states the extent of the operation under the authority issued, as follows:

> "These operations differ materially from the operations of bus and rail carriers which operate over regular routes, between fixed termini, and usually on fixed schedules. Applicants maintain a telephone service at New York City and at Monticello, N. Y. (N.B.—between Lakewood, N. J., and New York, N. Y., in the instant cases), and generally arrange to carry six passengers on each trip, although a single passenger will be carried for an individual fare if no other persons are available for

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transportation at that time. No fixed schedule is maintained by applicants and the most convenient route is used. This type of service is particularly attractive for persons traveling in family groups with small children or persons who are aged or infirm, and it fulfills a public need."

* * * *

"Lakewood is a winter resort and considerable vacation traffic is attracted thereto. Applicants, in each case, have been rendering a so-called door-to-door service since prior to June 1, 1935, whereby family groups and others are picked up at the home in New York City and are carried to the hotel or boarding house in Lakewood, with return trips being made to the home or other destination point designated by the passenger. The record indicates that many of the persons so transported are aged or infirm and they find such service more convenient than that provided by rail and bus lines operating on a fixed schedule between the same points. The service rendered by the respective applicants extends from November 1 to April 30, both inclusive, of each year, and is similar to that described in Nudelman Common Carrier Application, 28 M.C.C. 91. We conclude that a need has been shown for such operations. It is also clear that applicants, in each case, engage in special operations within the meaning of section 207(a) of the act, and that they should be restricted to the transportation of groups not exceeding six passengers in number. Nudelman Common Carrier Application, supra."

Throughout the report of the opinion of the Interstate Commerce Commission two provisions are repeated and emphasized, viz. (1) that the Respondents' operations are strictly from door-to-door as a special service and convenience to family groups and infirm and older people unable to avail themselves of services of other common carriers operating between established terminals at the same points, and (2) that not more than six passengers may be transported in any one vehicle, exclusive of driver and not including children under ten years of age not occupying a seat.

David Greenfield testified that the car used by him, which is similar to the cars used by the other Respondents, is a seven-passenger car, without driver, and that in many instances the Respondents have carried eight passengers in their cars. Mr. Greenfield stated "we have been carrying eight, seven and a child, in many instances." Obviously this is beyond the scope of the provisions of the certificates issued by the Interstate Commerce Commission.

A more serious violation, however, is to be found in the Respondents' own admission that their service is not confined to door-to-door operations but extends to the utilization of their

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offices as terminals between which a fare less than the door-to-door service fare is published, and the Respondents' tariffs provide for an additional fare of fifty cents (50c) at each end of the route where door-to-door service is requested by the passenger. It appears that passengers are accepted at the Respondents' offices or terminals at each end of the route, for trips between the terminals as distinguished from their homes or hotels, the latter being the specific reason for the issuance of certificates of convenience and necessity by the Interstate Commerce Commission, and specifically referred to therein. It is obvious that under the tariffs filed and the fares charged, the passengers have a choice of transportation to or from the Respondents' terminals at either end of the route or of paying the additional fare for the door-to-door service. Where the transportation is between terminals it is precisely the same as that afforded on existing bus routes operating between the same points. It, therefore, appears that the Respondents' contention that they are operating in accordance with the provisions of the certificates of the Interstate Commerce Commission is not sustained.

It appears to the Board that the operation of the Respondents' vehicles is between fixed terminals in the same manner and is of the same character as other bus operations extending between the same points which are subject to the Board's rules and regulations with respect to the construction and equipment of the vehicles operated and, in addition thereto, are subject to the Board's rules and regulations relative to the filing of public liability and property damage insurance. The Board's records disclose that none of the Respondents have filed, with the Board, evidence of public liability and property damage insurance in accordance with the rules and regulations of the Board.

Upon consideration of the testimony the Board finds and determines that the Respondents' operations between New York, New York and Lakewood, New Jersey, are subject to the jurisdiction of this Board and its rules and regulations pertaining to the construction of the equipment operated, Regulation B7, and the filing of public liability and property damage insurance. The Board further finds and determines that the Respondents, and each of them, have failed to comply with the law of this State and with the Board's rules and regulations in both respects, and hereby Orders them and each of them forthwith to cease and

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desist from such operations within the State of New Jersey on the service upon them of a copy of this Determination and Order.

Dated, June 17, 1943.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

NEW JERSEY SUPREME COURT

No. 226. January Term, 1944.

David Greenfield,
Prosecutor,
vs.
Board of Public Utility Commissioners,
Defendant.

Argued January 20, 1944. Decided

On writ of certiorari.

Before *Justices Case, Donges* and *Porter.*

For the prosecutor, *Louis Ogust, Esq.*

For the defendant, *Frank H. Sommer, Esq.,* and *Harold H. Fisher, Esq.*

The opinion of the court was delivered by

DONGES, J.

This certiorari was allowed to review a decision of the Board of Public Utility Commissioners of the State of New Jersey in the matter of the "Complaint of Lincoln Transit Co., Inc., alleging that one David Greenfield transports passengers between points in this State and points in New York State in auto buses the construction and equipment of which violates the regulations of the Board."

It is undenied that Prosecutor is operating under an order of the Interstate Commerce Commission for the issuance to Prosecutor of certificates of public convenience and necessity "authorizing special operations as common carriers by motor vehicle in the transportation of passengers and their baggage, between Lakewood, N. J., and New York, N. Y., in on-call, non-scheduled services over irregular routes, commencing November 1, and ending April 30, of each year, both dates inclusive."

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Prosecutor claims and argues that the Board of Public Utility Commissioners is without jurisdiction over the Prosecutor because he was operating under a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Motor Carrier Act.

The burden of Prosecutor's argument is that the State is without power to regulate operation of motor vehicles where the Federal Government, through the appropriate agency, has granted permission, and that, having received such permission, the State can impose no regulation, and that the whole matter is res judicata by the determination of the Interstate Commerce Commission.

In the report of the examiner who heard and examined the matter for the Interstate Commerce Commission, Exhibit R-1, it is said:

> "Size and weight of motor vehicles are matters which the Commission is authorized to investigate and report on the need for regulation. (Section 225 of the act.) At the present time there is no federal dimensional regulation relative to motor vehicles and in the absence of such specific legislation state regulation shall prevail. *S. C. Highway Dept.* vs. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734.
>
> "It is not the function of the Commission to interpret state laws or regulations made thereunder. It is reasonable to assume that a carrier will comply with all local regulations to which it is subject."

The questions involved are not res judicata. Nor does it appear that the State is without all power to regulate interstate commerce. In *South Carolina State Hwy. Dept.* vs. *Barnwell Bros., supra,* it was said:

> "While the constitutional grant to Congress to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Willson* vs. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412, and *Cooley* vs. *Port Wardens,* 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constititutional restraints."

That case involved and the decision sustained a statute prohibiting the use on State highways of motor trucks and semi-trailer motor trucks whose width exceeds 90 inches and whose

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weight, including load, exceeds 20,000 pounds. The Court further said: "The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden."

To the same effect is *Cloverleaf Butter Co.* vs. *Patterson,* 315 U. S. 148, 86 L. ed. 754.

In the instant case, the record submitted to us is meager. It does not contain the Order or regulation of the Board so that we may not determine whether or not it is a reasonable or legal regulation. The Prosecutor, from the records, appears to have conceded that the Order or regulation was not complied with, but relied upon the argument that the Board was without power to impose any regulations on the operation of Prosecutor, by reason of his licensing by the Federal Commission.

On the record before us, we are unable to conclude that the State Board exceeded its authority. The Court will not presume the judgment of a quasi judicial body to be erroneous in the absence of proof thereof.

We conclude that the Prosecutor has failed to show that the Respondent's Order was unwarranted or illegal and the writ is dismissed, with costs.

No. 2251

Public Service Coordinated Transport vs. Terzella Bus Service, Formal Complaint In re Unauthorized Operation of Auto Bus between Winfield Township (Clark Township) and the Federal Shipyard in Kearny, New Jersey.

Ambrose Mudrak, Esq., for Terzella Bus Service; *J. H. Mulhern, Esq.,* for Public Service Coordinated Transport; *Samuel L. Rothbard, Esq.* (by *Anthony J. Nisivoccia, Esq.*), for Winfield Township and Winfield Park Consumers' Co-operative, Inc.

BY THE COMMISSION:

Public Service Coordinated Transport filed a formal complaint in which it is alleged that Terzella Bus Service is conducting an unauthorized operation between Winfield Township (Clark Township) and the Federal Shipyards, in the Town of Kearny, and that such operations are a duplication of existing auto bus

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service in this area and prejudicially compete with the Company's operation on the Clark Township-Elizabeth-Kearny Bus Route No. 35 approved by this Board, November 27, 1941.

The Respondents contended that the operations conducted are contract charter operations and are not within the Board's jurisdiction and the operations are not unlawful.

The original complaint was filed by Public Service Coordinated Transport, April 1, 1942. Hearing on the complaint was held Thursday, June 18, 1942. The Respondent did not immediately avail himself of the opportunity to apply under chapter 49 of the laws of 1942. Subsequently, Terzella Bus Service applied June 24, 1942, and July 13, 1942, under chapter 49 of the laws of 1942 for temporary permit to operate two buses from Winfield Township to Port Newark and Kearny Shipyards. Public Service Coordinated Transport also applied August 24, 1942, under chapter 49 of the laws of 1942 for permit to operate two buses on Winfield Township-South Kearny Bus Route to serve members of the Winfield Park Consumers' Cooperative, Inc., who are employed at Federal Shipbuilding and Drydock Company, Kearny, N. J., and the Port Newark Shipyards. Informal conference on the Terzella Bus Service application was held on Thursday, August 20, and Wednesday, August 26, 1942, and Wednesday, September 16, 1942.

Oral argument before the Board on the two applications was held Thursday, September 24, 1942.

The Board is of the opinion that the operation by Terzella Bus Service without the Board's approval is unlawful and in normal times if such operations were intended to be permanent, an Order for its discontinuance would immediately issue. However, Respondent has filed application for temporary permit thus submitting to the Board's jurisdiction. The patrons of Terzella's Bus Service are mainly war workers employed at the Federal Shipyards, Kearny and have urged the Board to approve the service because it affords them convenient and direct service to the shipyards. In these abnormal times, with constant changing conditions, emergency operations and complaints must necessarily be treated with a wider discretion than in normal times.

The Public Service Coordinated Transport has notified the Board by letter dated June 9, 1943, that as a result of General Order No. 39, issued by the Office of Defense Transportation,

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it has discontinued service on the Clark Township-Elizabeth-Kearny Route No. 35, between Elizabeth and Kearny, effective June 7, 1943. This curtailment in service was made necessary by the present gasoline shortage and again changes the transportation situation in the area between Clark Township and the Federal Shipyards. No advantage would be gained by the Complainant or the workers if the Terzella Bus Service was ordered to be discontinued under present conditions. In view of the above facts the Board will dismiss the complaint against the Terzella Bus Service at this time without prejudice, and will issue a temporary certificate under chapter 49 approving of the service between Winfield Township and the shipyards in Port Newark and Kearny.

Dated, June 17, 1943.

No. 2252

In the Matter of the Application of Public Service Interstate Transportation Company for Approval of Municipal Consents for Change of Route Governing the Operation of Six of the Twenty-three (23) Auto Buses Presently Approved for Operation on the Fairview Bus Route No. 2 (P. U. C. Route-File No. 062-504.)

J. H. Mulhern, for Public Service Interstate Transportation Company; *Heine & Heine* (by *Norman Heine*), for Century Transit Company.

BY THE COMMISSION:

The applicant requests approval of municipal consents of the Township of Haddon, Borough of Oaklyn and Borough of Audubon for change of route governing the operation of six (6) of the twenty-three (23) auto buses presently approved for operation on Fairview Bus Route No. 2. The proposed change of route is as follows:

> From the approved route at Black Horse Pike and Kendall Boulevard, Haddon Township; thence on Black Horse Pike, Haddon Township; thence on Road A and Road B of a housing development constructed and owned by the Federal Government in the Borough of Audubon known as "Audubon Village", to Nicholson Road in the Borough of Audubon; thence via Nicholson Road to the approved route at Nicholson Road and West Atlantic Avenue, Audubon.

The applicant's testimony indicates that "Audubon Village" has a housing capacity for approximately 500 families and is presently occupied by 496 families.

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The applicant alleges that the change of route is necessary in order to afford reasonable service between "Audubon Village" and the business section of Audubon Borough and between the housing project and industries in Camden.

Century Transit Company objecting to the application sets forth that it now has authority of this Board to operate two (2) auto buses between "Audubon Village" and Camden in addition to five (5) auto buses which have heretofore been approved for operation over a regular route between Camden and Gloucester Heights which pass "Audubon Village" on Black Horse Pike. Century Transit Company further objected to the application for the reason that Public Service Interstate Transportation Company had not obtained permission of the Federal Housing Authority for the use of the roads within the housing project and owned by the Federal Government.

The Federal owned highways are a segment of the route proposed to be changed intermediate to two (2) public highways for which municipal consents were granted. The lack of authority for the use of the Federal owned highways by the applicant resulted in this application being placed on the "Suspense" list in order to afford applicant an opportunity to obtain this permission.

Subsequently, the applicant requested the Board to rehear the application, at which time the license to use the government owned highways was filed with the Board. In addition thereto, further testimony was submitted by the applicant.

The joint Labor-Management Committee of New York Shipbuilding Corporation testified that additional service was necessary between "Audubon Village" and the plant of the New York Shipbuilding Corporation. The Secretary of the Board of Trustees of the "Audubon Village" housing project further testified that the Board of Trustees had received numerous complaints of the service between "Audubon Village" and Camden and based upon these complaints believed that additional auto bus service was necessary.

Upon consideration of the evidence, the Board finds and determines that the approval of municipal consents for the change of route applied for is necessary and in the public interest.

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The Board HEREBY GRANTS the application and APPROVES the municipal consents for operation over the route and for the fares set forth in Schedule "A" attached hereto.

Dated, June 17, 1943.

An appeal was taken from this decision to the Supreme Court. The decision of the Supreme Court follows:

FARE SCHEDULE

AUDUBON SERVICE:

Miles

5.07 Pennsylvania Railroad Ferry, Camden, to Mt. Ephraim Avenue (Black Horse Pike) and Newton Creek, Camden 5c

Mt. Ephraim Avenue (Black Horse Pike) and Collings Road, Camden, to Kings Highway and Wyoming Avenue, Audubon 5c

COLLINGSWOOD SERVICE:

4.71 Pennsylvania Railroad Ferry, Camden to Mt. Ephraim Avenue (Black Horse Pike) and Collings Road, Camden 5c

1.48 Mt. Ephraim Avenue (Black Horse Pike) and Collings Road, Camden, to Lakeview Drive and Collings Avenue, Collingswood 5c

FAIRVIEW BUS ROUTE No. 2 (P. U. C. ROUTE-FILE No. 062-504)

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY

Has approval for the operation of seventeen (17) auto buses over the following routes:

Beginning at Federal Street Loop, Pennsylvania Railroad Ferry, *Camden,* thence via Private Right-of-Way, Federal Street, Broadway, Morgan Street, Morgan Boulevard, Yorkship Road, Yorkship Square, Kearsage Road, Collings Road, Mt. Ephraim Avenue, to Kendall Boulevard, *Oaklyn,* thence via Kendall Boulevard, Oakland Avenue, Madison Avenue, to West Atlantic Avenue, *Audubon,* thence via West Atlantic Avenue, West Merchant Street, Wyoming Avenue, Washington Terrace, Cedarcroft Avenue, to Kings Highway, *Haddon Heights,* thence via Kings Highway to Wyoming Avenue; returning via Wyoming Avenue to *Audubon,* thence via the same route to Federal Street Loop at the Pennsylvania Railroad Ferry, *Camden.*

Collingswood Extension:

From the intersection of Collings Road and Mt. Ephraim Avenue at the Haddon Township-Camden City Line, thence via Collings Avenue (continuation of Collings Road), through Haddon Township to Park Avenue, *Collingswood,* thence via Park Avenue, Lakeview Drive to Collings Avenue; returning via Collings Avenue, through Collingswood and Haddon Township to Mt. Ephraim Avenue.

Via Second Street and Ferry Avenue:

Beginning at the Federal Street Loop, Pennsylvania Railroad Ferry Terminal, thence via Private Right-of-Way, Federal Street, Second Street and Ferry Avenue to Broadway, *Camden;* returning via Ferry Avenue, Second Street, Arch Street, Delaware Avenue, Federal Street, Private Right-of-Way to the Federal Street Loop, Pennsylvania Railroad Ferry Terminal, *Camden.*

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Via Market Street:

Beginning at Federal Street Loop, Pennsylvania Railroad Ferry Terminal, thence via Private Right-of-Way, Federal Street, Delaware Avenue, Market Street, Broadway to Broadway and Federal Street, *Camden.*

R. C. A. TRIPPER SERVICE

Via Delaware Avenue:

Beginning at the R. C. A. Plant on Cooper Street, *Camden,* thence via Cooper Street, Delaware Avenue to Federal Street.

Via Second Street and Ferry Avenue:

Beginning at the R. C. A. Plant on Cooper Street, *Camden,* thence via Cooper Street, Second Street, Ferry Avenue to Broadway.

Audubon Village Service:

Also has approval for the operation of six (6) buses over the following route:

Beginning at Federal Street Loop, Pennsylvania Railroad, *Camden,* thence via Private Right of Way, Federal Street, Broadway, Morgan Street, Morgan Boulevard, Yorkship Road, Yorkship Square, Kearsage Road, Collings Road, Oakland Avenue, *Oaklyn,* Black Horse Pike to *Oaklyn* and *Haddon Township,* Road "A", Road "B", Audubon Village Housing Project, Nicholson Road, *Audubon,* West Atlantic Avenue, West Merchant Street, Wyoming Avenue, Washington Terrace, Cedarcroft Avenue, to Kings Highway, *Haddon Heights,* Kings Highway to Wyoming Avenue; returning via Wyoming Avenue, West Merchant Street, West Atlantic Avenue, Nicholson Road, *Audubon,* Road "B", Road "A", Audubon Village Housing Project, Black Horse Pike, Collings Avenue, Kearsage Road, Yorkship Square, Yorkship Road, Morgan Boulevard, Morgan Street, Broadway, Arch Street, Delaware Avenue, Federal Street, Private Right-of-Way, Pennsylvania Railroad Ferry Terminal, *Camden.*

NEW JERSEY SUPREME COURT

No. 205. January Term, 1944.

Century Transit Co.,
Prosecutor,

vs.

Public Service Interstate Transportation Company and Board of Public Utility Commissioners,
Defendants.

Submitted January 28, 1944. Decided May 9, 1944.

On certiorari.

Before *Justices Parker, Heher* and *Perskie.*

For the prosecutor, *Norman Heine.*

For the defendant Public Service Interstate Transportation Company, *William H. Speer.*

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PER CURIAM:

(Not to be printed in any report.)

The controversy is between two public utility corporations operating competing bus lines in the County of Camden, and particularly with reference to the settlement known as Audubon Village. The gravamen of the position taken by the Prosecutor, Century Transit Company, is that the Board of Public Utility Commissioners, in the exercise of its statutory jurisdiction and discretionary power, refused the application of the Prosecutor for permission to operate five more busses over the territory in question and permitted the operation of only two more busses although permitting the Public Service Interstate Transportation Company to operate six more busses in the territory in question. It seems quite obvious, therefore, that we are asked to overrule the exercise of a discretionary power committed to the Utility Board which had a hearing on November 18, 1941, and another hearing on April 6, 1943, and a third and final hearing on April 13, 1943. The members of the Board who sat in the case had the benefit of oral argument by counsel and, in the exercise of the discretionary power given to them, made the decision that is now before us to review. Certain testimony was taken in addition to the testimony before the Commissioners and this has been duly considered.

In this situation it is sufficient for the purposes of a decision to rely upon the rule laid down in the second headnote in the case of *Fornarotto* vs. *Public Utility Commissioners,* 105 N. J. L., at page 29, which reads: "The delegation of power to the Board of Public Utility Commissioners in approving or disapproving the granting of a franchise to a public utility, manifestly necessitates the exercise of their good judgment to determine the question upon the evidence as well as upon their knowledge of the conditions, and the needs of the general public welfare; and unless it appears that the Board, in dealing with the application for its approval, have reached their conclusion by a violation of the law, or a clear abuse of the discretion vested in it, their conclusion, where there is evidence which reasonably supports it, cannot be disturbed by the Supreme Court."

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As to the present case we find no violation of law nor do we find any abuse of the discretion vested in the Board which appears to be supported by suitable evidence.

The writ of certiorari is therefore dismissed, with costs.

No. 2253

Formal Complaint of the City of Atlantic City vs. Pennsylvania-Reading Seashore Lines In re Proposed Discontinuance of Railroad Passenger Service Between Philadelphia, Atlantic City and Intermediate Points via Delaware River Bridge Route on Saturdays, Sundays and Holidays.

H. Merle Mulloy and *Windsor F. Cousins,* for Pennsylvania-Reading Seashore Lines; *Samuel Backer,* for City of Atlantic City; *Frank S. Farley,* for County of Atlantic; *L. D. Champion,* for City of Pleasantville; *Enoch A. Higbee, Jr.,* for City of Margate City; *John D. McMullin,* for City of Absecon; *Hiram Steelman,* for City of Ventnor; *William Morse,* for City of Longport; *Mayor John Machise,* for City of Hammonton.

The Pennsylvania-Reading Seashore Lines announced a summer train service effective June 20, 1943, Philadelphia-Atlantic City and Southern New Jersey seashore points. The announcement proposed curtailing the present service from Philadelphia-Broad Street Station to Atlantic City and return Saturdays, Sundays and holidays.

The City of Atlantic City filed a formal petition praying an Order requiring the continuance of present passenger service by rail between Philadelphia, Atlantic City and intermediate points, via the Delaware River Bridge route on Saturdays, Sundays and holidays as heretofore and to preclude the curtailing of schedules for the same during the summer period of the year 1943. This formal petition was set down for hearing and the Company and the City of Atlantic City and the municipalities and organizations that joined with Atlantic City were heard.

After careful consideration of the testimony submitted, the Board makes the following findings and reaches the following conclusions:

The Board's authority is limited to requiring, after hearing, upon notice, the meeting of local transportation needs by "safe, adequate and proper service." What constitutes safe, adequate and proper service depends upon the conditions prevailing at the time of the inquiry. Certain facts stand uncontradicted. Under

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normal conditions 90 per cent of those coming into Atlantic City are carried by motor cars and motor buses. The rail carriers transport only 10 per cent. This situation has, through restrictions on auto and bus operations, been radically changed and a substantial added burden has been cast upon the presently existing passenger car and motive power facilities of the rail carriers. These facilities cannot be augmented because of the limitations and restrictions placed, under war conditions, upon the production of this equipment. It is clear, on the basis of past experience, that the extraordinary burden that the rail carriers are and will be called upon to bear will be at its peak during the months of July and August, and especially on Saturdays, Sundays and holidays. Adequate and proper service requires that all available equipment be employed to the greatest advantage of all who demand the service in question.

The testimony produced shows that the Pennsylvania-Reading Seashore Lines own only 72 coaches, 4 of which, on an average, are in the shops undergoing repairs. The Reading Company can supply for the service a maximum of 48 cars, subject, however, to priority requirements for military service. The Pennsylvania Railroad Company can supply, also subject to priority requirements of military movements, a minimum of 90 cars and a maximum of 100. This makes a maximum number of cars available in the service of between 210 and 216 cars.

As there are limitations upon the cars available, there are likewise limitations upon the locomotives available. In general, trains between Atlantic City and the Philadelphia-Camden area are operated by two types of locomotives, one type K-4, none of which are owned by the Pennsylvania-Reading Seashore Lines, and the other type E-6, of which 9 are owned by the Pennsylvania-Reading Seashore Lines and 14 are leased from the Pennsylvania Railroad Company. K-4 is heavier than E-6 and can handle a greater capacity of passenger equipment. K-4 engines are in great demand, particularly for troop movements on the Pennsylvania Railroad. The Pennsylvania Railroad is not in a position to furnish the Pennsylvania-Reading Seashore Lines any specified number of K-4 locomotives. The E-6 engines are limited to a maximum train of 10 coaches over the bridge line into and out of Broad Street, Philadelphia, because of adverse grades.

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The problem that is presented is that of making the most effective use of these available cars and locomotives. The round trip, including turn-around operations, between Philadelphia and Atlantic City requires approximately one hour and six minutes longer than the round trip between Camden and Atlantic City. This difference in time would enable the equipment operated between Camden and Atlantic City to be supplemented by the operation of sections additional to the scheduled trains. The proposed operation would result in the affording of more than 30 per cent additional service (or the carrying of 30 per cent more passengers). It appears that the proposed schedules would effect the most advantageous use of the limited equipment and would, in general, afford the greatest degree of service to the people of Atlantic City and those coming to that city.

The principal objection interposed by the City of Atlantic City and the municipalities and organizations associated with it, was directed to the curtailing of the service from Philadelphia-Broad Street Station to Atlantic City and was in the main directed to the fact that no through service was afforded those coming from distant points on Saturdays, Sundays and holidays. The Board recognizes the ground upon which this objection rests and that those coming from a distance would on these days be somewhat inconvenienced by the necessity of using the service from Philadelphia-Market Street Wharf. The Board, however, believes that in the present conditions care must be taken to make the limited equipment available to the greatest possible extent to the largest number of those demanding service. Recognizing this particular ground of the protest of Atlantic City and the associated municipalities and organizations, and to meet it as far as possible under the conditions above outlined, the Board has requested the Company to supplement its proposed schedule by the addition of the operation of another morning connecting train from Philadelphia-Broad Street Station to Atlantic City on Saturdays. This request has been acceded to and the additional train operation will be provided.

The Company interposed an objection to the jurisdiction of the Board to require the operation of any trains from Philadelphia-Broad Street Station to Atlantic City, advancing the proposition that the jurisdiction of the Board was confined to securing the operation of safe, adequate and proper service within the State

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of New Jersey. The Board does not concede the validity of that objection to its jurisdiction but reaches the conclusion that under existing conditions no service from Philadelphia-Broad Street Station to Atlantic City on Saturdays, Sundays and holidays, provided by the proposed schedules, increased by the adding of the operation of this morning train can be furnished without sacrifice of other proposed services to and from Atlantic City. Consequently, this jurisdictional question, which was reserved by the Companies, need not now be decided. This is the Board's determination on the petition filed by the City of Atlantic City and its associated municipalities and organizations and disposes of the issues raised by that petition and the testimony taken at the hearing.

The schedules proposed are permitted to become effective Sunday, June 27, 1943, with the additional Saturday morning only train to begin operation effective Saturday, July 3, 1943.

Dated, June 23, 1943.

No. 2254

In the Matter of the Formal Complaint of John P. Mahar, Beviano Chartered Service and Villani Bus Company vs. Public Service Coordinated Transport In re Unlawfully Picking Up and Discharging Passengers in the City of Linden at Unauthorized Points Along the Route of the No. 62 Line.

Joseph P. Lindabury, for John P. Mahar, Beviano Chartered Service and Villani Bus Company; *J. H. Mulhern,* for Public Service Coordinated Transport.

BY THE COMMISSION:

This matter comes before the Board on complaint of John P. Mahar, Beviano Chartered Service and Villani Bus Company against Public Service Coordinated Transport, alleging the picking up and discharging of passengers in the City of Linden at unauthorized points on the route of No. 62 Bus Line; the charge is that said line is operating as a local line in the City of Linden in violation of conditions imposed in the municipal consent granted by said city permitting only two stops in Linden.

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Respondent admits the mode of operation but denies that it is unlawful.

By a series of decisions this Board has approved the consent of the City of Linden without any express restrictions or limitations on the service.

Complainants contend that this Board had no right to disregard the restrictions and conditions imposed in the municipal consent of the municipality; that therefore the restrictions and conditions imposed by the municipality remain in full force and effect and that local operations as described become unlawful.

The complaint in effect becomes an application to this Board to interpret its decisions heretofore made and approvals heretofore given pertaining to the operation of the line. We cannot now be called upon to pass on the question whether or not this Board had the power to approve a municipal consent stripped of its conditions. The sole question is, did this Board so approve the municipal consent stripped of its conditions?

If the Board did by its decisions in fact approve the municipal consent of the City of Linden without restrictions and conditions imposed therein by the municipality, and if, as contended by the complainants, such action of the Board was beyond its authority, then the remedy of the complainants was by a review of the Board's decisions and rulings when made; and as long as such decisions or rulings by the Board remain in full force the local operations as alleged do not constitute a violation of the Board's regulations.

Complainants further contend that this Board approved the municipal consent of the City of Linden with the condition "that all State laws and municipal regulations must be fully complied with before these consents become effective." From this, complainants argue that the conditions against local operation originally included in the municipal consent were thus maintained by the Board.

No express limitations or restrictions were made by the Board with respect to local operation in the City of Linden, and a reference to the decisions of the Board in the matter of the application of Respondent, Public Service Coordinated Transport, for approval of municipal consent of the City of Linden makes it clear that the Board intended to and did approve the municipal consent without conditions or restrictions, in fact expressly providing for local operation.

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The original application of the Respondent for approval of the municipal consent in question was denied by this Board's decision of March 18, 1930, on the ground that the proposal was to institute an express bus service for a then existing local railway service. In its decision of May 26, 1933, the Board reconsidered this matter on proper application, and finding that the operation then proposed before it was for a local operation with a general plan for 5c-fare zones, approved the consent. The reconsideration and modification of the previous decision made by the Board, on May 26, 1933, was predicated upon the fact that the proposed service in the municipality in question (with certain exceptions which do not concern the present matter) was a local service with 5c-fare zones. It is true that in its decision of May 26, 1933, the name of the City of Linden was left out in enumerating the municipalities which had given their consent. This obviously was a typographical error because in a subsequent decision, viz., August 30, 1933, the Board in referring to its decision of May 26, 1933, recited the approval of the consent of the City of Linden along with other municipalities. Also, the Board's records show that municipal consent of the City of Lincoln, was in existence as of May 26, 1933.

It appears, therefore, that in approving the municipal consent of the City of Linden this Board permitted the operation of local service on the line in question and that therefore the operation by the Respondent now complained of is not a violation of the orders of this Board or of the municipal consent as approved by this Board.

The complaint is therefore dismissed.

Dated, July 29, 1943.

No. 2255

In the Matter of the Application of Hambloch Brothers for Approval of Transfer of Municipal Consents to Hambloch Brothers, a Partnership, for the Operation of One (1) Auto Bus Between Paterson and Haledon on the Paterson-Haledon Bus Route No. 14 (P. U. C. Route-File No. 155-179), and

In the Matter of the Application of Hambloch Brothers for Approval of Transfer of Municipal Consent to Hambloch Brothers, a Partnership, for the Operation of Two (2) Auto Buses on the Bunker Hill Bus Route No. 64 (P. U. C. Route-File No. 057-179).

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Samuel A. Wiener, for Hambloch Brothers; *J. H. Mulhern,* for Public Service Coordinated Transport.

BY THE COMMISSION:

These are applications for approval of transfer of municipal consents of the City of Paterson and Borough of Haledon for the operation of three (3) buses in all; also application for the sale of equipment, more particularly seven (7) buses, by Hambloch Brothers, Inc., to Hambloch Brothers, a partnership.

A reference to the applications filed in the two cases shows that the applicants, designated as "Hambloch Brothers" seek approval of transfer of municipal consents for the operation of one (1) and two (2) buses, respectively. Presumably the applications are made under R. S. 48:4–6, which provides:

> "Any such municipal consent for the operation of an autobus heretofore granted and now in effect or hereafter granted and in effect may be transferred by the holder thereof upon obtaining the approval of the board of public utility commissioners upon application to it by either the transferor or the transferee."

The applications on file show the applicant in each instance to be "Hambloch Brothers," whatever that may stand for. The body of the application states that the transferee is "Hambloch Brothers partnership." It is further stated in the application that the would-be transferor, Hambloch Brothers, Inc., a corporation, is now dissolved. The application is signed by Frank Hambloch as "partner," and by "Hambloch Bros., Inc., by Frank Hambloch, president," although, as noted above, the corporation is dissolved and unable to transact business as such. This requires transactions for liquidation to be conducted by its directors in their capacity as trustees in liquidation. (See R. S. 14:13–5.)

Passing irregularities of form for the moment, the testimony taken at the hearing on May 20, 1943, indicates more serious irregularities and obstacles. It appears that the would-be transferees in their individual or partnership capacities, have been operating the buses in question without consent, and without transfer of consent. It also appears that the partners, the individuals comprising the new partnership, have been using the very buses, equipment and other property of the corporation and there is no evidence of any sale of these buses or equipment by the corporation to the individuals; or any approval of such sales as required under R. S. 48:3–7. It appears that the individuals,

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formerly and still stockholders of the corporation, took possession of all properties of the corporation, lock, stock and barrel, without approval of this Board.

The testimony discloses that not only do applicants seek transfer of municipal consents, but also transfer of seven (7) buses; no evidence is submitted as to consideration for the transfer, nor is there any explanation given as to why no application is made for transfer of the realty, equipment and other property of the corporation which are being used by the individuals; although approval is sought for transfer of the buses. The attempted transfer of the buses was made on October 1, 1942.

It also appears that Hambloch Brothers, Inc., has or had an undivided interest in the Bunker Hill bus route, together with the DiBari Transportation Company. What disposition is being made of that is not clear from the testimony.

Under all of the evidence adduced, the Board is of the opinion that it is not justified in approving, nunc pro tunc, operations or transactions unlawfully made, irregularly presented and attempted to be supported by evidence that is vague and insufficient.

For these reasons the Board denies the applications.

Dated, July 29, 1943.

No. 2256

In the Matter of the Complaint of the Township of Teaneck Upon the Issuance of Certificate of Temporary Permit R-263 Issued by the Board Under Chapter 49, P. L. 1942, To Public Service Interstate Transportation Company for a Change of Route in the Township of Teaneck Governing the Operation of Three Auto Buses on the Hackensack-Bergenfield Route No. 70 (P. U. C. Route-File No. 144-504).

Donald M. Waesche, for Township of Teaneck; *J. H. Mulhern,* for Public Service Interstate Transportation Company.

BY THE COMMISSION:

This matter comes before the Board upon complaint of the Township of Teaneck upon the issuance of Certificate of Temporary Permit R-263 issued by the Board under the provisions of chapter 49, laws of 1942, to Public Service Interstate Transportation Company for a change of route in the Township of Teaneck governing the operation of three auto buses on the Hackensack-Bergenfield Route No. 70 (P. U. C. Route-File No. 144-504.)

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Certificate of Temporary Permit was issued by the Board changing the route of the buses in the Township of Teaneck from Cedar Lane, Queen Anne Road, State Street, Windsor Road, and Briarcliff Road to the new portion of the route, via Elm Avenue, Garrison Avenue and Sussex Road. The certificate was issued on the facts presented by Public Service Interstate Transportation Company that the changed route would afford a more direct service between Bergenfield and Hackensack for the convenience of persons who interchanged to other facilities of the Company at Hackensack and who were employed in war industries, effecting a saving in time, and further, that the changed operation would result in the reduction of 5,000 bus miles per year, which is in accord with the national policy of conserving fuel, rubber, equipment and other materials essential to the war effort. Paragraph No. 10 of chapter 49, laws of 1942, provides as follows:

> "The board shall have power to co-operate with the Federal government or with any agency of that government having jurisdiction to act with respect to emergency autobus transportation requirements, and the board shall have power insofar as Federal legislation may permit jointly with such Federal agency or alone to do whatever may be necessary or proper to give effect to the orders, rules, regulations or requirements of such Federal agency adopted, issued or imposed to minimize or obviate within this State the emergency in autobus transportation."

The Township of Teaneck, through municipal officials, sets forth that Public Service Interstate Transportation Company and other bus transportation companies in the past have endeavored to obtain municipal consent of the Township of Teaneck for the operation of buses on Garrison Avenue and Sussex Road and that the officials of the Township have in each instance refused to issue the municipal consent. It further contends that the recourse of Public Service Interstate Transportation Company to the provisions of chapter 49, laws of 1942, was a subterfuge to establish a bus route on these highways.

Witnesses engaged in war industries and social welfare work in conjunction with the war effort, testified that the route as changed in Certificate of Temporary Permit R-263 is more convenient and affords a more direct service for persons required to use the buses.

The Certificate of Temporary Permit, issued under the authority of chapter 49, laws of 1942, does not create a property or vested right in the holder thereof, and will be inoperative and of no effect six months after the date of the making of a treaty

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of peace or the last of treaties of peace concluding all of the present wars with the governments of Japan, Germany and Italy, unless otherwise revoked, altered or modified by the Board.

Upon consideration of the evidence, the Board finds and determines that Certificate of Temporary Permit R-263 is consistent with the national policy for the conservation of equipment and materials essential to the war effort, and further that the route as changed in the Certificate of Temporary Permit is desirable and essential to persons engaged in war industries who are dependent upon bus service for transportation between their homes and places of employment, and is necessary and proper to meet the emergency.

The Board therefore DISMISSES the complaint.

Dated, July 29, 1943.

No. 2257

Application of the Central Railroad Company of New Jersey for Discontinuance of Certain Train Service Between Jersey City and East Long Branch, Effective August 9, 1943.

A. H. Elder, and *Earl J. Harrington,* for the Central Railroad Company of New Jersey; *William E. Foster,* for Township of Middletown; *Nicholas W. Kaiser,* for Monmouth Beach Improvement Association; *Leo J. Warwick,* for City of Long Branch; *George W. C. McCarter* (by *Winslow B. Ingham*), for Rumson Borough Improvement Association; *John M. Pillsbury,* for Borough of Atlantic Highlands, Borough of Highlands, Keansburg and Keyport.

BY THE COMMISSION:

The Central Railroad Company of New Jersey has applied to the Board for approval of the discontinuance and adjustment, effective August 9, 1943, of the following trains:

Train No.

4008 Weekdays leaving East Long Branch at 7:37 A.M., arriving at Matawan 8:30 A. M., Jersey City 9:12 A. M., New York 9:25 A. M., to be operated earlier and leave East Long Branch 7:28 A. M., arriving at Matawan 8:23 A. M. and be discontinued between Matawan and Jersey City. Passengers would change at Matawan for Train No. 3308 leaving Matawan at 8:26 A. M. and arriving at New York 9:20 A. M.

5014 Weekdays leaving East Long Branch 8:15 A. M., arriving at Matawan 9:15 A. M., to be discontinued.

4001 Weekdays leaving New York 10:35 A. M., Jersey City 10:48 A. M., to be discontinued between Jersey City and Matawan but continue from Matawan to East Long Branch, leaving Matawan at 12:52 P. M.

5011 Weekdays except Saturday, leaving Matawan 1:53 P. M., arriving East Long Branch 2:49 P M., to be discontinued.

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After notice, the matter was heard on July 29, 1943, and it appears that the Company's sole object is to effect the release of train crew personnel and motive power from passenger service for use in freight service. The net saving will be five crew members, consisting of an engineman, fireman, conductor and two brakemen, and one locomotive. Proofs were offered by The Central Railroad to show that an increase in freight operations and the loss of railroad personnel to the military services have brought about a condition in which delays in the movement of freight are occurring from time to time. It is a matter of common knowledge and judicial notice may be taken of the fact, that demands for passenger service have increased and that delays in movement of passengers have occurred.

The proposal of the Company is opposed by commuters and residents of the communities served by the railroad between Matawan and East Long Branch. The Township of Woodbridge objects to the discontinuance of Train No. 4001 on behalf of the residents of Sewaren.

A count of passengers using these trains on July 10, 12, 13 and 14, 1943, was offered by The Central Railroad Company. The Board's staff made a similar count on July 23, 24 and 26, 1943, and the summarized results of both counts are as follows:

PASSENGERS CARRIED—1943

	Sat. *July* 10	*Mon.* *July* 12	*Tues.* *July* 13	*Wed.* *July* 14	*Fri.* *July* 23	*Sat.* *July* 24	*Mon.* *July* 26
	†	†	†	†	*	*	*
No. 4008 Weekdays, East Long Branch to Jersey City	106	289	186	199	199	94	319
No. 5014 Weekdays, East Long Branch to Matawan	79	155	87	86	74	83	150
No. 4001 Weekdays, Jersey City to Matawan	187	130	103	120	92	190	95
No. 5011 Weekdays except Saturday, Matawan to East Long Branch		116	105	102	134		136

† From exhibits offered in evidence by Railroad Company.
* From count made by the Board's staff.

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The Board is not unmindful of the severe strain on manpower imposed upon rail carriers by the war, affecting both freight and passenger operations. Both kinds of traffic have demanded the utmost in the use of men and equipment.

The records of this Board disclose that on May 11, 1932, as the result of a joint application by The Central Railroad Company and the Boro Busses-Rollo Transit Corporation, an Order was entered allowing the railroad to substitute the operation of four auto bus units for certain trains on this branch between Matawan and Atlantic Highlands. This operation was continued until May of this year when, without notice to the Board, the railroad discontinued the bus service and restored trains No. 5014 and No. 5011.

The explanation given at the hearing was that the continuance of the bus service became impossible by reason of the Order of the ODT of May 27, 1943, directing that all bus operators reduce their mileage by 20 per cent. Of course, that Order of the ODT gave the Boro Busses-Rollo Transit Corporation no right to abandon its line without the approval of the Board. However, it appears that the trains in question were restored by the railroad because it felt that the service was necessary to take care of the then existing demands. There is nothing to indicate that the railroad's judgment at that time and in that respect was incorrect. The travel on this branch has always increased during the summer months and the discontinuance of it at this particular time, even to accomplish the result desired by the railroad, does not justify the consequent inadequacy in service and inconvenience to the public.

The application is denied at this time without prejudice to its renewal when passenger traffic conditions justify such a course.

Dated, August 5, 1943.

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No. 2258

In the Matter of the Application of Olympic Bus Lines, Inc. for Approval of Municipal Consent of the Borough of Wood-Ridge for change of Route Within the Borough of Wood-Ridge and for Removal of Certain Restrictions Imposed Upon the Operation in the Board's Decision of December 2, 1940 (P. U. C. Route-File No. 260-315), and

In the Matter of the Application of the Borough of Wood-Ridge for Approval of Revocation under Municipal Resolution Adopted February 16, 1943, of Municipal Consent of the Borough of Wood-Ridge Dated January 13, 1943, Granted to Olympic Bus Lines, Inc.

Victor Greenberg, for Olympic Bus Lines, Inc.; *William H. Blake,* for Public Service Coordinated Transport; *S. J. Griffinger,* for Charles Logatto, et al.; *Ralph W. Chandless* (by *Ernest Weller*), for the Borough of Hasbrouck Heights; *Guy W. Calissi,* for Mrs. Anne Gesumaria and Mrs. Grace Popejoy.

BY THE COMMISSION:

The application of Olympic Bus Lines, Inc., dated January 26, 1943, requests approval of the following:

1. Municipal consent of the Borough of Wood-Ridge dated January 13, 1943, which, in part, reads as follows:

> "*Be It Resolved,* that municipal consent be, and it is hereby granted, to the Olympic Bus Lines, Inc., to change its route between the intersection of Valley Boulevard and Sussex Road and the intersection of North and Fifth Streets, and to abandon its present route between the two aforesaid points, on the East Rutherford-Passaic bus route within the Borough of Wood-Ridge as follows:
>
> *New Route*
>
> "From the Hasbrouck Heights-Wood-Ridge boundary along Valley Boulevard, North Street, Fifth Street and Fritsch Avenue to the Wood-Ridge-Carlstadt boundary.
>
> "Return via the same route.
>
> *Route to be Abandoned*
>
> "From the intersection of Valley Boulevard and Sussex Road along Sussex Road, Seventh Street and North Street to the intersection of North Street and Fifth Street."

2. Removal of the following restriction imposed upon the applicant for the operation of seven (7) buses in the Board's decision of December 2, 1940:

> "Operators shall not accept passengers in the area located between the intersection of Kipp Avenue and Woodside Avenue in Hasbrouck Heights and the intersection of Sussex Road and Grandview Boulevard for discharge in East Rutherford, and vice versa."

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Since the filing of the said application by Olympic Bus Lines, Inc., the Borough of Wood-Ridge passed a resolution to revoke said municipal consent, dated January 13, 1943, granted to Olympic Bus Lines, Inc., and now under consideration and by letter dated February 20, 1943, requested the Board to give consideration to said resolution of revocation.

After proper notice to parties interested, this Board held public hearings on April 8, 1943, considering the letter of the Borough of Wood-Ridge as an application for approval of revocation of the municipal consent theretofore granted to Olympic Bus Lines, Inc. Neither from the proceedings had before the Borough Council of the Borough of Wood-Ridge nor from the testimony and evidence produced before this Board on its public hearing, does it appear, as required by the statute, that the Olympic Bus Lines, Inc., as the holder of municipal consent originally granted to it, had failed to comply with any law of this State or any regulation imposed by the Board or by the municipality. For these reasons, the resolution of the Borough Council of the Borough of Wood-Ridge, considered herein as a revocation of the municipal consent previously granted by the Borough, will be disapproved.

Objection was interposed to the abandonment of the route operated at present and testimony indicates that the entire abandonment of the route will inconvenience a number of persons. In view of this objection the Company would necessarily have to maintain a portion of its service along the present route during the morning and evening peak periods of travel. During the off-peak periods of travel all of the service would be confined to the changed route as herein proposed. At the present time the operator has approval to operate seven (7) auto buses and the operation of a portion of the service as herein indicated would only cause confusion to the traveling public and would not benefit the operator. The testimony is conflicting and does not justify this Board in approving the change in the Borough of Wood-Ridge at this time. However, the operator may, under chapter 49 of the laws of 1942, apply immediately for a temporary permit to reroute the seven (7) buses, which application will be acted upon promptly by the Board.

In respect to the requests for the permanent removal of restrictions herein referred to, the Board is of the opinion that the

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proofs submitted are not sufficient to justify the permanent removal of this restriction, but in order to meet the present emergency, the Board, on its own motion, under date of June 30, 1943, did issue to the applicant a temporary certificate under chapter 49 of the laws of 1942, giving authority to lift such restrictions.

Upon consideration of the evidence the Board finds and determines that the permanent change and the abandonment of a portion of the route in the Borough of Wood-Ridge is not necessary and proper for the public convenience, and, the Board hereby dismisses the application without prejudice to a renewal of the application after the termination of such temporary permit or permits that may be issued.

Dated, August 12, 1943.

No. 2259

In the Matter of the Application of Benjamin H. Hyson, Jr. to Reinstate the Application of the Salem Gas Light Company for the Sale to Him of All of Its Assets.

James M. Davis, Jr., for Benjamin H. Hyson, Jr.; *George B. Pidot* (by *Thomas L. Hanson*), for Salem Gas Light Company; *Alfred E. Driscoll* and *Thomas L. Hanson,* for John H. Ware, Jr.; *Lum, Fairlie & Wachenfeld* (by *Charles S. Barrett*), for Mark Anton, H. Emerson Thomas and Sylvester C. Smith.

BY THE COMMISSION:

Benjamin H. Hyson, Jr., applies to reinstate an application heretofore filed with the Board by Salem Gas Light Company for the sale by it to said Benjamin H. Hyson, Jr., of all of its assets, and seeks a determination that the said Hyson "may have the authority of this Board to become the successor of the Salem Gas Light Company and operator of its plant in the City of Salem, Salem County, N. J."

The chronology of the prior proceedings with reference to this matter is as follows:

On May 10, 1943, Salem Gas Light Company filed an application with this Board asking the approval of a sale to Benjamin H. Hyson, Jr., of all of its assets in accordance with the terms of

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a contract theretofore made between the Company and Hyson under date of May 10, 1943. On June 23, 1943, the Salem Gas Light Company withdrew the application before there had been a hearing and before any determination by the Board on the application for approval of the proposed sale.

The applicant's position is that he has pending or contemplates legal or equitable proceedings to enforce his rights on what he claims to be a breach of contract between said applicant and the Salem Gas Light Company. He further contends that the Board has jurisdiction to approve that contract and then leave the parties to the determination of their rights by proper judicial authority.

At this point let it suffice to say that while the applicant claims a breach of contract, the Salem Gas Light Company claims the contract was legally rescinded. In turn, the applicant herein claims that any alleged rescission was obtained by fraud. Therefore, legal or equitable questions, or both, are raised.

This Board is not and cannot be concerned with a determination of the respective rights of these parties insofar as a judicial determination is necessary to establish those rights.

The primary function of this Board as an administrative agency is to safeguard the consuming public which the utility is designed to serve. It neither has the power nor was it intended by the statute that this Board should or could usurp the powers of judicial tribunals.

The Board's function is clearly set forth by the statute, which states in substance that a "sale" by a public utility without the approval of the Board is void. Where a public utility enters into a contract to sell; claims rescission thereof; refuses to consummate the sale; and withdraws its application to the Board for approval, there is nothing before the Board to invoke its power of approval or disapproval of a "sale."

The situation is not bettered if the other party alleges a breach of contract and claims that the rescission was obtained by fraud, and applies to the Board for approval. There is no "sale" as a proper subject for consideration by this Board.

The application is, therefore, dismissed.

Dated, August 20, 1943.

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No. 2260

In the Matter of the Application of Salem Gas Light Company for Permission and Authority to Sell and Transfer All of its Property and Assets to John H. Ware, Jr.

George B. Pidot, for Salem Gas Light Company; *Alfred E. Driscoll* and *Thomas L. Hanson,* for John H. Ware, Jr.; *James M. Davis,* for Benjamin H. Hyson, Jr.; *Lum, Fairlie & Wachenfeld* (by *Charles S. Barrett*), for Mark Anton, H. Emerson Thomas and Sylvester C. Smith.

BY THE COMMISSION:

The Salem Gas Light Company by petition dated June 23, 1943, applies for approval of the sale and transfer to John H. Ware, Jr., of Miami, Florida, of all of its property and assets for a purchase price of one hundred dollars ($100.00) in cash and the assumption of all the outstanding obligations and liabilities of the petitioner, except indebtedness by the petitioner to its parent company, Consolidated Electric and Gas Company, a Delaware corporation, in accordance with the terms of a contract entered into by the Salem Gas Light Company and John H. Ware, Jr., which petition and contract, together with a resolution of the Board of Directors of the Salem Gas Light Company, authorizing this sale and submitted with the petition, are made a part hereof.

The contract provides:

> "If requested by Buyer, Seller will convey the property to a nominee of the Buyer; in that event all of the obligations of the Buyer in this Agreement shall be those of both Buyer and its nominee."

John H. Ware, Jr., testified at the hearing on July 29, 1943, as to his financial responsibility and qualifications to operate the plant and facilities to be acquired in a manner consistent with the public interest. He also introduced testimony as to the financial responsibility and qualifications of his sons who are associated with him in other utility enterprises and who are expected to take an active part in the management and operation of the Salem property.

He further testified that a corporation now in the process of formation, to be known as the Salem Gas Company, will be designated to take title to the property sought to be conveyed

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under the terms of the contract of sale referred to supra; that his son, John H. Ware, 3rd, was to be president of the newly formed company and that another son, Willard M. Ware, was to be vice-president and treasurer; also that both sons were now engaged in the operation of other gas plants. The testimony further indicated that the Salem Gas Company was being organized under the provisions of the "Gas Act." While this Act (R. S. 48:9–1), contains certain provisions relating to minimum allowable capitalization of companies formed under its provisions, no testimony was introduced as to the paid-in capital or other assets with which the new company would commence business.

Therefore, while the record indicates that approval of the proposed sale to John H. Ware, Jr., as prayed for in the petition now before the Board would not be inconsistent with the public interest and that the issuance of a certificate approving said sale to John H. Ware, Jr., would be warranted, the same conclusion cannot be unequivocably reached from the present posture of the record with respect to the buyer's nominee, Salem Gas Company.

Since it is clear from the record that it is the intention to take title in the name of Salem Gas Company, a certificate will not issue approving the sale to Mr. Ware's nominee, the Salem Gas Company, until there is filed with this Board satisfactory evidence as to the financial ability of Salem Gas Company. Upon the filing of such evidence a certificate approving the sale will issue with the usual conditions and reservations.

Nothing in this decision, indicating as it does that evidence presented appears to warrant an approval of a proposed sale to John H. Ware, Jr., or his nominee company, is to be construed as a determination of the rights of the parties under contracts of sale between the Salem Company and John H. Ware, Jr., and Benjamin H. Hyson, Jr. It is not intended that this decision should enhance or prejudice the rights of the parties under the two contracts in any judicial proceedings, pending or later instituted.

Dated, August 20, 1943.

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No. 2261

In the Matter of the Application of Rollo Transit Corporation for Approval of the Sale and Conveyance of Property Situate in the Borough of Keyport, Monmouth County, New Jersey to Peter J. Rollo and Louis Rollo for the Sum of Sixty-four Thousand One Hundred and Thirty-one Dollars and Thirteen Cents ($64,131.13).

Rollo Transit Corporation, a corporation of New Jersey by application dated July 23, 1943, applies to the Board of Public Utility Commissioners for the approval of the sale and conveyance of two parcels of land and premises to Peter J. Rollo and Louis Rollo, for the sum of sixty-four thousand one hundred and thirty-one dollars and thirteen cents ($64,131.13), the said land being situate in the Borough of Keyport, Monmouth County, State of New Jersey, and more particularly described as Parcel No. 1 and Parcel No. 2 in Schedule "A" attached and made a part hereof.

Accompanying the petition is a certified copy of a resolution of the Board of Directors of Rollo Transit Corporation, adopted December 30, 1942, authorizing the sale. The testimony and the proofs indicate that the property described as Parcel No. 1 in attached Schedule "A" contains a brick building that has been occupied as a tavern and lunch room and is presently unoccupied and non-income producing, and is not presently nor prospectively necessary for the corporate use of the applicant. Testimony and proofs indicate that the property described as Parcel No. 2 in attached Schedule "A" contains a garage which is at present occupied by the applicant and will be necessary in the future for the corporate use of the applicant in its service to the public.

The application indicates that the selling price for Parcel No. 1 is thirty-four thousand and fifty dollars ($34,050) and the selling price of Parcel No. 2 is thirty thousand and eighty-one dollars and thirteen cents ($30,081.13), and that the "selling price is based upon figure of acquisition and the price of valuation of properties as carried on the books of the applicant."

In the absence of more competent testimony or other proof as to the fair market value of the two parcels and further because Parcel No. 2 is necessary for the corporate use of the applicant, the said Board, after investigation and hearing, HEREBY DENIES,

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without prejudice, said application for permission to sell the two parcels described in Schedule "A" attached.

Dated, September 9, 1943.

SCHEDULE "A"

PARCEL No. 1:

Situated in the Borough of Keyport, Monmouth County, New Jersey, on the corner of Broadway and State Highway Route No. 35, being described as lots Nos. 1, 2, 3, 4, 5, 34, 35, 36, and 37 in Block A on map or plan of lots known as George W. Cross Subdivision, Keyport, New Jersey, made by Richard Heuser, C.E., January, 1912, and filed in the Monmouth County Clerk's Office, on which is erected a brick building heretofore occupied as a tavern and lunch room and now unoccupied.

PARCEL No. 2:

Adjoins Parcel No. 1 and is known as the garage and is presently occupied by the applicant, Rollo Transit Corporation. It is described as lots Nos. 6, 7, 8, 9, 30, 31, 32 and 33 in Block A on the same map described above under Parcel No. 1.

No. 2262

In the Matter of the Application of Henry K. Norton, Trustee, New York, Susquehanna & Western Railroad Company, for Approval of New Passenger Operating Train Schedule.

Grover R. James and *Ralph E. Lum,* for Trustee of New York, Susquehanna & Western Railroad; *George Ralph Hendrickson,* for Butler, Bloomingdale, Pompton Lakes, Oakland, Franklin Lakes, Wyckoff, Midland Park and Hawthorne; *Edward C. Waddington,* for Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Locomotive Engineers, 21 operating unions on the railroad, and various commuters; *Francis Caminetti,* for Borough of Hawthorne; *James Muth,* for Borough of Oakland; *Dominick Fondo, Otto Saalfeld* and *John Frank, Jr.* (representing *Chandless, Weller & Kramer*), for Township of Saddle River; *Charles K. Barton,* for City of Paterson and Passaic County; *Reuben H. Reiffin,* Assemblyman, Passaic County; *George Sauerbrey,* for Borough of Maywood; *John McNaughton,* for Borough of Pompton Lakes and Board of Education of Pompton Lakes; *Otto Saalfeld* (representing *DeVoe & DeVoe*), for Butler, Ringwood and Midland Park; *George F. Cassidy,* for Township of Rochelle Park; *R. S. Nicosia,* for Borough of East Paterson; *Horace F. Banta, John A. Christie* and *Carl W. Wright,* for City of Hackensack; *Walter Jones,* Assemblyman, Bergen County; *Charles H. Carr,* for Brotherhood of Railroad Trainmen; *Edward A. Lanza,* for Brotherhood of Railway Clerks; *Charles McCloskey* and *Willard H. McEwan,* for Railway Employees Department; *Thomas S. Doughty,* for Board of Education of Midland Park.

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BY THE COMMISSION:

This is an application made by the Trustee of the New York, Susquehanna and Western Railroad Company for approval of a new passenger operating train schedule. It involves a reduction in train service on the steam-propelled trains which render service between the municipalities of Butler and Jersey City. The sole purpose of the application, as stated, is "to release eight steam locomotives for other war service."

The matter came on for a hearing after due notice to interested parties and the applicant and objectors were fully heard.

It appears that the purpose of the application originates as a result of certain general requests made by the Office of Defense Transportation to railroad companies to reduce fast services and eliminate nonessential services in order to bring about a conservation of rolling equipment and to release and make available any such equipment not used for the specific use of prosecuting the war.

The public interests were considered in the course of the hearing. On the part of the applicant it was claimed that the amended or newly suggested schedule would fairly meet all public requirements. This was denied by the objectors and various witnesses were produced and they testified to the necessity of having the present schedule remain in effect and unchanged.

The testimony produced by the applicant does not, in the judgment of this Board, suffice to justify a finding that the schedule proposed in the application meets the requirements of public necessity and convenience.

During the course of the hearing the applicant offered another amended schedule. The protestants objected and no proof was submitted directly relating to that schedule. Therefore the Board has not considered it.

The finding of this Board then rests upon the answer to the question: Shall this schedule be placed in effect for the sole purpose of releasing "eight steam locomotives for other war service"?

The policy of this Board could not be otherwise than to cooperate in every possible respect with the efforts of this nation at war. On the other hand we are a statutory body clothed with certain defined powers and whether one of those powers includes the right to consider applications to reduce train services solely

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in order that a company can release engines or other equipment and without regard to consideration of convenience and necessity is one which we seriously question.

As to the legal right of this Board to release equipment of the Company for the sole purpose as intended here, we think the "convenience and necessity" of the public remains the true test and extent of authority of this Board, unless and until otherwise directed by some competent Federal authority, in which case it may be that the powers of this Board would be temporarily subordinated to that authority for the duration of the war.

This Board has not received any representations from the Office of Defense Transportation or any other Federal agency indicating an interest in this application. There is no evidence before us to indicate the purposes for which these releases are proposed to be made or to whom this equipment is proposed to be released. The objectors produced a letter from the Interstate Commerce Commission indicating that certain other like engines previously released by this railroad still remain out of use and this line of testimony was not contradicted by the applicant.

The Board, on these grounds, therefore denies the application and Orders that the proposed schedule be not put into effect.

Dated, October 28, 1943.

No. 2263

In the Matter of Public Service Electric and Gas Company—Reasonableness of Classification of Electric Customers as Established by Tariff.

ORDER

WHEREAS, Public Service Electric and Gas Company filed with the Board of Public Utility Commissioners of New Jersey its "Schedule of Rates for Electric Service and Terms and Conditions of Service," otherwise referred to herein as the Company's Tariff, which tariff contains all of the rates applicable to electric service furnished by said Company and contains, among others, Rate CLP applicable to commercial lighting and power service and Rate WP applicable to wholesale power service, and

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WHEREAS, said Rate CLP was filed to be effective December 1, 1943 and said Rate WP was filed to be effective June 1, 1943, and

WHEREAS, the Board of Public Utility Commissioners accepted said Rates CLP and WP for filing subject to protest of any interested party, which acceptance did not constitute approval by the Board of the classifications, rates, charges, restrictions and terms and conditions of service specified in said Rates CLP and WP, and

WHEREAS, in the course of a staff investigation by the Board as to possible unjust discrimination in rates to, and unjust or unreasonable classification of, certain customers taking electricity for combined lighting and power services, it appears to the Board that the rate schedules of Public Service Electric and Gas Company available to electric customers may, in certain respects, contravene R. S. 48:3–1, particularly as follows:

1. The most favorable rate for combined lighting and power service, which is Rate WP, is limited to industrial and manufacturing concerns, which limitation has been the subject of complaint by customers.

2. The most favorable rate for combined lighting and power service, which is Rate WP, purports to restrict the portion of lighting load to total load in language so indefinite as to make possible discriminatory classification of certain customers.

3. Differentials exist between the rates available for combined lighting and power service for commercial customers as compared with industrial customers which may not be justifiable on the basis either of the costs to serve or of the value of the service to the customers.

4. Instances of improper classification of customers as between Rate CLP and Rate WP have raised a question as to the feasibility of application of the classifications established by said rate schedules.

5. Rates for electric service available to the smaller commercial customers whose use is of the "high load factor" type appear to be out of line with both the costs to serve and the value of the service.

AND WHEREAS, it further appears to the Board that certain principles of ratemaking are thus in issue which have not heretofore been disposed of in formal proceedings before this Board, and that such issues may most expeditiously be disposed of by resort to formal proceedings,

NOW, THEREFORE, the Board of Public Utility Commissioners of the State of New Jersey on its own motion hereby fixes the 20th day of January, 1944, at eleven o'clock in the morning at the office of the Board, 1060 Broad Street, Newark, New Jersey

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as the time and place of a public hearing as to whether the schedules of rates of Public Service Electric and Gas Company for electric service involve, in the instances and respects before cited, unjustly discriminatory rates and unjust or unreasonable classifications in violation of law; and it is HEREBY ORDERED that Public Service Electric and Gas Company on or before the 15th day of December, 1943, file with the Board a statement in writing of its position as to the matters to which said public hearing is directed.

Should the Board find and determine in such public hearing that such schedules of rates violate the law the Board will enter an order prescribing schedules removing the unjust discriminations and unjust or unreasonable classifications found to exist.

Dated, October 29, 1943.

SUPPLEMENTAL MEMORANDUM

BY PRESIDENT CONLON AND COMMISSIONER BOSWELL:

The propriety of the tariffs filed in this matter to accomplish the requisite reduction in rates was not discussed in detail in the original memorandum filed by us. We feel that for the record we should indicate some of the reasons impelling our acceptance.

1. The reductions made available have been allocated to all classes of schedules except those affecting the wholesale power users. First consideration has been given to the elimination of inequities in the old tariffs by conforming them more nearly to modern accepted standards. A complete report explaining in detail the results thereby accomplished is in the Board's files.

2. The revenue of this Company from residential users is approximately 35 per cent of its income. Out of the total reduction of $5,030,600, the amount of $1,823,500, or approximately 36 per cent, has been assigned to the reduction of residential rates. These reductions are equitably distributed among the residential users with due regard to the relative amount of energy consumed. The following results are obtained:

(a) Approximately 92 per cent of the residential reductions will inure to the benefit of those users whose monthly bills range from $1.45 to $7.35.

(b) All residential customers who use in excess of 20 kilowatt hours in any one month will benefit by the reduction. This

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means that a monthly bill of any customer which is more than $1.45 will be reduced. Reductions must have a proper relation to the costs of service. A person who closes his city home for the summer, for instance, or who maintains electric service in his summer home during the winter months, with little or no use, or who otherwise maintains his consumption at levels of less than 20 kilowatt hours per month makes very little contribution to the general overhead costs of providing the service. Minimum charges are recognized in every single electric utility tariff filed with this Board. The users of this minimum service do not necessarily constitute any particular class of user, and there is no discrimination in this respect.

(c) Practically all of the residential users will receive some benefit from the reductions in this schedule. A number estimated at less than 7 per cent of the customers of the utility incur bills which over a period of a year average not more than $1.45 a month.

3. The analysis of the schedules indicates that the rates of no class of users will be increased by the revised tariffs. The reports before us show that, by the elimination of some old, obsolete tariffs, out of a total of approximately 1,000,000 customers, only 1,100, or approximately one-tenth of one per cent will have their bills increased by an average of approximately fifty cents per month per customer. However, the reduction of $5,030,600 accepted by the Board is the net amount of the reductions in the revenues of the Company and the increases above mentioned as being imposed upon those specific customers (which amount in the aggregate to no more than $6,000) is used to increase the amount of reduction to other customers.

4. The fuel clauses were approved because they were generally agreed to be a proper part of any electric utility tariffs. With the approval of the Board every other electric utility in the State has had such provisions in their tariffs, most of them having been in effect for many years. The obvious purpose of such clauses is to make a fair distribution among the Company's users of the increase in cost of power occasioned by a substantial increase in the cost of fuel. The cost of such increase is imposed proportionately, and, as a result, most of the burden is carried by the wholesale power users whose rates are the lowest and therefore leave the least margin to meet the overhead cost of the service. A fuel clause does not result in increase in revenue to the Company. It is

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merely an equitable division of an unforeseen and often non-recurring increase in cost.

The setting up of tariffs for an electric utility with many diversified classes of service is a highly technical and complex proceeding. In its determination there is involved the application of certain fundamental principles and a great deal of discretionary judgment to fit the needs of the particular utility. There is no such thing as a perfect tariff schedule. The staff has quite clearly indicated that if it were setting the tariffs in this case it might have given some different treatment to some of the schedules. However, the staff was in unanimous agreement that the schedules as filed were not objectionable to the extent that they should not be accepted for filing. In a matter of this nature, where the questions involved are highly technical and involve prolonged study of experts in the particular field, the Board is bound to be materially influenced by them, and unless some intelligible reasons are advanced to the contrary, the advice of the experts should be followed.

Dated, June 27, 1944.

MEMORANDUM OF DISCONTINUANCE

Public Service Electric and Gas Company having subsequently to the initiation of these proceedings and on December 11, 1943, and April 1, 1944, effected changes in its tariffs which in part meet the purposes of this investigation, and the Company having now, effective as of July 1, 1944, filed a complete new electric tariff which satisfactorily disposes of the issues involved in this proceeding, the proceeding is hereby discontinued.

This discontinuance carries into effect the recommendations of the staff in a report under date of June 13, 1944.

Dated, June 27, 1944.

Commissioner Jamieson dissents.

MEMORANDUM

BY PRESIDENT CONLON AND COMMISSIONER BOSWELL:

The revised tariffs for electric rates reflecting a reduction in gross annual income of five million dollars ($5,000,000) have been filed by Public Service Electric and Gas Company as a result

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of negotiations initiated by the Board with the Company. Following extended studies by the Board's staff it was agreed by a majority of the Board that a reduction of that amount was indicated. The Board was willing, in view of the uncertainties of the future, due to the war, that the proposed reduction should be of a temporary character and for that reason be effected, in part, by bill discounts. The Company opposed the bill discount feature, and the Board then amended its proposal by requiring in the alternative a permanent reduction in the same amount. This proposal has been accepted by the Company. Obviously, the Board has no legal authority to require a retroactive reduction in rates, nor does it have authority to impose bill discounts by formal order.

The reduction will become effective with bills based upon meter readings beginning July 1, 1944. The Company has filed new tariffs which have been examined and accepted by the Board's staff. In view of the large amount of the reduction it has been possible to eliminate many cumbersome and inequitable features of the old tariff schedules.

The reduction thus accomplished eliminates the necessity of a rate proceeding at a time when such a proceeding would have been most inopportune. Furthermore, a rate proceeding would postpone any reduction until the termination of such proceeding, with a consequent loss to the consumers in the interim. The tariffs as filed will be accepted, subject to the usual conditions.

Dated, June 13, 1944.

DISSENTING OPINION

BY COMMISSIONER CRAWFORD JAMIESON:

I disagree with the board approving of the filing of the new Public Service tariffs because I believe the Board should insist upon greater reductions or should immediately institute a rate case.

It is the duty of our Board to approve rates only on a basis of allowing a utility a fair return on a fair valuation of its properties in use for utility purposes. I believe that not more than 6 per cent is a fair return for an electric company. Our Board in the recent settlement with the New Jersey Power and Light Company agreed that not more than 6.5 per cent was a fair return.

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Under this settlement Public Service is being allowed a return of from 7 per cent to 10 per cent depending upon the valuation fixed for its properties.

Under the joint study of valuations of the original cost of Public Service properties just completed by the Federal Power Commission and our Commission, Public Service electric properties are worth $235,000,000. Using this valuation the Public Service reductions should be over $12,000,000 for the year 1944.

The Board's staff has reported that the most "generous base" that could be allowed the Public Service is $300,000,000 and this permits additions to the original cost for prudently invested capital of $65,000,000. On this valuation, reductions for 1944 to permit a 6.4 per cent return (as recommended for compromise purposes by the staff) would mean a reduction of $8,973,000 for 1944. The prudent investment method of fixing valuations for utility properties has recently been approved as proper by the United States Supreme Court in the case of *Federal Power Commission, City of Akron, et al.* vs. *Hope Natural Gas Company.*

Even the majority members of our Board, who are now approving the present reduction, demanded that the Public Service reduce its rates for 1944 by at least $5,000,000. The Board's demand involved the return of the amount of one-half month's electric bill in cash for the months of July and December, 1944, and other reductions, all of which were to be made in 1944. Their demand has not been met and the reduction is not $5,000,000 for 1944 in that only $2,500,000 of the amount will be reflected in 1944. Accordingly, for the year 1944, the Public Service will again show a return on its investments in utility property of 7 per cent to 10 per cent.

I am opposed to the reduction also because certain other utility companies are now placed in a position of demanding increases in rates so that they may obtain the same high return being allowed the Public Service.

I also object to the method of granting the reductions as shown by the tariffs filed. The consumers in the lowest brackets of both business and residential users will receive no reduction. In the instance of these residence users, about 130,000 bills of people paying $17.40 per year, or less, are eliminated from the cut. This group constitutes 14 per cent of residence users. Another 84 per cent of residence users receive a maximum of 20c per

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month reduction. The tariffs filed are, therefore, decidedly discriminatory.

I also object because the Public Service is taking advantage of the filing of new tariffs to file schedules for increased costs to consumers in three classifications.

Dated, June 27, 1945.

No. 2264

In the Matter of the Application of Brigantine Coach Company for Permission to Discontinue the Sale of Reduced Fare Multiple Trip Tickets on the Atlantic City-Brigantine Bus Route (P. U. C. Route-File No. 018-057).

Martin Bloom, for Brigantine Coach Company; *Kirkman & Mulligan* (by *Eugene N. Harris*), for Atlantic City and Shore Railroad Company; *John Lloyd, Jr.,* for City of Brigantine.

Applicant requests permission to discontinue the sale of reduced fare multiple trip tickets for trips between Brigantine and Atlantic City and retain only the cash fare of ten (10) cents between these points. The schedule of fares presently in effect on this route is as follows:

Cash Fares:

Within the City of Brigantine	5c
Between Atlantic City and Brigantine	10c
From all points on route to Brigantine Country Club	25c

Ticket Fares:	*Cost*	*Cost per Trip*
12 trip weekly commutation ticket	$1.00	8.33c
11 trip ticket (good until used)	1.00	9.1c
50 trip ticket (good until used)	4.00	8c

Reasons for the application are:

1. The costs of printing tickets will be saved.
2. Expenses of accounting for the tickets will be eliminated.
3. A more speedy service will result through the elimination of sale and collection of tickets on the vehicles.
4. A loss in revenue has been suffered to the extent of $1,200 per year by the discontinuance of an advertising contract with the City of Brigantine.

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Based on 1943 traffic, the granting of this application would produce to the Company additional revenue in the sum of $287.92. The application, then, is tantamount to a request for increased fares, assuming the same number of purchasers of tickets continued as users of the public carrier, paying the cash fare which is higher than the ticket fare per ride.

The City of Brigantine resists this application excepting that it is admitted there is little or no demand for the 12-trip weekly commutation ticket, thus, as to this portion of the application, no objection appears to the discontinuance requested.

The testimony respecting reasons (1), (2) and (3) does not convincingly support the contentions of the applicant, but even assuming it did, the significance would appear to be inconseqential.

When the ticket system was inaugurated, it was unquestionably a means of inducement to the public to become users of this common carrier. It must be assumed that the system served some useful purpose in that connection, as the present fare schedule has been in effect since the applicant acquired this operation on July 17, 1940, and tickets are presently used to a considerable extent. To permit discontinuance now for this reason would appear to be unfair to the public.

The fourth reason, however, assumes a place of importance when consideration is given to the fact that the Company has now suffered a loss of $1,200 in revenue as the result of the discontinuance of the advertising contract.

The Board has carefully considered the profit and loss statement and revenue per mile chart for the year 1943 as exhibited by the Company. The average gross revenue per mile of 20.9c was calculated without consideration given to the additional sum of $3,470.65 received from charter revenue and advertising sources. The profit and loss statement, however, includes this item in showing a net profit to the Company of $1,441.11 for the year.

To give fair consideration to such items in an operation of this particular size and character, some inquiry as to the final resting place of the item of $3,121.61 charged off to depreciation might be proper. Obiter to this case is also the fact that the 1942 annual report of the Company shows a total of salaries and wages of $6,428.73, while the 1943 statement shows a total of $6,911.25 for "wages" and $4,425.60 for "salaries—officers" or

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a total of $11,336.85, which may account in some measure for the decrease in net profit of the Company from $3,794.15 in 1942 to $1,441.11 in 1943.

No attempt has been made to establish the cost per mile of operation and, therefore, the net profit per mile of operation is a factor not at hand for consideration. No direct calculation respecting these items was presented in evidence.

It appears to the Board from the testimony and records that the annual gross revenue for passenger transportation now derived from this operation is greater than in any previous year. It also appears that there is no serious indication that there will be a likelihood that the immediate future will show any rapid decline.

Not a part of this case was certain testimony of the objector relating to an alleged abandonment of certain established methods used in connection with the sale of these tickets to the public. It was indicated that the abandonment took place without notice or approval of this Board.

This testimony, other than as is related to the personal experience of the objector, was merely opinion evidence, but it did tend strongly to support the objector's contention, particularly as indicated from the shifting of revenues as the result of sales of certain kinds of tickets and the withholding of other types.

In view of the character of this testimony, the Board does not reach a conclusion based on any finding of fact, but a desirable situation in any given instance is the relationship between a public carrier and the public being served. This relationship should be mutually fair and to this end, more is set forth in the conclusion of this decision.

In the judgment of the Board, it does not appear from the testimony that the discontinuance of sale of all classes of reduced fare tickets should be approved for the following reasons:

(1) The discontinuance of sale of the reduced fare tickets is not in the public interest.

(2) The present revenue of the applicant and the prospective outlook as to revenue in the immediate future do not warrant the discontinuance of the sale of all of the classes of tickets presently sold by the operator.

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Accordingly, it is on this 7th day of March, 1944, ordered that:

(1) The applicant be hereby granted permission to discontinue the sale of the 12-trip weekly ticket.

(2) Remaining portions of the application be hereby denied.

(3) Notices stating the fare schedule shall be conspicuously displayed in each of the applicant's vehicles and types of tickets authorized to be sold by the Company shall be made readily available to members of the public desiring to purchase the same.

Dated, March 7, 1944.

No. 2265

In the Matter of New Jersey Power and Light Company—Reasonableness of Rates for Electric Service.

ORDER FIXING DATE OF PUBLIC HEARING

WHEREAS, New Jersey Power & Light Company is a corporation which owns and operates an electric light, heat and power system under privileges agreeable to the Statutes of the State of New Jersey and therefore is a public utility under the jurisdiction and control of this Board,

WHEREAS, under the Statutes of New Jersey a public utility may not make, impose or exact any unjust or unreasonable rate or charge for service supplied by it and the Board may, after hearing, fix just and reasonable rates or schedules of rates,

WHEREAS, The Board has caused its staff to make an investigation of the financial results of operation by New Jersey Power & Light Company and the reasonableness of its rates and charges for electric service,

WHEREAS, said staff investigation indicates that there is reason to believe that the existing rates and charges of New Jersey Power & Light Company for electric service are and may continue to be unreasonable, and

WHEREAS, the Board's staff, after conference with officials of the Company, has developed a method, identified as the "Rate Adjustment Plan," to provide a basis for establishing and maintaining just and reasonable rates to be charged by New Jersey Power & Light Company for electric service, and a report has

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been submitted to this Board by its staff, which report expresses the general purposes of the Plan and the reasons assigned by the Board's staff for its specific provisions;

NOW, THEREFORE, the Board of Public Utility Commissioners of the State of New Jersey on its own motion HEREBY FIXES the 21st day of March, 1944, at ten o'clock in the morning, at the office of the Board, 1060 Broad Street, Newark, New Jersey, as the time and place of a public hearing as to the reasonableness of such existing rates and charges for electric service and as to whether or not there is objection by consumers or the Company to adoption by the Board of the said Rate Adjustment Plan as the basis of the Board's action in the matter of establishing and maintaining just and reasonable rates to be charged by the Company for electric service.

A copy of the said plan is attached to this Order and copies of the said report to the Board are available to interested parties upon request to the Board's Secretary.

Dated, March 2, 1944.

ORDER

The matter of the reasonableness of rates for electric service supplied by New Jersey Power & Light Company was heard by the Board on its own motion under Order of the Board dated March 2, 1944. Said Order, among other things, suggested a proposed method, identified as the "Rate Adjustment Plan," of establishing and maintaining just and reasonable rates to be charged by said company for electric service. Notice of hearing was served upon all interested parties and no objection was made to the adoption by the Board of said Plan.

Evidence was received in the form of oral testimony and exhibits submitted by J. Rhoads Foster, Consultant; Herbert J. Flagg, Chief Engineer, and Henry Herz, Assistant Economist, members of the Board's staff; and Malcolm G. Davis, Vice-President of Gilbert Associates, Inc., Consultants for the Respondent.

Upon consideration of the evidence in this proceeding, the Board finds and concludes that the existing rates and charges of New Jersey Power & Light Company for electric service are unjust and unreasonable, and that the proposed method of rate regulation, identified as the "Rate Adjustment Plan," and at-

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tached hereto, together with an immediate billing credit, provides an appropriate and equitable basis for establishing and maintaining just and reasonable rates for electric service to be charged by the Company.

NOW, THEREFORE, the Board of Public Utility Commissioners, by virtue of the authority vested in it, does HEREBY ADOPT, subject to the Company's acceptance of this Order, the said Rate Adjustment Plan as the method to be followed by the Board in establishing and maintaining just and reasonable rates to be charged by New Jersey Power & Light Company for electric service.

This adoption of the Plan does not establish Board policy, precedents or findings of fact necessarily to be accepted or applied in any proceeding concerning the rates of the Electric Department of New Jersey Power & Light Company in the event of termination of the Plan or concerning the rates of other utilities under the Board's jurisdiction.

For the purpose of making effective the provisions of the Plan and making available to customers an adjustment of charges for electric service, as hereinafter set forth, the Board HEREBY ORDERS

1. That New Jersey Power & Light Company shall allow billing credits on all bills rendered to customers during the month of April, 1944, for electric service taken under the Company's residential and general service schedules, identified as Schedules DS and GS in its tariff, in an amount equal to one-half of the first monthly billing based on meter readings made on and after April 1, 1944, and shall file with the Board supplements to said schedules designed to make effective this adjustment of charges for electric service.

2. That New Jersey Power & Light Company shall establish a balance sheet account to be known as "Account 259, Stabilizing Reserve," to which as at December 31, 1943, it shall transfer the amount of nine hundred and seventy-five thousand dollars ($975,000) from earned surplus by debiting Account 271, Earned Surplus, and crediting the said Account 259, Stabilizing Reserve. No debits or credits shall be made to said Account 259, Stabilizing Reserve, except in accordance with the provisions of the Plan.

3. That the record in this case shall be kept open until certain contemplated accounting transactions affecting the stated value of the Company's common stock and its surplus shall have been

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completed, but in no case later than December 31, 1944, whereupon the said New Jersey Power & Light Company shall certify to the Board the amount of its equity capital as defined in Footnote 10 of the Plan hereby adopted, and, subject to approval of the amount by the Board, said amount shall be inserted in said Footnote 10. The amount of said equity capital to be inserted in said Footnote 10 and which is to be used in the determination of the basic rate of return set forth in said Plan shall in no event be less than four million dollars ($4,000,000).

4. That within ten (10) days from the date hereof New Jersey Power & Light Company shall notify the Board as to whether or not it accepts this Order and the said Rate Adjustment Plan as the method to be followed in establishing and maintaining just and reasonable rates to be charged by the Company for electric service.

5. That upon such acceptance the said Plan hereby adopted shall provide the basis for the determination of the rates for the Electric Department of New Jersey Power & Light Company, so long as said Plan shall remain in force and effect.

Dated, March 28, 1944.

NEW JERSEY POWER & LIGHT COMPANY

9 WEST BLACKWELL STREET

DOVER, N. J.

March 30, 1944.

Board of Public Utility Commissioners
of the State of New Jersey,
1060 Broad Street,
Newark, New Jersey.

Re In the Matter of New Jersey Power & Light Company—Reasonableness of Rates for Electric Service.

Dear Sirs:

Enclosed is an acceptance by this Company of the Order issued by the Board of Public Utility Commissioners of the State of New Jersey in the above entitled matter, and of the Rate Adjustment Plan attached to said Order, together with certified copy

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of resolutions adopted by the Board of Directors of this Company on March 30, 1944, in connection therewith.

Very truly yours,
NEW JERSEY POWER & LIGHT COMPANY
By /s/ H. C. Thuerk
President

Encls.

NEW JERSEY POWER & LIGHT COMPANY

CERTIFIED RESOLUTIONS

Resolved, that this Company accepts the Order issued by the Board of Public Utility Commissioners of the State of New Jersey on March 28, 1944, in the Matter of New Jersey Power & Light Company—Reasonableness of Rates for Electric Service, and the Rate Adjustment Plan attached to said Order, as the method to be followed in establishing and maintaining just and reasonable rates to be charged by this Company for electric service, so long as said Rate Adjustment Plan shall remain in force and effect; provided, however, that this acceptance shall not be deemed an acceptance of any particular provision or provisions of said Order and Rate Adjustment Plan except while said Order and Rate Adjustment Plan are in full force and effect in their entirety, nor shall such acceptance be construed as an acceptance or admission in any proceeding concerning the rates of the Electric Department of this Company in the event of termination of said Rate Adjustment Plan.

Further Resolved, that the President of this Company be and he hereby is authorized to execute in the name and on behalf of this Company and to file with the Board of Public Utility Commissioners of the State of New Jersey, an instrument signifying such acceptance.

THIS IS TO CERTIFY that the undersigned is Secretary of NEW JERSEY POWER & LIGHT COMPANY, a corporation of the State of New Jersey; that the above and foregoing is a true and correct copy of certain resolutions duly and regularly adopted by the Board of Directors of said Company at a meeting thereof duly convened and held on the 30th day of March, 1944, at

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which meeting a quorum was present and voted, and that said resolutions have not been annulled, revoked or amended in any way whatsoever and are in full force and effect.

WITNESS the signature of the undersigned as such officer of the Company and its corporate seal hereunto affixed this 30th day of March, 1944.

/s/ B. N. Malehorn,
Secretary.

(Seal)

RATE ADJUSTMENT PLAN

I. PURPOSE OF THE PLAN

1. This Rate Adjustment Plan (herein called the Plan), set forth in detail herein, was developed by the New Jersey Board of Public Utility Commissioners (herein called the Board) through conferences with New Jersey Power & Light Company (herein called the Company). The purpose of the Plan is to establish and maintain just and reasonable rates for electric service by providing definitive rules, standards and procedures which shall constitute the sole basis whereby the return to th Company's Electric Department shall be subject to annual review, and adjustment when adjustment is required by the provisions of the Plan, in accordance with the operating results experienced during each preceding calendar year, herein referred to as test year.[1]

2. The Plan establishes (a) standards and formulæ for measuring the 'experienced return' and for determining the 'basic return' for each calendar year; (b) a 'stabilizing reserve' to offset in whole or in part any deficiencies of 'experienced return' below 'basic return'; and (c) a procedure for annual adjustment of return. The operation of the Plan shall follow the provisions specifically set forth in the following sections and accompanying footnotes, which footnotes are an integral part of the Plan.

II. EXPERIENCED RETURN

3. The *experienced return* for each test year shall be the amount of electric utility operating income (comprised of operating revenue, less operating expenses, maintenance expenses, depreciation, taxes and other operating revenue deductions, plus income from rent of utility plant) as reported by the Company for the Electric Department and accepted by the Board for the purposes of the Plan, subject to the following adjustment and treatment of specific items:

(a) Profit or loss from merchandising, jobbing and contract work shall be considered as a credit or charge to operating revenue deductions.

[1] *Test year* means the immediately preceding completed calendar year for which experienced return and basic return are to be, or have been, determined for the purpose of the Plan. The first test year under this Plan shall be 1944.

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(b) Extraordinary or infrequently incurred items of operating revenue deductions may be spread over a reasonable amortization period, beginning with the year of the expenditure, as approved or directed by the Board.

(c) The amounts of taxes, other than Federal taxes based upon income, shall be included in operating revenue deductions at the amounts of calculated or estimated tax liabilities.

(d) The amount of revenue deductions for Federal taxes based upon income shall be computed for the Company at the tax rates effective for the test year applied to the incomes upon which taxes are based established in accordance with the provisions of the applicable statutes and regulations governing the filing of separate returns. The taxes so determined for the Company shall be reasonably apportioned to the Electric Department.

(e) In the event the incomes upon which the taxes are based, as determined under the provisions of Paragraph 3(d), should be increased or decreased by non-recurring charges or credits of substantial amounts, such taxes based upon income shall be included in the determination of the experienced return for the test year at the amounts of the taxes which would have been computed had said charges or credits not been available for the calculation of incomes upon which the taxes are based. When any such special reduction in, or addition to, calculated taxes is the result of additions to, or changes in, capitalization, the amount of said difference in calculated taxes shall be applied to reduce or increase the amount of unamortized debt discount and expense which is to be amortized over the appropriate period of years in accordance with the provisions of Paragraphs 6 and related footnotes.

(f) A charge of $43,582 shall be included in operating revenue deductions for each of twenty years, beginning with 1944, to amortize amounts aggregating $871,640 included in the rate base as at January 1, 1944, which are not subject to depreciation under the provisions of the uniform system of accounts.

III. RATE BASE

4. The *rate base* for each test year, which establishes the basic return when multiplied by the basic rate of return for the test year, shall be the sum of:

(a) $16,750,000;

(b) total gross additions[2] from January 1, 1944, to the beginning of the test year; and

(c) one-half of gross additions during the test year;

less the sum of:

[2] ***Gross additions*** means original cost of used and useful property installed or acquired by the Electric Department and charged to electric plant accounts, plus such amounts of acquisition cost in excess of original cost (incurred subsequent to January 1, 1944) as may be approved by the Board for inclusion in the rate base.

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(d) total gross retirements[3] from January 1, 1944, to the beginning of the test year;

(e) one-half of gross retirements during the test year;

(f) net change in the depreciation reserve[4] from January 1, 1944, to the beginning of the test year;

(g) one-half of the net change in the depreciation reserve during the test year; and

(h) accumulated amortization of amounts as provided under Paragraph 3(f), to middle of the test year, but not more than a total of $871,640;

plus working capital consisting of:

(i) average book cost of materials and supplies, including fuel, on hand at the end of each monthly accounting period during the test year; and

(j) average cash requirements taken at one-ninth of test year operating revenue deductions (exclusive of taxes, depreciation expense, and net debits or credits for energy interchanged and power purchased and sold) less the average of the two lowest month end balances in the tax accrual and tax reserve accounts during the test year, provided that the resulting difference shall not be taken at a negative amount. Balances in tax accrual and tax reserve accounts, for the purpose of this paragraph, shall be taken before debits representing tax payments made in advance of the dates permitted by law or governmental regulation.

IV. BASIC RATE OF RETURN

5. The *basic rate of return,* to be determined for each successive test year, shall be the sum (rounded to the nearest hundredth of one per cent) of the debt capital component, preferred stock capital component and equity capital component.

6. The *debt capital component* for each test year shall be the debt capital cost rate[5] multiplied by the ratio of debt capital[6] to total capital.[7]

[3] ***Gross retirements*** means original cost of property retired from service and credited to electric plant accounts, plus the retirement or amortization of items of acquisition cost in excess of original cost, where incurred subsequent to January 1, 1944, and approved by the Board for inclusion in the rate base in accordance with the definition of gross additions.

[4] ***Net change in depreciation reserve*** means the net increase (or decrease) in depreciation reserve, being the difference between (a) amounts charged to operating expense and credited to the reserve for depreciation of electric plant, and (b) amounts charged to the reserve to record the net cost of retirements.

[5] ***Debt capital cost rate*** means the percentage ratio of annual requirements of debt capital to total debt capital. *Annual requirements of debt capital* shall comprise total interest charges actually incurred during each test year, plus the sum of annual amortization on straight line bases of the following: (a) total debt discount (or premium) and expense and call premium, heretofore incurred on all prior and present issues of debt capital, to the date of maturity of the present 4½ per cent bonds of 1960, which item shall be taken at $589,470 as of January 1, 1944; (b) debt discount (or premium) and expense hereafter incurred in connection with new or refunding issues of debt capital, to dates of maturity of such issues; (c) call premium or expenses of acquisition and other expenses on present or future issues of debt capital, hereafter reacquired and held in the Company's treasury, to the dates of maturity of such issues; and (d) call premium and expense on present or future issues of debt capital, hereafter refunded,

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7. The *preferred stock capital component* for each test year shall be the preferred stock capital cost rate[8] multiplied by the ratio of preferred stock capital[9] to total capital.

8. The *equity capital component* for each test year shall be the equity capital return rate, determined according to the formula stated in Paragraphs 9 to 12, multiplied by the ratio of equity capital[10] to total capital.

9. The *equity capital return rate* for each test year shall be the average earnings-price ratio, determined according to the provisions of Paragraphs 10 and 11, multiplied by the *capital structure factor* corresponding to the percentage ratio of equity capital of the Company to total capital of the Company, according to the following table:

Per cent of Equity to Total Capital	Capital Structure Factor
10% or less	2.16
15%	1.80
20%	1.60
25%	1.44
30%	1.33
35%	1.25
40%	1.18
45%	1.12
50%	1.07
60%	1.01
70%	0.94
80%	0.90
90%	0.86
100%	0.82

to the dates of maturity of the refunding issues. A proportionate share of any unamortized debt discount (or premium) and expense related to a particular issue of debt capital called in part or in whole and retired, but not refunded or replaced in like amount, shall be extinguished together with the related call premium at the time of retirement. Unamortized debt discounts (or premiums), expenses and call premiums shall be adjusted in accordance with the provisions of Paragraph 3(e) covering calculated tax savings resulting from related refunding or other adjustment of debt capital.

[6] *Debt capital* means the average of the month end totals during each test year of (a) the principal amount of debt outstanding (including debt held in the Company's treasury) having an initial term or terms in excess of five years; plus (b) unamortized premium received; and minus (c) unamortized debt discount and expense and call premium on the outstanding and refunded issues of debt obligation. Said debt discount (or premium) and expense and call premium shall be as defined for the purpose of determining the annual requirements of debt capital. Total debt capital shall be taken at $8,410,530 as of January 1, 1944.

[7] *Total capital* means the sum of debt capital, preferred stock capital and equity capital as defined.

[8] *Preferred stock cost rate* means the percentage ratio of total dividends paid or accrued during each test year to total preferred stock capital.

[9] *Preferred stock capital* means the average of the month and totals during each test year of (a) par or stated value of preferred stock outsanding (including preferred stock held in the Company's treasury); plus (b) total premiums received; and minus (c) total discounts and expenses experienced and call premiums paid on the outstanding and refunded issues of preferred stock. Total preferred stock capital shall be taken at $2,803,160 as of January 1, 1944 (comprised of $3,306,000 of stated value and $502, 840 of net premiums, discounts, expenses and call premiums heretofore incurred). A proportionate share of any premiums, discounts and expenses related to a particular issue of preferred stock capital called in part or in whole and retired, but not refunded or replaced in like amount, shall be extinguished together with the related call premium at the time of retirement.

[10] *Equity capital* means the average of the month end totals during each test year of stated (book) value of common stock, plus earned surplus and capital surplus, and minus flotation commissions and expenses experienced in connection with the issuance of common stock. Total equity capital shall be taken at $ as of January 1, 1944. (See Order adopting the Plan—par. 3, page 103.)

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Capital structure factors for intermediate percentage ratios of equity capital to total capital shall be interpolated from the above table on a straight line basis.

10. The *average earnings—price ratio* for each test year shall be the arithmetic mean of the yearly earnings-price ratios, determined according to the provisions of Paragraph 11, for the test year and the two preceding calendar years.

11. The *yearly earnings-price ratio* for each test year shall be the arithmetic mean of the median four among the earnings-price ratios[11] for the common stocks of the following ten companies:

Boston Edison Company
Central Hudson Gas & Electric Company
Cleveland Electric Illuminating Company
Commonwealth Edison Company and Subsidiaries
Connecticut Light & Power Company, The
Consolidated Edison Company and Subsidiaries
Consol. Gas, Elec. Lt. and Power Co. of Baltimore
Detroit Edison Company
Philadelphia Electric Company
Pennsylvania Water and Power Company

For the purposes of the computation of equity capital return rate the yearly earnings-price ratio for any test year shall not be taken at less than six and one-half per cent nor at more than nine per cent. In the event the yearly earnings-price ratios as herein determined are more than nine per cent or less than six and one-half per cent for three consecutive years, the reasonableness of the said limits and of the bases adopted for computing the equity capital return rate shall be subject to reconsideration.

12. If the required information is not available for any of the above listed common stocks at the time of determination of the basic rate of return for any test year, the number of such common stocks shall be maintained at ten by substituting, for such test year only, the common stocks of other electric or electric-gas combination operating utilities. Such substitution shall be made in accordance with the following order of preference:

(a) electric utilities with annual gross operating revenues of from five to fifty million dollars and located in the New England, Atlantic and East North Central states;
(b) electric-gas combination utilities of the said size and located in the said areas;
(c) electric utilities located anywhere within the United States; and
(d) electric-gas combination utilities located anywhere within the United States.

[11] ***Earnings-price ratio*** means the percentage ratio of income available per share of common stock during the test year to the average of the monthly highest and lowest market prices of the selected company's common stock during the twelve months of the test year (bid quotations shall be substituted, if no transactions are reported). In the event a calendar year income statement for the test year is not available for any selected company, the latest twelve months' statement available on March 15 of the following year shall be used.

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When more than one utility is available in accordance with this order of preference, the utility with the largest annual operating revenue shall be substituted.

V. BASIC RETURN

13. The *basic return* in each test year shall be an annual amount equal to the rate base multiplied by the basic rate of return, less three per cent of the balance in the stabilizing reserve at the beginning of the test year.

VI. STABILIZING RESERVE

14. A *stabilizing reserve* shall be established and maintained under the provisions of this Plan for the purpose of offsetting in whole or in part, to the extent of any balance in the reserve, any return deficiency[12] experienced during any test year, by a transfer from the reserve to the Company's earned surplus.

15. The stabilizing reserve shall be created, upon adoption of the Plan, by a transfer at December 31, 1943, of $975,000 from the Company's earned surplus.

16. The stabilizing reserve shall be credited and earned surplus debited, for the test year 1944 and each test year thereafter, with amounts determined in accordance with the following schedule, so long as the amount in the reserve is less than six per cent of the rate base at the end of the test year:

(a) the full amount of any additional return[13] up to the amount of the basic reserve requirement;[14] plus
(b) one-half of any additional return in excess of any amount required to be transferred in accordance with Paragraph 16(a).

All credits to stabilizing reserve, based upon results of a particular test year, shall be considered to be made as at December 31 of the test year.

17. In the event that, as the result of any extraordinary charge, the balance in earned surplus available for the payment of preferred stock dividends is reduced to less than a periodic preferred stock dividend requirement, any existing balance in the stabilizing reserve may be transferred to such earned surplus in amount sufficient, but no more than required, to permit payment of such a preferred stock dividend. When debits to the stabilizing reserve are made as the result of application of this paragraph, the amounts so debited shall be restored to the stabilizing reserve by crediting the reserve and debiting surplus accumulated out of earnings available for corporate purposes, and no common dividends shall be declared or paid until the amount so transferred is thus restored.

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[12] *Return deficiency* means any amount by which the experienced return is less than the basic return for a test year.

[13] *Additional return* means the amount in dollars by which the experienced return exceeds the basic return for a test year.

[14] *Basic reserve requirement* means any amount by which the balance in the stabilizing reserve, before the credit or debit to the reserve on account of operating results during the test year, is less than four and one-half per cent of the rate base at the end of the test year

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18. Additional return not required to bring the stabilizing reserve up to six per cent of the rate base, as provided in Paragraph 16, shall be available to the Company for general corporate purposes, subject to the provisions of Paragraph 17.

19. During the year immediately following a test year in which a return deficiency is experienced an amount equal to the return deficiency, or such part thereof as is not in excess of the balance in the stabilizing reserve, shall be transferred to earned surplus from the balance, if any, in the stabilizing reserve. Said transfer, for the purposes of the Plan, shall be considered to be made as at December 31 of the test year.

20. Return deficiencies accumulated during not more than two consecutive test years after the year in which the balance in the stabilizing reserve has been entirely exhausted, when such return deficiencies have not been made the bases of rate increases, shall be recouped in full by application of the additional return available in subsequent test years, before any such additional return shall be credited to the stabilizing reserve.

VII. ADJUSTMENTS OF RATE SCHEDULES

21. *Rate adjustments,* calculated to cause a reduction in future experienced return, shall be made effective during the year following each test year for which an additional return has been experienced, which additional return is in excess of any amount required to be transferred to the stabilizing reserve under the provisions of Paragraph 16, except as hereinafter specifically provided in Paragraphs 23 and 24. Rate adjustments, calculated to cause an increase in future experienced return, may be made during the year following each test year in which a return deficiency has been experienced, subject to the qualifying provisions set forth hereinafter in Paragraphs 25, 26 and 27.

22. Solely for the purpose of establishing the amount of any calculated rate adjustment that may be made in the year following any test year during which a revision of the Electric Department's rate schedules was made, the amounts of experienced return and additional return or return deficiency shall be determined for such test year by adjusting the actual experienced return to the basis of a full twelve months' application of the said revised rate schedules together with associated adjustments of taxes related to income computed in accordance with the provisions of Paragraph 3, and taxes related to revenue at the tax rates in effect for the test year. If no revision of the Electric Department's rate schedules was made during the test year, the actual additional return or return deficiency shall form the basis for establishing the amount of any calculated rate adjustment required under the provisions of this Plan.

23. The amount of additional return in any test year, adjusted, if necessary, in accordance with Paragraph 22 and multiplied by the ratio of (a) additional return[15] available to the Company for general corporate purposes to (b) total additional return[15] shall form the basis for the calculated reductions of future operating revenues and future experienced return to be placed into effect during the year following the test year.

[15] Before application of Paragraph 22.

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The amount of such calculated reduction of future experienced return shall be determined as follows:

— Column 1 — Additional Return Available for Measurement of Reduction of Future Experienced Return as Provided in this Paragraph.	— Column 2 — Amount of Calculated Reduction of Future Experienced Return Expressed as Percentages of Amounts in Column 1.
Amount equivalent to the first one per cent or less of the rate base	Sixty per cent
Amount equivalent to the next one per cent of the rate base	Seventy-five per cent
Amount equivalent to the excess over two per cent of the rate base	Eighty-five per cent

24. Upon application by the Company, and approval by the Board, all or a part of the amount determined to be available for reduction of rates in any year following a test year may be returned to customers as a billing credit or credits.

25. In the event a return deficiency exists in any test year (after adjustment in accordance with Paragraph 22) the Company may file revised rate schedules designed to increase future experienced return in an amount to be determined from the adjusted return deficiency of the test year, considered in relation to the balance in the stabilizing reserve at the end of the test year before any debits to the stabilizing reserve on account of the return deficiency for the test year. The amount of the increase to future experienced return shall be determined as follows:

(a) the amount of return deficiency equivalent to the balance (if any) in the stabilizing reserve in excess of one and one-half per cent of the rate base shall be excluded from the amount of adjusted return deficiency with respect to which rate increases shall be measured;

(b) the remaining amount of adjusted return deficiency equivalent to all or any part of the balance in the stabilizing reserve up to one and one-half per cent of the rate base shall be the measure of the increase in future experienced return to the extent of fifty per cent of such amount of adjusted return deficiency;

(c) if there is any remaining amount of return deficiency in excess of the total balance in the stabilizing reserve, it shall be the measure of the increase in future experienced return to the extent of one hundred per cent of such amount of adjusted return deficiency.

26. The Company may elect not to file schedules providing for increased rates if it considers rate increases to be unnecessary or undesirable, provided that such election at the time of the annual proceeding shall not bar the Company from filing such schedules at a later time during the year.

27. All computations of adjustments to experienced return and revenues of the year following a test year shall be based upon customers, kilowatt-hour sales and revenues of the test year, after adjustments to

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give effect to a full twelve months' application of any revised rate schedules effective during such test year, and shall give effect to taxes related to income computed in accordance with the provisions of Paragraph 3, and revenue, at tax rates effective for the test year. No adjustment of rates shall be made under this Plan unless the estimated annual effect on future experienced return is at least $10,000.

VIII. ADMINISTRATION OF PLAN

28. As promptly as may be practicable after the end of each test year the Company shall submit to the Board a verified report showing for the test year all financial and operating data which may be required in the administration of the Plan. Basic computations and other data pertinent to administration of the Plan shall be made available for review and examination by the Board and its staff.

29. The annual proceeding with respect to application of the Plan to each test year shall be concluded at a time which will permit any revised rate schedules or tariff to become effective on April 1st, if possible, of the year immediately following the test year.

30. In the event a rate adjustment is to be made under the provisions of Paragraphs 23 to 25, inclusive, the Company shall submit to the Board, if possible in advance of April 1st of the year immediately following the test year under consideration, revised rate schedules or a tariff designed to effect the required adjustment of future revenue and experienced return. When the Board is satisfied that such revised rate schedules or tariff are designed to effect the required adjustments of future revenue and experienced return, that they conform to the requirements of the Plan and that they provide for a reasonable distribution of the adjustment among the several classes of service, they shall be accepted to become effective as soon as practicable after such acceptance.

31. The annual determination of experienced return and basic return for the preceding test year, when accepted by the Company, shall be conclusive and not subject to retroactive adjustment.

IX. DURATION AND REVISION

32. This Plan shall be effective December 31, 1943, and subject to the provisions of law shall continue in effect for an indeterminate period subject to termination by either the Board or the Company. Notice of intention to terminate the Plan shall be in writing and may be filed by either the Board or the Company at any time during a calendar year, but not later than sixty days following the determination of the application of the provisions of the Plan to the operations of the test year, said termination to be effective at the end of the calendar year.

33. In the event of termination of the Plan, one-half of the balance in the stabilizing reserve, as of the end of the year of termination, determined in accordance with the provisions of the Plan governing such determination, which is in excess of $250,000 shall become the measure, after adjustment for taxes, of the total amount of billing credits to be made subsequent to the date of termination. The said billing credits shall

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be applied in a manner approved by the Board and shall be made in individual amounts of not more than one-half of a calendar month's billings at intervals of not less than six months, until the total amount of such billing credits has been applied.

34. In the event the Plan is terminated, the balance in the stabilizing reserve as of the end of the year of termination shall be determined in accordance with the provisions of the Plan governing such determination and, if a credit balance, shall be disposed of as follows:

(a) the balance in the stabilizing reserve, but not more than the initial balance of $975,000, less the portion of such balance equivalent to the measure of the billing credits to be distributed to customers, as provided in Paragraph 33 above, shall be transferred to capital surplus;

(b) the remaining amount in the stabilizing reserve shall be transferred to earned surplus.

35. The Plan herein set forth shall be subject to modification and revision in the event of unforeseen circumstances which make such modification or revision desirable.

LETTER OF TRANSMITTAL

To the Board:

In April, 1942, Mr. J. R. Foster was directed by the Board to discuss with representatives of the New Jersey Power & Light Company a method, which he had suggested in a tentative form, for continuous regulation of the return to its Electric Department. After his resignation as Economist in June, 1942, Mr. Foster, together with Mr. H. J. Flagg acted as representatives of the Board in this proceeding.

The Company retained Gilbert Associates, Inc., and Mr. Malcolm G. Davis, Vice-President of the consulting organization, participated continuously as a representative of the Company. In the later stages of the discussions the Company also was represented by its President, Mr. H. G. Thuerk and by Mr. Ernest Howe, Chairman of the Executive Committee and Vice President of NY PA NJ Utilities Company, the holding company.

Careful and extended studies have been made of the numerous problems presented and frequent discussions have been held. Mr. Henry Herz of the Board's staff has assisted in connection with the rate of return section and he has reviewed the studies carried forward by Mr. Davis and his organization.

The draft Plan is accompanied by a 'Report to the Board', prepared initially by Mr. Foster and jointly revised, which undertakes:

1. to express the general purposes, scope and characteristics of the Plan; and
2. to state the considerations and review the reasoning which controlled the determinations.

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The formal text of the Plan is complete; no subsidiary agreements or interpretations are proposed. The Report is a 'conference report,' a record of the discussions with the representatives of the Company. It is hoped that the continued application of the Plan to the advantage of the customers, the general public, the Board and the Company will be furthered by a common understanding of the objectives and proposed methods and that this Report may contribute to such an understanding.

The draft Plan has evolved through more than a dozen distinct revisions and many other changes. In its development attention has been continually directed to the objectives and the reasonableness of the final results. The Plan is a new and, it is believed, improved method of rate regulation basically similar to the customary rate case method but of continuing application and refined to give more precisely reasonable results. Therefore, provisions of the Plan are not necessarily to be tested in the light of methods or standards which would be applicable in an ordinary rate case, although we have not been unmindful of such methods or standards. Further, it is not intended that the Plan shall establish Board policy applicable in any proceeding concerning the rates of other utilities under the Board's jurisdiction or the electric rates of New Jersey Power & Light Company in the event of termination of the Plan.

In view of the fact that 1944 will be the first test year and the mechanics of the Plan do not permit a rate adjustment to become effective during 1944, the Company has agreed that independent of the Plan, billing credits equal to one-half of all billings under the Utility's residential and general service rates (Schedules DS and GS) will be made effective upon bills rendered during the month of April, 1944.

The Board's representatives recommend that the Board institute appropriate proceedings having as their objective formal adoption of the proposed Rate Adjustment Plan to be effective as at December 31, 1943.

Respectfully submitted,

J. RHOADS FOSTER,
Consultant

H. J. FLAGG,
Chief Engineer.

Newark, N. J.
February 14, 1944.

INTRODUCTORY

Corporate History

New Jersey Power & Light Company is the present name of a corporation organized by the W. S. Barstow interests, pursuant to the laws of New Jersey, in December, 1915, under the name 'The New Jersey Power & Light Company'. The Company proceeded to acquire and merge some twenty-eight operating utility systems in the northwestern part of the state. The present name of the corporation was authorized by the stockholders in 1926.

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From the date of its incorporation until March 22, 1929, the Company continued under the W. S. Bartow management as a subsidiary of General Gas and Electric Corporation. On that date the control of the Company passed to the Hopson interests where it remained until January 10, 1940, when reorganization proceedings affecting the Associated Gas and Electric Corporation were instituted. The Company is a wholly owned subsidiary of NY PA NJ Utilities Company, a sub-holding company in the Associated System, which in turn is fully controlled by Denis J. Driscoll and Willard L. Thorp, Trustees of the Associated Gas and Electric Corporation.

Outstanding Securities

The securities of the Company, outstanding as of December 31, 1943, are as follows:

Capital stocks:		
Common (87,000 shares—no par value) ...	$6,535,000	
Preferred, $6 Cumulative		
(33,060 shares—no par value)	3,306,000	$9,841,000
Funded debt:		
First Mortgage Bonds		
4½ per cent Series, due 1960	$9,000,000	
N. J. Northern Gas Co.		
5 per cent Bonds, due 1952	61,000	$9,061,000

As of December 31, 1943, the Company carried its electric and gas plant on the books at $25,015,188. This figure is subject to adjustment in an amount that will be disclosed when the 'original cost' study, now in progress, is completed.

Business of the Company

The Company is engaged in the generation and distribution of electricity in the seven northwestern counties of New Jersey, comprising an approximately rectangular area about 30 miles wide from east to west and 70 miles long from north to south. Gas is also supplied in three separate areas within the electric service area. The relative importance of the two utility services is shown in the following table:

Statistics as of Dec. 31, 1943

	Electricity	Gas
Number of Communities Served	347	16
Number of Customers	58,517	7,786
Operating Revenue (1943)	$5,054,033	$290,163
Book Value of Plant	$23,655,440	$1,359,748

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The economic activity in the territory served is well diversified between agriculture and manufacturing. This is indicated by the classification of electric operating revenues for the year 1943.

Class of Customer	Number of Customers	Operating Revenue
Residential	51,452	$2,143,235
Commercial	6,489	732,990
Industrial	404	1,823,946
Miscellaneous	172*	353,862
Total	58,517	$5,054,033

* Includes 169 street and highway lighting customers.

Source of Supply

The main source of supply of electric energy is the Company's 'Gilbert Station' located at Holland, New Jersey. This is a modern high pressure steam-electric generating station with a rated capacity of 55,000 kw. The Company has interconnections with other systems as follows:

Metropolitan Edison Company	at 4 points
Jersey Central Power & Light Company	at 1 point
Public Service Electric and Gas Company	at 1 point
Central Hudson Electric & Gas Corp.	at 1 point

The aggregate capacity of these interconnections is said to be 279,000 kva which is approximately four times the maximum load required to supply the Company's own customers.

Gas service to customers in the Phillipsburg and Washington areas is supplied from the gas manufacturing plant of the Metropolitan Edison Company in Easton, Pennsylvania. New Jersey Power & Light Company has gas manufacturing plants at Newton and at Flemington.

IA. GENERAL CHARACTERISTICS AND OBJECTIVES

The first purpose of this proposed method of rate regulation is to provide procedures which may be expeditiously applied in adjusting the rates of the Electric Department so that its return will be reasonable but no more than reasonable. To accomplish this purpose the Plan provides objective standards or formulæ for determination of all essential factors.

The Plan is a sliding scale arrangement if the term is used with its general meaning of any form of rate regulation in which the price of service decreases, according to the terms of a formula, as the income available to the utility for distribution as common dividends increases. Under such a plan the utility shares in increased earnings, resulting from growth of revenues or reductions of cost levels, when such increased earnings are the basis for rate reductions. On the other hand, a deficiency of return under conditions specified by the Plan is the basis of increase in charges to consumers.

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The Plan contains several features which are regarded as distinct improvements in the method of regulating utility rates by means of a sliding scale plan. The most important are (a) establishment of a stabilizing reserve designed to avoid or dampen the abruptness of rate increases which otherwise might be required, and (b) a method of determining the basic rate of return so that it will remain adjusted to changes in the cost of utility capital.

Administrative Advantages

The policy of the Board is to review periodically the reasonableness of rates charged by the principal utilities operating under its jurisdiction. Conference and negotiation necessarily play an important part in the administration of this policy. It has been and is the Board's desire to develop and follow a procedure, either formal or informal, which will avoid, as far as possible, expensive and prolonged rate cases.

The proposed scheme of rate regulation is a product of the Board's continued search for means to implement this policy.

In instances when the method of informal negotiation has proved to be inadequate in practice, it has been supported by the willingness of the Board to undertake extensive formal investigations.

Formal rate cases in the past have required preparation of field inventories and pricing of inventory items; they cannot be concluded within a brief period of time, but require months or years. A number of instances are on record in other states in which from five to ten years have been required to determine reasonable rates for a public utility.

Institution of a formal rate case sometimes is not available to the Board as an effective alternative because of the statutory requirement that the hearing be completed and closed within six months after initiation of the proceeding. The statutory time limitation is not consistent with the time consuming nature of cost of reproduction evidence.

When the negotiation method flounders, the formal rate case often is not an effective alternative for the further reason that the regular legislative appropriations for the Board's support are not adequate to meet the costs of important formal proceedings.

The Rate Adjustment Plan is designed to present an avenue of escape from the possibility of a long drawn out, tedious, costly and uncertain formal proceedings. It provides for an annual adjustment of the earnings level and does so by specifying exact and relatively simple rules for determination of the rate base, the rate of return and reasonable operating expenses. Accounting standards and practices are now sufficiently refined that cost of plant and other property may be ascertained with relatively little expense, time and dispute.

It is obvious that agreement upon a starting rate base for the purpose of such a plan is no easier to obtain than agreement on the rate base in a formal proceeding. In this instance the co-operative attitude and good will of the Company, and its understanding of the mutual advantages which may be available from development of a more objective and speedy method of rate regulation are the reasons for the accomplished result with respect to the reasonable rate base.

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No commission can predict accurately the earnings which will result from an existing or a proposed new tariff. At a time when revenues or costs may be moving to either higher or lower levels, it becomes necessary for the commission to estimate the effect of its determination during a period in the immediate future. In such a proceeding the utility naturally is inclined to be pessimistic as to revenue prospects and liberal in its estimates of probable operating expenses. The Board's staff cannot have the intimate knowledge of the market and operating conditions which may be expected to be possessed by the managers of the property. If the commission estimate is conservative or if the actual return is more than is expected on the basis of the revised schedules of rates, the realized return in excess of a fair return belongs to the utility. The consumers will then have paid more than reasonable rates. On the other hand, the utility must assume the risk that it will experience a deficiency below a reasonable return and that it will be made up only if the regulatory process gives similarly inexact results in the future.

The Plan removes the necessity for making forecasts as to the trend of operating revenues, operating expenses or taxes. It provides a stabilizing reserve to which will be credited excesses over the basic return and to which will be charged deficiencies under the basic return. The revenues and the expenses which are reasonable for rate making must be ascertained for each test year during the first months of the following year, but it is far easier to determine reasonable amounts for past than for future periods.

Effectiveness of Regulation

If the ends of administrative practicability may be met in increased degree, a gain in the effectiveness of commission regulation is to be expected. Appraisal of the advantage of this gain is subject, however, to the consideration that the result of the new method must be reasonable and in the public interest.

The first responsibility of the regulatory commission is to protect the public interest in availability of service at reasonable rates. In New Jersey a public utility is prohibited by statute from imposing any unjust or unreasonable rate. Its right to a fair return is recognized. The public interest requires that rates be adequate but not more than adequate to attract capital at reasonable cost rates where the public demand for service requires additional capital investment. This public interest is the basis of the economic measurement of reasonable rate levels. Thus, the consumer and investor interests are not at odds in the case of a growing utility and the legal right to a fair return is not in conflict with the economic measure of reasonableness.

Reasonableness of Results

Within the framework of its statutory powers, the Board is free to obtain results consistent with the public interest by choice of appropriate methods of administrative procedure; adherence to any particular formula is not required by the Federal courts. The guarantee of due process demands that the method of rate making "shall not be arbitrary or capri-

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cious and the means selected shall have a real and substantial relation to the objectives sought to be obtained." (*Nebbia* vs. *New York,* 291 U. S. 520, 525 (1934).) The result of the rate-making process should be reasonable but "the Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and "regula tory agencies are free to make the pragmatic adjustments which may be called for by particular circumstances." (*Federal Power Commission* vs. *Natural Gas Pipe Line Company of America,* 315 U. S. 575, 586 (1942).) In the *Hope Natural Gas Company Case* the Court reiterated that "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling" (88 Sup. Ct. 281; 51 P. U. R. (N. S.) 193, 200).

Therefore, in the valuation of utility property for rate making purposes, commissions are free to look to the economic consequences of their determinations, particularly to the effect on the ability of utilities to attract additional capital both in periods of low and periods of high prices. In view of the possibility of wide price fluctuation in future years, it is fortunate that the Court has not heeded the clamor of its critics to cast the regulatory process into a rigid mold of enforced adherence to either past or present costs in rate base determination. The means adopted by regulatory policy should be functional; the administrative process should operate both to deny excessive (monopolistic) returns and to protect the necessary competitive returns. If regulation fails in this respect it loses its capacity to motivate men to act in the economic best interest of the public.

Operating within the latitude thus available for administrative action, it is believed that the Plan will simplify the procedures of rate regulation and increase their effectiveness. It also is believed that the economic consequences of its application will conform in maximum degree to the interests of both consumers and investors. It is the fair return which is significant in rate regulation and not either the rate of return or the rate base standing alone.

The Plan proposes adoption of the accounting approach to the problem of rate base determination but does not disregard the fair value doctrine. The suggestion is that the Board, in this instance, may move toward a simpler and more satisfactory method of rate regulation by adopting prudent investment substantially as the measure of the rate base and by providing a means for adjustment of the rate of return to reflect changing economic conditions.

It is considered that the fair return is a 'cost' of supplying utility service and that the cost of equity capital is measurable by reference to the return alternately available to investors from "investments in other business undertakings which are attended by corresponding risks and uncertainties." (*Bluefield* vs. *Public Service Commission,* 262 U. S. 679, 692 (1923).) Where the annual return to a soundly capitalized utility is equal to the full amount of annual requirements resulting from past contractual commitments for debt and preferred stock capital, plus the return currently expected from equity commitments in enterprises of similar risk characteristics, the utility always will be able to obtain new capital funds at reasonable prices.

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Flexibility of the Return

Adoption of a stable rate base and a rate of return which varies with the cost of capital will not give to a utility's investors the same *real* return or purchasing power that was represented by a fair return on the investment at the time the investment was made.

Bond and preferred stock investors, of course, make their commitments in return for a promise of a future income fixed in terms of dollars unequal in purchasing power. Their contracts do not provide and they do not expect a return adjusted to either changes in the general price level or in the returns from alternative opportunities for investment.

The case tends to be different with equity investors whose right to a return is residual and whose function is to assume, in larger part, the risks inherent in changing price levels and other economic conditions.

If the Plan were to provide both a stable rate base and a fixed rate of return, the status of equity investors would tend to approximate that of senior security holders. In the case of an electric utility capable of earning a fair return at all foreseeable times, the return to the common stockholder would be approximately fixed in dollar amount but would vary in terms of real income.

Returns to equity investors, if established on the basis of a rigid rate of return, would not vary with changes in income available from alternative employments of equity capital.

It is believed that, if the economic well being of the utility is to be maintained, the suppliers of equity capital to the utility should receive relatively high returns when the returns to other equity investments of similar risks are relatively high. If the method of regulation were to deny relatively high returns, the ability of the utility to attract additional capital would tend to be impaired. The markets for investment funds are intensely competitive; investors have full freedom to act as rational economic beings. On the other hand, when yields on alternative investments are relatively low, high returns to equity investments in public utilities are unnecessary as a means of attracting capital.

It is for these reasons that the equity component of the basic rate of return is made variable. The proposed method of rate regulation is thus functionally adapted to the results sought.

The assurance that investors will be entitled to receive a return commensurate with the alternative return available from commitments in other enterprises of similar risk characteristics will tend to minimize the speculative element in the return on the common stock investment. It is believed that the credit status of the utility will be improved by the arrangement for varying the rate of return in order to reflect the going rate in the market for equity capital, and by existence of a reserve which operates to stabilize income.

It is true, of course, that a rate base expressed substantially in terms of past cost dollars does not represent, unless by accident, either the cost of reproducing an identical plant or the cost of constructing the most economic plant capable of supplying the same service. Equity investors may expect a return, at current rates of return, on dollars with a present day purchasing power, not on dollars of past costs. Nevertheless, adjustment of the rate base to reflect fluctuating construction costs is not admin-

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istratively feasible, and it is believed that the provisions of the Plan will yield reasonable results without the necessity of such adjustment.

Consideration has been given to the possibility of weighting the rate base by use of a moving average of a cost of construction index. It is considered, however, that no available index of construction costs has the degree of acceptance which permits it to be adopted for the purpose. Secondly, the application of index numbers to past construction costs is economically desirable only if the techniques used to measure depreciation give results which reflect in full the incidence of obsolescence as a cause of depreciation. An estimate of the service rendering capacities of an existing plant, in comparison with an alternative new and modern plant, has a greater economic significance than an estimate of changes in the cost of constructing an identical plant.

Stabilizing Reserve

Disregarding the effects of long term growth, the annual return actually earned by any public utility varies widely because of cyclical and accidental factors. The business cycle, the continued recurrence of periods of depression and business prosperity, is perhaps the most important of these factors. Both the First World War and the present conflict resulted in violent price disturbances and changed the relationships between cost and revenue levels. In spite of price fixing, rationing, taxes and bond scales, the basic causes of substantial price changes have not been eliminated in the present economy.

The returns realized by electric utilities seldom have been greatly inadequate as a result of business cycle changes. The continued growth in number of customers, the acceptance of the service for refrigeration and a multitude of other uses, and the relative inelasticity of demands for some purposes have tended to maintain the levels of return in spite of adverse economic conditions.

At present, the markets for residential and industrial electric service are developed more intensively than at any time in the past. The impact of depression of equal severity is likely to cause a relatively greater curtailment of over-all demand than was experienced from 1930 to 1933.

The legal doctrine of fair return on fair value and the established rate making policies give relatively little consideration to value of service in the case of utilities which are capable of earning an over-all fair return. Therefore, effective regulation would tend to reduce rates in periods of expanding business and to be faced with the need for increased rates in depression periods. In theory, rates would tend to be increased at the very time when purchasing power is curtailed, and when higher rates would tend to be adverse to the factors which facilitate recovery. A sliding scale arrangement without a stabilizing reserve would tend to accentuate these undesirable results, because it would give a prompt annual adjustment of rates based on the excess or deficiency of experienced return.

The Rate Adjustment plan provides for a stabilizing reserve with a ceiling equivalent to six per cent of the rate base. At the effective date of the Plan an initial contribution of $975,000 will be made by transfer from earned surplus. The reserve will be built up thereafter by application

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of experienced return in excess of the basic return, according to the terms of the formula, until the ceiling of six per cent is reached.

The stabilizing reserve will be used to make up any deficiency of basic return, that is, any amount by which the actual return is less than a fair return. Therefore, within the limits of the amounts available, the balances in the stabilizing reserve will be used to maintain income available for payment of common dividends in the event of adverse business conditions.*

The plan does not provide for rate increases merely because the experienced return of any one test year is less than the basic return; instead, deficiencies of return are to be absorbed by any balances in the stabilizing reserve. When the reserve is depleted to one and one-half per cent of the rate base, one-half of any further deficiency is the basis for a rate increase, and rates are increased by the full amount to which a return deficiency is in excess of the reserve balance.

With the sharp price increases during and after the First World War, commission regulation rapidly shifted to consideration of increases rather than reductions in rates. Procedures often were not available for prompt consideration of applications for approval of rate increases and the proposed increases were unpopular with the public. The proceedings were prolonged, and, in spite of the public disapproval, commissions found it necessary in many instances to permit upward adjustment of rates in order that the credit of the utilities would not be unduly impaired.

During the prolonged depression (particularly from 1931 to 1935) public dissatisfaction with utility enterprises and regulatory commissions resulted in new restrictive legislation, criticisms of the commissions, discriminatory taxation of utilities, emergency rate reduction orders, the Tennessee Valley Authority and other publicly owned power projects.

After the present war emergency, state commissions will be under pressure to make the processes of rate regulation more effective than they have been in the past. Assuming that business cycle fluctuations continue, however, earnings will tend to be less than a 'fair return' during bad times in proportion to the effectiveness with which they have been held down to the level of a 'fair return' during the preceding good times. (Unfortunate consequences commonly have not followed from past business cycle changes, because the lags in the regulatory process have left a substantial margin over 'fair return' during good times.) In periods of business depression, being accustomed to a succession of rate decreases, the public will not welcome rate increases.

In the midst of a severe business depression it is unlikely that utility rates can be reduced (justly), but means ought to be devised to avoid raising rates. It is for this reason that the stabilizing reserve is an essential and protective feature of the Plan.

The reserve ought to be sufficient in amount to counteract the effects of any adverse business conditions which reasonably may be anticipated. A reserve accrued to the limit provided by the Plan will offset an annual return deficiency, continuing for about three years, equal to two per cent of the rate base, before significant rate increases would become necessary.

* The advantages of a stabilizing reserve are discussed in *The Problem of the Rate of Return in Public Utility Regulation,* Federal Communications Commission, Telephone Rate and Research Department, June, 1938, p. 37.

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There is no assurance that a reserve of this maximum amount will be adequate in the face of all contingencies, but it will contribute largely to avoid rate increases which otherwise would be required because of temporarily adverse conditions.

Managerial Incentives

In theory, the usual method of rate regulation limits the earnings of a utility to a 'fair return' and the presence of any excess over this return indicates that a reduction in rates is in order. If regulation were effective on this basis, there would exist no *financial* incentive for management to strive for increased efficiency, since the benefits of any additional economies would go promptly and in full to consumers. Regulation has not had this result in its actual practice. The lags and uncertainties of the regulatory processes often have resulted in substantial excesses over a fair return being retained by utilities.

Adoption of more effective methods of rate regulation requires that careful consideration be given to their effect on managerial incentives and efficiency.

The draft plan provides (Paragraph 18) that for each test year any amount of return in excess of the 'basic return,' if not required to be credited to the stabilizing reserve, shall be available in full to the Company for general corporate purposes. Amounts of additional return available to the Company for general corporate purposes are the basis of rate reductions. The amounts of such reductions, effective during the following year, are measured by sixty per cent of the first one per cent of the rate base, seventy-five per cent of the second one per cent and eighty-five per cent of any amount of additional return in excess of two per cent.

The fundamental assumption is that by establishing a relationship between the income available to stockholders and the amounts of rate reductions, the management will be persuaded to identify its interests with the interests of the customers in lower rates.

In some instances sliding scale agreements have been partly unsuccessful because the utility affected was controlled by a holding company which preferred to take its additional return in the form of profits on inter-company transactions. Such an influence is now extremely unlikely. Inter-company relationships are subject to effective control by the Securities and Exchange Commission, and the Board has jurisdiction over inter-company contracts, as well as authority to determine the reasonableness of inter-company charges as operating expense items in a rate case.

In the event of further consolidation or merger of New Jersey Power & Light Company with other operating utilities, increased earnings may be expected as the result of business and technological economies available from the integration. The financial advantages of these economies ought to go to the consumers in some definite part but not in their entirety. If no gain may be retained by the owners, mergers and consolidations are discouraged, and consumers may not realize the gains which otherwise might be available to them.

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This public interest in possible further integration is recognized by the provisions for division of additional return between investors and consumers.

The question of what the division of increments of return ought to be is a difficult one. The division between customers and investors provided by the Plan recognizes that, when not required for the stabilizing reserve, the owners retain one hundred per cent of the experienced earnings for each test year. The sliding scale formula is applicable only to reduce subsequent earnings, beginning after three or four months of the next year. Assuming that all conditions remain constant, the amounts of subsequent returns in excess of the basic return are reduced annually on the basis of the percentages stated above. Therefore, the amounts of additional return are progressively decreased by reductions in charges to the customers until the earnings of the utility become stable at the level of the basic return after four or five years. In other words, the reward for managerial accomplishments is limited in time; it can be made continuous only by continuous accomplishments.

It also is considered that such external factors as increased demand for service, improvements in load distribution, and changes in costs (the price level, taxes, wages, etc.), in large part are not subject to control either by management or the stockholders. It undoubtedly is true that the long term growth in the demand for service is more important than any other cause of incremental returns. Aggressive management may contribute greatly to the development of its markets, but the demand for electric service has increased and probably will continue to increase in some degree regardless of promotional efforts by management.

The use of sixty, seventy-five and eighty-five per cent of successive blocks of additional return as the basis for rate reductions, recognize the distinction between returns yielded by increased efficiency and those which arise from circumstances and factors beyond the control of management. If the incremental return is more than one per cent of the rate base, it may be assumed that the gain in earnings results in substantial part from causes beyond the Company's control.

The sliding scale arrangement also recognizes that financial rewards do not provide the only incentive to good management. For the most part, the executives and managers of operating utilities have a pride of accomplishment, and understanding that the business is one involving a public interest, and a heritage of good managerial standards.

A further consideration is that operating utility officials and managers are paid for their services by means of salaries, and the stock they may hold in the Company commonly is the merest fraction of the outstanding shares. Where the voting shares are widely held, the contribution of the shareholders to efficient management often is remote and sporadic and stockholder participation in additional earnings may fail to serve the purpose of providing an incentive for improvement.

The common stock of New Jersey Power & Light Company is at present wholly owned by a single stockholder, and participation of the owner in the management of the enterprise is more active and close than would be the participation by stockholders if the stock were widely held.

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IB. LIMITATIONS OF SCOPE AND OBJECTIVES

The proposed Plan for regulating the electric rates of New Jersey Power & Light Company has certain limitations of character and purpose. It is important that these limitations be definitely stated and recognized.

1. For the reasons stated in the Letter of Transmittal, it is intended that no provision of the Plan shall either establish or reflect Board policy applicable in any proceeding concerning the rates of other utilities under the Board's jurisdiction or the electric rates of New Jersey Power & Light Company in the event of termination of the Plan.

2. The Plan and its provisions are adapted to the particular circumstances of the Electric Department of the Company. Its adoption must not establish any implication that the Board approves it as a method of regulating the rates of any other utility within the Board's jurisdiction.

There are several reasons why adoption of the Plan for the Electric Department of New Jersey Power & Light Company does not imply that it should be applied to any other utility. One may be given as an illustration.

The plan makes rate increases permissible when the balances in the stabilizing reserve fall below fixed minima. This automatic provision is sound in the case of a utility serving markets in which a large proportion of the demands are relatively inelastic. In the case of other utilities, it is possible that no tariff could be designed which would yield the basic return.

The sliding scale agreement clearly is not appropriate in the case of a utility serving a market which is shrinking because of basic or long run changes in consumption habits. Under a sliding scale agreement any utility earning less than the basic rate of return would be entitled to increase the prices to be charged for its service, but such increases might disregard value of service and in some situations would result only in accelerating the decrease in earnings, thereby creating a vicious circle of rising price and falling demand.

Therefore, a sliding scale is believed applicable only to utilities serving stable or expending markets capable of yielding the basic rate of return over relatively long periods.

3. Even in the case of the Electric Department of New Jersey Power & Light Company, in developing and adopting this Plan, the Board will in no sense guarantee that the utility shall earn a fair return. It is believed, however, that the Plan will provide the Electric Department with an opportunity to earn a fair return; it is expected that the demand for its service will continue to enable it to do so.

4. The Plan is applicable only to the Electric Department; it adheres to the rule, recognized generally for rate-making purposes, that each distinct type of service should be self-sustaining. The existing and prospective gas business is so small in proportion to the total, however, that the financial structure of the Company is recognized for the purpose of the provisions controlling rate of return determination.

From the very beginning of commission regulation, the commission and court decisions have adhered generally to the standard that each distinct

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type of service should be self-sustaining. The New Jersey Power & Light Company is both an electric utility and a gas utility and the statute provides that no public utility shall exact any unreasonable or unjustly discriminatory charge for services. It would be uneconomic and contrary to the public interest to require electric customers to pay amounts in excess of the cost of supplying electric service for the purpose of providing a fair return on the gas business if the price which customers are willing to pay for gas service were not sufficient to meet the cost of supplying the service.

Therefore, any proceeding with regard to reasonableness of gas rates would be entirely independent of the Plan.

5. Another limitation is that the provisions of the Plan do not concern the design of rate schedules or the form of tariffs. The Plan will determine the amounts by which rate adjustments will increase or decrease annual operating revenue, but it includes no specifications with respect to distribution of the amounts among classes of customers or among customers within a general class. The design of the tariff, or set of filed rate schedules, is subject to the authority of the Board to prevent discrimination and to require rate patterns that will contribute effectively to development of the market.

The unique advantage of regulation, in contrast to public ownership and operation, is the possible stimulation of private initiative directed toward higher efficiency and more rapid development. The importance of this objective is perhaps greatest with reference to the pattern of prices for service. The provision of a stabilizing or depression reserve makes the returns to investors in part independent of earnings under current business conditions and rates charged at a particular moment. The rate base and rate of return are eliminated as problems which absorb continuing effort.

Therefore, it will be possible for both the Utility and the Commission to give increased attention to the pattern of rates which will result in the most intensive development of the market. It is known that in the different segments of the market the demands are not the same at one rate level as at another. The desired electric operating income may be produced by more than one combination of rates. It will be possible to give more careful study to the prices of substitute services, to the influence of rate changes and promotional activities on demand for different uses and to the relationships between rates and business cycle changes.

Rate schedules properly may be complex because they provide the pattern of offering prices for different segments of the general market for service and these segments have different characteristics. Flexibility in rate schedule design is required because of the continually changing circumstances and the need to adjust the schedules of rates to the demand characteristics of the markets served.

6. The jurisdiction of the Board over accounting is independent of the Plan and is not affected by its provisions. For instance, the starting rate base is an amount agreed upon as reasonable for the purpose of the Plan; it determines neither the security base of the Company nor the cost to be recorded on the books. The authority of the Board to require uni-

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form accounting is independent of its power to regulate rates. The accounting reports of the utility serve many purposes other than the ends of rate regulation. The book figures are evidence available in rate making, but the treatment given to particular items for the purposes of the Plan may be affected by considerations other than those which would determine their appropriate disposition in an accounting proceeding. Therefore, the consideration which may be deemed to have been given to any item in drafting the provisions of the Plan does not imply a parallel treatment in any accounting proceeding.

7. Similarly, the Board's continuing jurisdiction over depreciation will be unaffected by adoption of the Plan. Depreciation is recognized as a negative element in the starting rate base, which is an overall amount not segregated into its components. For the purposes of the Plan, it is provided that the rate base will be adjusted from year to year on the basis of the net increase (or decrease) in the depreciation reserve. That is, the excess of depreciation expense credited to the reserve over net retirements at original cost is a negative component of the total annual adjustment. This formula, however, rests upon (a) the consideration of administrative practicability, and (b) the consideration that subject to the other provisions of the Plan, the credit of the utility will be favorably maintained when the experienced costs of supplying service are recovered in full over a period of years. The formula does not imply that annual depreciation expense will correspond exactly to depreciation accrued in the plant during each accounting period.

The plan implies, however, that reasonable depreciation expense will be determined for each test year. If reasonable for accounting purposes, the amount of such an annual allowance will be reasonable for the purposes of the Plan.

By order dated November 18, 1937, the Board required that each electric utility in New Jersey file a statement "showing the methods which the utility proposes to use in the determination of its annual charges for depreciation" and ". . . analytical studies establishing the propriety of the specific rates of depreciation for different classes of depreciable property or composite rates for categories of depreciable property, which the utility proposes to use in determining its annual depreciation charges." The order requires that the "methods submitted for the approval of the Board provide for depreciation reserves adequate to maintain the integrity of the total investment in utility plant."

This outstanding order of the Board is mentioned for the purpose of reinforcing the statement that the Plan does not include a formula to establish depreciation expense and that reasonable depreciation rates are subject to determination from time to time under independent powers of the Board.

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II. DETERMINATION OF EXPERIENCED RETURN

Probably the most difficult step in the annual proceeding will be determination by the Board of the operating revenue deductions reasonable for rate making purposes. This step includes consideration of whether or not:

1. there are expenses which are not properly includible for rate making;
2. items of operating expense are reasonable in amount; and
3. joint costs are reasonably allocated between New Jersey Power & Light Company and other companies and between the electric and gas departments.

Except where Paragraph 3 expressly provides otherwise, the determinations are subject to the same standards as are applicable in any formal rate proceeding.

Paragraph 3(a)

Merchandising of utility appliances is considered a part of utility operations, on grounds both of purpose of the activity and administrative convenience. It is the business of the Utility to sell electric service, not to sell appliances. Nevertheless, under some circumstances, sale of appliances directly by the Utility may be a necessary prerequisite to the maximum socially desirable sale of service. Where particular appliances have not yet obtained customer acceptance and the capacities of existing dealers are not adequate for satisfactory development of the market, direct merchandising by the Utility may advance customer acceptance and consumption measurably. Where direct merchandising is thus advantageous, the public interest in lower electric rates is involved. Failure of the Utility to realize the advantages of direct merchandising would be contrary to its own interests and those of the general public. In such circumstances the merchandising activity must be considered an integral part of the utility business.

When a utility engages in merchandising for a purpose other than the development of the market for its service the profits or losses realized in such a non-utility activity are properly excluded in determining experienced return. When existing independent dealers are numerous and strong enough to promote the sale of appliances aggressively, or when an appliance has a high degree of customer acceptance, the promotional operations usually should take forms other than direct merchandising.

Paragraph 3(a) also is based upon considerations of administrative convenience. For instance, showroom display of the latest models of appliances is a common, if not essential promotional practice, regardless of whether the utility is cooperating with the independent dealers or is itself merchandising. Similarly, a utility engages in appliance as well as institutional advertising regardless of its merchandising policy and practice. If a utility does not merchandise directly, it may purchase appliances on behalf of the dealers in order to give them the advantage of quantity discounts. The expenses and annual investment costs assigned

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to these and other promotional activities are joint costs. Segregation between promotion and the business as a whole requires arbitrary and uncertain allocation. Further segregation of the joint costs between non-merchandising and merchandising activity would require other arbitrary and still more uncertain allocations. Definition of direct merchandising, where reasonably advantageous, as a part of the utility business, avoids the necessity of these troublesome and unreliable accounting allocations.

The Board's representatives are aware that some commissions would exclude from operating expenses the expenses incurred "for keeping old customers from going into the use of a competitive service," as well as merchandising revenue and expenses.

The question of the reasonableness of particular items or amounts of promotional expense is pertinent in any rate proceeding but the distinction between old and new customers is without merit. A householder or business enterprise is not merely a customer or not a customer. The use of either electric or gas service by a household varies from a single purpose to a large variety of purposes. The question of retaining a householder as a customer arises infrequently unless the utility is on its way out of existence. The more usual question concerns the continued use of the service for particular purposes and there is always the objective of increasing the amount of service used for the given purposes.

Advertising, the displays, the home service activities and other promotional activities develop 'new business' and jointly retain 'old business.' The one objective could not be reached without influencing the other. No basis exists for allocating the expense, because the extent of retention of old business is not capable of objective measurement.

A larger scale of operations decreases the unit cost of supplying service and results in advantages to all customers. This relative advantage, which is expressed sooner or later in the form of lower rates if the utility continues as a going concern, is obtainable equally from the development of new business and the retention of old business.

Paragraph 3(b)

Definition of "extraordinary or infrequently charged items of operating revenue deductions" is subject to the customary rate case standards. The treatment of such items should be consistent with the purpose of basing rate level adjustments upon 'normal' expense levels. The expenditures incurred in connection with the determination of original cost as required by the revised system of accounts, or extraordinary maintenance expenditures, are illustrations. The items subject to amortization for the purpose of the Plan are not necessarily limited to non-recurring items. Neither should they include items, such as the overhaul of a turbine, which recur with sufficient frequency that the effects tend to be balanced from one year to another.

Paragraph 3(c)

Taxes other than taxes based upon income are included in operating revenue deductions in the amount of the estimated actual liabilities for the test year, at the rates and on the bases effective during the test year. The

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taxes accrued by the Utility, its tax returns and any other available facts are evidence of the actual liabilities, to be considered at the time of the annual proceeding.

The representatives of the Board are aware of the contention that capital stock taxes "inure to the benefit of the stockholders, not the consumers, and the stockholders should therefore bear the cost of such taxes."

"There are distinct advantages which attend the doing of business in corporate form, and, if persons engaged in a utility enterprise desired to profit by these advantages, they, not rate payers, should pay these expenses which are incident to the conduct of the business in corporate form."*

Not only are there 'distinct advantages' but in practice a corporation is the only form of organization available for an enterprise with the characteristics of a public utility. Since no organizational alternative is available, it is questionable to assert that the stockholder and not the consumer benefits from the corporation form and, therefore, should pay the expenses incidental to that form. Even if practical alternatives were available the usual criteria of reasonableness would be applicable. Does the choice of form decrease the net cost or improve the quality of service? Assuming this evidence of prudency and reasonableness, expenses incidental to the corporation form are as entitled as any other to recognition for rate making. Non-recognition merely tends to shift the cost item to the annual return, assuming that the fair return is determined on the basis of the return rates elsewhere available from investments of equal risk.

Paragraph 3(d)

The applicable system of accounts provides that operating revenue deductions shall include taxes based upon income as well as other taxes related to the business as a public utility.

Regulatory commissions occasionally have refused to allow as operating revenue deductions taxes based upon income, on the ground that to do so would exempt the utility corporation from payment of the tax and shift the burden to customers.

The general rule that taxes are recognized as operating expenses and passed on to customers in rate making does not mean, however, that the burden of the taxes is 'shifted' to customers. A public utility must be permitted to recover in operating revenues all unavoidable costs of supplying service, including both taxes and the 'fair return' or reasonable cost of capital; the long run alternative is disintegration of the service.

The cost of capital and taxes based on income are each costs of supplying service which cannot be avoided in the long run and which must be paid ultimately by customers, at least in the case of a growing utility such as an electric company. In general, they cannot be shifted to the investor if he is aware of the attempt, for the cost of capital is determined by the investment opportunities elsewhere available to the investor.

If the taxes are *included* among operating revenue deductions for the purpose of determining the price of service, the 'return' is net to the investor, subject to his personal income taxes. If the taxes are *excluded*

* *Re Washington Gas Light Co.*, 46 PUR(NS) 1, 39 (October 13, 1942).

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from operating revenue deductions, the 'return' is subject both to the corporate income taxes and to the investor's personal income taxes. Assuming that investors are reasonably well informed, under the latter administrative procedure the rate of return allowed on the rate base would need to be correspondingly higher.

Of course, if the practice of refusing to allow taxes based upon income as proper deductions in rate proceedings should become general, it would become necessary that the Plan be revised to conform to such a new general standard. Obviously, investor appraisals of common stock equities would be adjusted to that standard and earnings-price ratios would be correspondingly higher. To the extent that the higher earnings-price ratios would be used to establish the basic rate of return under the Plan, the customers of the Electric Department would be treated unfairly.

The opinion that taxes based upon income are properly includible as operating revenue deductions does not necessarily apply to 'war' taxes, such as excess profits taxes. New Jersey Power & Light Company, however, has not paid excess profits taxes and would not have done so if its return had been filed on a corporate instead of a consolidated basis. The belief is that it will not do so in the future under existing laws, particularly since a reduction of utility operating income necessarily will result from operation of the Plan. It is understood that if the Utility should become liable for excess profits taxes, because of revision of the tax laws or for other reasons, Paragraph 3(d) is subject to reconsideration and possible revision (Paragraph 35).

The surtaxes are included in operating revenue deductions, first, because it is by no means certain that they are temporary income taxes limited in duration to the emergency, and second, because it is assumed that the Plan will have a long life and that its terms should be those which are reasonable on the long run as well as the short run.

The most troublesome issue was whether the Federal income tax to be allowed should be determined by applying the rates effective during the test year to net taxable income or should be the estimated actual liability.

The consolidated income tax return now being filed involves some ninety-seven operating and holding companies in the Associated System. The income tax liability of the Electric Department under such a joint return and the operation of Securities and Exchange Commission Rule U-45 has been substantially less than the liability which would exist if New Jersey Power & Light were to file a separate return.

The Company contended that taxes based upon income should be estimated by applying the tax rates effective during the test year. The tax 'savings' made available by the privilege of filing a consolidated return result from deduction of capital costs and capital losses, income deficiencies of holding companies and, in some small part, income deficiencies of operating companies. The consolidated return is of no advantage to a group of operating companies each earning a return, aside from the possible effect of holding Company debt. It was contended that customers in New Jersey should not benefit from capital costs and losses or income deficiencies experienced by companies located in other states or interruption of the flow of income from operating companies located in foreign countries. In a recent decision the New York Commission allowed the

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Federal income tax which would be paid by the Staten Island Edison Corporation as a separate corporation, instead of the tax assigned to that company as a part of the Associated System. (Case 8983, May 20, 1943.)

The Board's representatives recognized that when tax 'savings' are the result of capital losses they are appropriately treated as offsets to such losses and are not includible in rate making.* The propriety of their exclusion in income determination is the same on the separate return as on the joint return basis. (See Paragraph 3(e).)

We believe the situation to be different, however, when the reduction in tax liability results from income deficiencies of companies associated in the joint return. Savings and economies available as a consequence of the relationships among affiliated companies should be reasonably distributed and should benefit customers.**

Paragraph 3(d) has been accepted, after prolonged consideration of the issue, not because it is believed to reflect a sound rate making principle, but because of the compelling force of the following considerations.

1. It would be impossible to estimate within reasonable limits, the amount of tax upon a consolidated basis at the time when the determination is required in administration of the Plan. The complex consolidated return customarily has been filed toward the end of the year instead of at March 15. Validity of the deductions claimed, particularly interest on the fixed income obligations of holding companies in receivership, has not been determined. Objective evidence of the amount of tax liability upon the consolidated basis would not be available at the time of the annual proceedings because the records of some ninety companies located beyond the Board's jurisdiction would be involved. In addition to the impossibility of an objective determination under Paragraph 3(d), administration of the provisions of Paragraphs 3(e), 22 and 27 would be made difficult because of the uncertainty as to the magnitude of the tax and the resulting tax ratios.
2. The more or less fortuitous advantages available from the consolidated return option will be of short duration. They certainly will disappear with enforcement of Section 11 of the Holding Company Act, and the inclusion of New Jersey Power & Light in a regional holding company system independent of other parts of the present Associated System.
3. Compensating advantages to customers have been obtained in the form of an increase in the amount to be transferred from earned surplus to the stabilizing reserve as at December 31, 1943.

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* Consolidated Electric and Gas Company, Holding Company Act, Release No. 4806, S.E.C., January 3, 1944.

** This standard was disregarded in determining the engineering fees to be included in the 'starting rate base,' but only because "retroactive application of new rules and standards should be generally avoided in rate regulation" and prior to 1935 there was no public policy which required that customers should benefit from the economies available "because of the holding company relationship." (See p. 54 below.)

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The possibility of deficiency assessments has been considered, but no special provision is necessary, since a deficiency assessment could not be included in the operating revenue deductions of a future year. The Plan provides that the amount of operating revenue deductions for each test year shall be determined with finality at the time of the annual proceeding, although refunds may be made or additional payments required by the taxing authorities at a later date. (Paragraph 31.)

Paragraph 3(e)

Taxes based upon income of a given year may be abnormally decreased by the availability of an extraordinary deduction from net taxable income, such as may result from the issuance of new bonds or the refinancing of existing bonds.

If the income taxes as thus determined were included for the given year without adjustment the result might be an abnormal and undesirable fluctuation in the level of rates. Therefore, Paragraph 3(e) provides that taxes based upon income shall be included for the particular year at the amounts of the liabilities which would exist if deductions were not available as a result of the refinancing transactions. The provision does not control the accounting procedure, although a similar treatment may be appropriate for accounting purposes. It merely avoids distortion of the operating expense level for the purpose of rate making.

Although the rate level should not be permitted to fluctuate unnecessarily, the Company is not entitled to receive a larger net income as a result of the tax 'saving,' beyond the amounts available under the sliding scale formula. Therefore, provision is made to distribute over a period of years the 'saving' which otherwise would be available in a single year. One logical method would be to provide for amortization over a reasonable period. This method would regard the 'saving' as an operating cost as distinguished from a capital cost.

The alternative method, which has been adopted because of its greater simplicity, is to deduct the saving from the amount of unamortized debt discount and expense applied annually in determining the historical cost rate for debt capital. This method treats the tax 'saving' as an adjustment of the cost of debt capital, on the ground that the capital transaction is the source of the saving. It gives generally the same long run result so far as the effect on electric rates is concerned. It does not appear that tax savings of the nature identified in Paragraph 3(e) could ever be in excess of the unamortized balance of debt discount and expense as defined for the purposes of the Plan, but such a circumstance simply would result in a negative balance to be used in computation of the historical cost rate for debt capital.

Paragraph 3(f)

Original cost is defined by the applicable system of accounts as the cost at the time property was first devoted to the public service. Depreciation expense includible in operating revenue deductions provides for the spreading of original cost over the useful life of the assets.

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The rate base includes items aggregating $871,643 (Paragraph 4(h)) which are excluded from estimated original cost as defined for accounting purposes. They are accepted for the purposes of the Plan as having been prudently incurred and as representing utility property of continuing value.

Although included as a part of prudent investment, the excess over original cost should not be given a place in the rate base without provision for disposition. The assets represented are subject to depreciation and provision should be made for distributing the related costs to operating revenue deductions over a reasonable period.

Twenty years is a reasonable average period. Some of the plant represented, particularly the generating plant, has a longer prospective life. Other plant represented by the acquisition adjustment costs probably has a shorter prospective useful life.

III. RATE BASE

STARTING RATE BASE

Determination of an acceptable and reasonable starting rate base (Paragraph 4(a) of the Plan) has absorbed more time and attention than any other provision of the Plan. The immediate source of the final figure was the following formula:

1.	Revised tentative original cost as at December 31, 1943 (Estimated)		$20,402,414
2.	Less: Investment in Gilbert-Metuchen transmission line right-of-way		340,233
3.	Electric utility plant at estimated original cost		$20,062,181
4.	Plus:		
	(a) Additional overhead cost allowances:		
	Engineering fees	$366,905	
	Interest during construction	31,200	
	(b) Excess of acquisition over original cost	387,547	
	(c) Present worth of 6 per cent return for 5 years on investment in transmission line right-of-way	85,991	
			871,643
5.	Total cost at 12-31-43		$20,933,824
6.	Deduction for depreciation		4,188,646
7.	Starting rate base before working capital (12-31-43)		$16,745,178
8.	Rounded to nearest $10,000		$16,750,000

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It must be understood, however, that this formula was a device for compromising differences and reaching a result acceptable to both sides as reasonable and that its reasonableness must be tested by many considerations not expressed directly in the details of the formula. The result sought was a reasonable rate base, which term is used here to mean 'present fair value.' Original cost, prudent investment and cost of reproduction are each evidence of the reasonable rate base, to be given such consideration and weight as may be appropriate in the light of existing circumstances and the reasonableness of the final result. In the present instance the starting rate base is approximately equal to estimated prudent investment and no weight is given to the evidence of cost of reproduction.*

The Gilbert estimate of cost of reproduction less existing depreciation as at January 1, 1942, was:

Cost of reproduction of plant in service	$23,784,000
Existing depreciation	4,187,000
Cost of reproduction less depreciation	$19,597,000

Independently, early in 1942, the Board's engineers estimated that cost of reproduction at January 1, 1942, was $22,734,331. The Board's engineers have not made a comparable estimate of existing depreciation, but it is highly probable that, aside from the influence of war conditions, the cost of constructing a plant capable of giving the same service is substantially larger than the investment in the existing plant.

No weight was given to this evidence of the recent level of construction costs because the result of the determination was otherwise reasonable.

The rate base cannot be considered independently of the applicable basic rate of return. The objective is a total annual return which will be reasonable and adequate to enable the Utility to finance additions and extensions at a reasonable price of capital, and the annual basic return depends upon both the rate base and the rate of return allowed. The basic rate of return provided by the Plan includes a full recognition of prudent historical cost of debt and preferred stock capital. Under the circumstances, if the rate of return were to be based upon the current overall cost of capital, assuming the most desirable current capital structure, and

* The representatives of the Board and of the Company agreed early in the proceeding that it would be possible to determine "fair value" or a reasonable rate base for the purpose of the Plan without giving substantial weight to cost of reproduction as evidence, provided the accompanying rate of return were established on a historical cost basis. Subject to this agreement with respect to the related elements of rate base and rate of return the Gilbert report (see footnote page 50) expressed the understanding with respect to rate base in the following language: "In the instant case the Company concedes that estimated historical value new should predominate in the determination of the basic factor, i.e., undepreciated value of the property, in the calculation of rate base. Furthermore, in establishing the magnitude of historical value new it is proposed to adopt, as a base, the tentative original cost findings developed by the Company's Accounting Department, to which will be made certain adjustments deemed to be reasonable in reaching a determination of value. The concession thus made is not to be considered as a denial by the Company of the propriety and reasonableness of giving due weight to other elements of value; it merely means that under the present circumstances and in order to reach a negotiated and reasonable determination of rate base the Company will not press for the consideration of other elements of value."

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applied to a rate base corresponding to the evidence of prudent investment, the result would be less than a fair and reasonable annual return.

Among the other considerations recognized but not stated by the formula are the following:

1. The valuation of the plant in service recognizes that the Company is a going concern but no separate or distinct component was included to represent going concern value.

2. Customer advances and contributions are not deducted in determining prudent investment, although their deduction, at least in part, is consistent with the investment cost approach to the rate base problem. When utility plant is constructed by the use of moneys made available by nonrefundable customer contributions, the investment required of owners and creditors is reduced accordingly.

3. The Gilbert Report presented a determination of existing depreciation made upon the basis of certain specific definitions set forth in that report. The representatives of the Board are in disagreement with certain of these definitions and are of the opinion that the overall estimate of accrued depreciation thus determined may be somewhat low.

4. In determining the amount of depreciation to be included as a negative element of the rate base, estimated depreciation on appraisal write-up of book cost was deducted from the depreciation reserve.

5. The equity capital component of the basic rate of return is determined by the evidence of current cost of equity capital.

The remaining parts of this section will outline the consideration given to specific rate base components.

Original Cost

Tentative original cost figures were available late in 1942 from the studies being made by the Company. These tentative original cost figures were utilized by Gilbert Associates, Inc., in the preparation, on behalf of the Company, of a study* to determine the appropriate rate base for the purposes of this Plan.

As shown by the following statement,** the Gilbert Report concluded that the reasonable rate base as at December 31, 1941, was $18,124,921, including working capital.

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* The report is entitled "Determination of Rate Base and Annual Depreciation for Application to Proposed Sliding Scale Rate Plan"; it was prepared under the direction of Mr. Malcolm Davis, Vice-President of Gilbert Associates, Inc., is dated March 27, 1943, and is referred to herein as the Gilbert Report.

** From page 7 of the Gilbert Report.

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New Jersey Power & Light Company
Summary of Components of Rate Base Value
of Electric Department Properties at December 31, 1941

Tentative original cost findings	$20,400,000
Additional elements of value (net)	466,205
Total undepreciated historical cost value	$20,866,205
Estimated accrued loss in value of physical property	3,440,246
Depreciated historical value exclusive of electric acquisition adjustment account	$17,415,959
Working capital requirements	500,000
Electric plant acquisition adjustments (tentative)	208,962
Rate Base at 12-31-41	$18,124,921

The terms "historical cost value" and "historical value" as used in the Report were not explicitly defined, but it is understood that they meant the reasonable actual cost to the present owners of the used and useful electric plant as at December 31, 1941. As thus defined, historical cost is the same as prudent investment—the amount of capital prudently committed to the enterprise by investors.

In December, 1943, revised tentative original cost figures became available. The difference between book cost of electric plant and this original cost estimate is comprised of the following items:

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Amount recorded in electric plant accounts at 12-31-38			$22,228,447
Estimated components of difference (net after retirements) between book cost and revised tentative original cost:			
Plant Adjustments—Acct. 107:			
Overhead charges eliminated:			
Engineering fees	$612,847		
Purchasing fees	30,342		
Interest during const.	153,943		
	$797,132		
Appraisal appreciation—booked ..	1,584,573		
Maint. & oper. exp. capitalized ..	31,664		
Expense of capital—retired and outstanding issues	202,752		
Excess of book cost over purchase price	96,845		
Purchase of private lines and const. advances	(113,508)		
Retirement adjustments	14,541		
		$2,614,000	
Acquisition Adjustments—Acct. 100.5		687,547	
Transfers:			
Plant Held for Future Use—Acct. 100.4	$340,233		
Gas Plant—Acct. 100.6	2,647		
Other Physical Property—Acct. 110	48,095		
		390,975	
			3,692,522
Fixed capital at revised tentative original cost at 12-31-38—Acct. 100.1			$18,535,925
Net additions and retirements from 1-1-39 to 12-31-43 (Incl. estimated adjustments)			1,526,256
Electric plant at revised tentative original cost at December 31, 1943			$20,062,181

Property Not Used or Useful

The tentative original cost estimate in the Gilbert Report included $351,402 (later revised to $340,233) which represents a transmission line right-of-way not at present used. The right-of-way was acquired in 1930 and 1931 in connection with the contemplated construction of facilities to provide an interconnection between the Gilbert Generating Station and Staten Island. The plan was not made effective because of the depression and the consequent decrease of load growth. Some parcels never were acquired, particularly at the Eastern end. The right-of-way is said to be now 92 per cent complete. The project was reconsidered subsequently but never revived by specific or definite construction plans.

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The representatives of the Utility contended that the investment cost of this right-of-way should be included in the rate base on the grounds that (a) the investment was made in good faith for the realization of economies available from this source of power, (b) that the project was not abandoned but deferred and that present and prospective loads make the interconnection an immediate post war necessity. The property was said to be useful in the sense that there is every reason to expect that it will be used within the near future.

It was concluded that the transmission line right-of-way would be excluded from the starting rate base, but that consideration would be given to the Company's position by including in the starting rate base an amount equal to the present worth of a six per cent return for five years on the investment in the right-of-way. It is understood that after January 1, 1949, but not before, the particular transmission line right-of-way investment may be included in the rate base if and when the Board finds that there exists a definite plan for its utilization. In effect, the inclusion of $85,991 means that transmission line right-of-way is included for the first five years and thereafter the burden of establishing the reasonableness of its continued inclusion will be upon the Utility.*

Acquisition Adjustment Cost

The revised tentative original cost study shows $687,547 chargeable to Account 100.5 as at December 31, 1938, in the reclassification of book costs. The majority of transactions resulting in this acquisition adjustment amount were acquisitions by New Jersey Power & Light Company of operating plant or mergers of operating utilities already acquired by the holding company interests or by affiliated companies. Since the transactions were not at arm's-length in the majority of instances the circumstances have been given careful scrutiny. Adequate evidence is available that the transactions were prudent and that the acquisition prices were reasonable.

The excess of acquisition over original cost represented in larger part the higher level of construction cost at the time of acquisition as compared with the level at the time of construction of the plant. In some undefined part the acquisition adjustment cost apparently represented capitalized savings of operating expenses and annual capital costs available as a result of the acquisitions and the resulting integration of organization and operation. Acquisition prices in excess of original cost frequently were necessary during periods of relatively higher construction cost; otherwise, small independent establishments would not have been acquired and technological and business economies, or other advantages of integration, would not have been available to the consumers unless at a later date.

A portion of the estimated amount of $687,547, however, is not acceptable as representing prudent acquisition cost of property with a continuing value at the present time.

* It is understood that the Plan refers to utility plant in service and utility plant held for future use under a definite plan for such use. Thus, the test of usefulness is whether or not a definite and rational plan exists for the use of plant not being used and this test is to be applied to all items of property. The rate base standard conforms, in this respect, to the existing accounting rules. Construction work in progress is includible in "electric plant accounts" as the term is used in Paragraphs 4(b) and 4(c), if interest during construction is not charged during the test year on the amounts debited to construction work in progress account.

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Since the acquisitions began in 1915 and in substantial part were during the earlier years, it is obvious that a considerable portion of the acquired plant has been physically retired from service and that the related part of the $687,547 does not represent property now used or useful.

The Company states that, in general, its accounting practice was to retire acquired property at estimated original cost of construction plus a percentage addition to reflect the appraisal appreciation of 1926. For this reason, the original cost report now available treats all retirements of property from 1915 to December 31, 1938, as having been made at original cost. Thus, the excess of acquisition cost over original cost at the time of each acquisition is left undisturbed and is the aggregate of $687,547.

Studies have not yet been completed which make it possible to estimate closely the part of the aggregate which should be assigned to retired property. It is estimated that the amount is somewhere between the limits of $200,000 and $300,000. It is assumed for the purpose of rate base determination that the correct amount is at the upper limit of $300,000. Therefore, regardless of what may be the final determination or disposition for accounting purposes, the excess of acquisition over original cost included in determining the starting rate base is $387,547.

Engineering Fees

For the purpose of meeting the original cost requirements of the System of Accounts the New Jersey Power & Light Company agreed to reduce engineering fees, as stated on its books, from $1,003,144 to $354,915. This reduction was based upon the over-all average (35 per cent) of the annual operating ratios, including a return on working capital, of the affiliated engineering organization and its predecessors, which provided consulting, designing and supervisory engineering services at a profit to themselves. (See report presented by the New Jersey Power & Light Company to the Board entitled "Study of Overheads in Respect to Original Cost Studies—December 1, 1941" and related Staff reports.) On this basis it was understood that, incident to adjustments of book costs in connection with the original cost proceeding, engineering fees charged against specific major construction projects would be reduced so that the total amount of such fees would be thirty-five per cent of the fees which had been charged to all the fixed capital accounts. It was understood that all fees charged to other than major projects would be eliminated in their entirety.

Although it conceded that the engineering fees actually charged to the fixed capital accounts included intercompany profits, and agreed to their adjustment on the basis of the average operating ratio of thirty-five per cent, the Company contended that for rate base purposes the appropriate test of reasonableness is not cost to the affiliated enterprises, but the fees which might reasonably have been paid if similar services had been supplied by a non-affiliated engineering organization.

The amounts which are includible on the basis of these competitive prices for the services are estimated by the Gilbert Report to total $775,420, of which $721,820 was estimated to be applicable to property in service at December 31, 1941.

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With reference to the question of what is the appropriate test of reasonableness of engineering fees in view of the circumstances of this rate proceeding, it is believed that the Company's contention is sound.

The test of 'prudency' should not result in application of a rule of hindsight rather than foresight. The adjective 'prudent,' as used in connection with the prudent investment doctrine indicates merely that the rate base must not include fraudulent, extravagant or unreasonable expenditures.* It is true that the meaning of the term 'reasonable' is the very question which is presented here. The Holding Company Act of 1935 requires that engineering services be supplied at cost by affiliated organizations. The book costs which are at issue in this rate proceeding, however, were recorded prior to 1935, at a time when no rule of law or standard of public regulation required that engineering services be supplied at cost to affiliated operating companies. On the contrary, in the absence of regulation of servicing organizations, the fees established by competitive, non-affiliated organizations were the significant standard of reasonableness.

Recognition of this standard as the determinant of reasonable charges by the holding company or its engineering subsidiary is inconsistent with the claim of advantages and economies available from centralized management and performance of services. Nevertheless, retroactive application of new rules and standards should be generally avoided in rate regulation and prior to 1935 there was no public policy which required that economies available from centralized performance of services should accrue to the serviced companies.

In applying the competitive measure, the amount of engineering fees reasonably to be included in cost of utility plant necessarily becomes a question for informed judgment.

The average operating ration of thirty-five per cent assumed that the percentage relationship of costs to revenues received by the servicing company was uniform among all serviced companies, affiliated and unaffiliated, and between engineering and non-engineering services supplied by the servicing company. The actual cost of the engineering services supplied to the Electric Department of New Jersey Power & Light Company cannot now be ascertained and it is recognized that the assumption of a uniform rate of profit on the several different classes of services may be an unreliable guide.

Close attention was given to the records upon which was based the estimate that fees in the amount of $721,820 might reasonably have been paid for engineering services if they had been supplied by independent engineering organizations. It was concluded that the estimate is reasonable and acceptable for the purpose of this proceeding.

Other Construction Overheads

In connection with the original cost proceeding New Jersey Power & Light Company agreed, at the suggestion of the Board's staff, to eliminate from its utility plant accounts practically all amounts charged from 1921

* Mr. Justice Brandeis, concurring in *Southwestern Bell Telephone Company* vs. *Public Service Commissioners*, 262 U.S. 276, 289 (1923); Report of Commissioners Walsh, Bonbright and Adie, Revision of Public Service Commission Law, New York, Volume I, p. 380.

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to 1927 to represent interest during construction of the Gilbert Station. In the present proceeding the Gilbert Report urged that $38,300 of this amount should be included as a component of the rate base. The charges actually made to the fixed capital accounts were based upon interest accrued at ten per cent per annum on demand notes issued for funds advanced by affiliates and retired by New Jersey Power & Light Company upon purchase of New Jersey Power Corporation (the construction company). Conceding that the interest rate of ten per cent was excessive, the Report recomputed interest during construction at seven per cent and urged that "insofar as value is concerned, there exists no sound reason to differentiate between interest accrued and paid to an affiliated corporation and interest accrued and credited to income, as is the case where a corporation finances construction from its own cash resources."

This argument reflected a misunderstanding of the reason for the complete elimination of the item in the accounting proceeding. The Board's staff understands that some time in 1921, after preliminary construction expenditures had been made at the Gilbert Plant site it was decided by the management of the then affiliated New Jersey and Pennsylvania companies to develop a power plant site in Pennsylvania, later known as the Middletown Station, before proceeding further at the New Jersey site. This decision was said to be taken with a view to obtaining maximum overall economy for the integrated operations. The Gilbert Station project was not revived until 1927 and the Board's staff is of the opinion that interest during construction should not be charged during the period the project was dormant.

Mr. Davis urged that the investment was prudently made, that the changes in construction plans reflected the continuing effort to develop the most economic sources of supply, and that for these reasons the Utility is entitled to a return on the investment. Nevertheless, it was agreed that no specific recognition should be given to the item in establishing the starting rate base.

The Gilbert Report also contended that the rate base should include the following items which are not and have not been represented in book cost of utility plant:

1. Interest during construction on 'minor projects' during the years 1916, 1919-1922 and 1935-1941.
2. Interest during construction on all 'blanket projects' between 1923-1935 inclusive.
3. Administrative and general expenses assignable to construction cost during the entire history of the Company.

The total amount of these items is estimated to be only $61,000. The Report asserted that: "It is obvious that time was involved in all construction projects, and, as a result, that interest during construction should be included as an element of value, even though it may not have been booked and has been omitted in the original cost determinations." The same argument is applied to administrative and general expenses.

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The accounting policy of not charging interest during construction undoubtedly may have been a non-recognition of a component of construction cost and the argument that the cost items should be recognized in determining historical cost may be valid. The second question presented is the reasonable amount of such interest during construction. It was agreed that the amount of $31,200 representing estimated additional interest during construction on 'minor projects' (but not on 'blanket projects') should be included for rate making purposes.

It was agreed, further, that amounts of administrative and general expense not charged to the plant accounts should not be recognized in determining a reasonable starting rate base for the purposes of the Plan.

The effect of not charging administrative and general expenses to plant accounts was merely a different distribution of a component of cost among accounting periods. If the Company had chosen to capitalize the cost item instead of charging it to operating expenses of the year in which the disbursements were made, the accounting disposition would have been distribution to operating expenses over a period of years. Thus, in either case, the administrative and general costs assignable to utility construction is entitled to be considered for rate making purposes in the year in which it appears as operating expenses. Since the Company chose the alternative of charging the items to expense in the year in which they were incurred, the items are not entitled to be put in a position of being reconsidered for rate making purposes at a later date.

Depreciation

The Gilbert Report developed in considerable detail two distinct approaches to the subject of depreciation in the electric utility plant. The Report presented an estimate of existing depreciation or, as designated in the Report, "present actual loss in value existing in the property" at December 31, 1941. This determination recognized physical deterioration as at that date, as estimated upon the basis of extensive field observation and examination of the property, and obsolescence, inadequacy and other non-physical causes of loss in value that was estimated to have developed up to the time of the study. The Report also developed an estimate of the so-called 'depreciation reserve requirement' at December 31, 1941, based upon straight line accruals to an accounting reserve to provide for the retirement of electric plant stated at original cost.

The book reserve for depreciation of electric plant was the third consideration influencing the treatment of depreciation in rate base determination which was suggested by the Board's representatives.

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The estimates and book amounts from which the depreciation element of the rate base was developed, stated as at December 31, 1941, are summarized in the following tabulation:

Basis	Estimated Existing Depreciation (Gilbert Rep't p. 48)	Estimated Depreciation Reserve Requirement (Gilbert Rep't p. 45)	Book Reserve for Depreciation
Tentative Original Cost			
Utility plant	$20,011,798	$20,011,798	.....
Depreciation	3,345,362	4,747,066	5,941,694
Per cent	16.6%	23.6%	.....
Historical Cost			
Utility plant	20,478,003	20,478,003	.....
Depreciation	3,429,746	4,866,766	5,941,694
Per cent	16.7%	23.8%	.....
Historical Cost (Adjusted)			
Utility plant	20,409,903	.....	.....
Depreciation	3,417,419	.....	5,941,694
Per cent	16.7%	.....	.....

Existing Depreciation

Existing depreciation, or "present actual loss in value existing in the property," was defined by the Gilbert Report as representing the loss in value arising from all causes, both physical and non-physical. Although the definition in some part appeared ambiguous, it was intended that the determination of depreciation on this basis comprehend (a) all depreciation arising from physical causes, to the extent determinable from a detailed examination of a large portion of the Company's property, and (b) the estimated loss in value arising from obsolescence, inadequacy and other non-physical causes, to the extent that such causes "had become effective" at the date of the determination. The report stated, with respect to this particular determination that: "The *actual* depreciation or *loss in value* existing in a property at a specific time measures the overall effect of physical deterioration and loss of economic value resulting from the cumulative effects, to the date of determination, of obsolescence and the several other related economic causes of the decline in value."

While the meaning of "other related economic causes of decline in value" was not entirely clear, Mr. Davis indicated that this was intended to cover the estimated effects of inadequacy, changes in markets and other functional causes which might result in loss in value beyond that sustained by reason of physical deterioration. However, the effect of these causes of loss in value is estimated on the basis of the extent to which such factors "had affected the property as at the date of determination." It was not intended that this method of estimating depreciation give recognition to the economic concept of decline in present worth, expressed in monetary terms, of expected future services from the property.

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The estimate of existing depreciation was considered by the Board's engineers and is believed by them to be generally within reasonable limits. For the purpose of this rate proceeding it is believed acceptable as a measure of the amount of depreciation existing at December 31, 1941, subject to reservations with respect to acceptability of the definitions and the reasonableness of depreciation so determined as the measure of the negative component of the rate base.

Reserve Requirement

The Gilbert Report also included a thorough study of probable average life expectancies of the various classes of utility plant and developed an estimate of the reserve requirement at December 31, 1941, based upon the straight line method.

The estimate of reserve requirement, related to tentative original cost, was approximately $4,747,000, or 25.6 per cent of depreciable electric plant. This determination is comparable with the estimate of about $3,345,000 for existing depreciation, which amount is equivalent to 18.1 per cent of depreciable property.

The depreciation reserve requirement was defined in the report as being the amount "necessary to provide an actuarially sound reserve for both currently realized and potential future loss of value consumed in service."

It was calculated on a straight line basis and the difference between accrued depreciation and reserve requirement was explained as representing the accumulated amount necessary to provide for the recoupment of "losses occasioned by non-predictable and non-cumulative causes." It has been explained during the discussion that the term "non-predictable" was intended to convey the idea that such losses are non-predictable "as to the date of their occurrence although they may be expected to occur within a reasonably predictable life span." It is said that in order to provide for such losses it is necessary to provide an accounting treatment which will spread the costs over the predictable life span.

The theory of the Gilbert Report was that at any particular time the reserve thus established (to provide for future retirements) is somewhat greater than the actual loss in value then existing in the property. Since, for this reason, the accrued provision for depreciation is continually in excess of the existing loss of value and since the latter is the acceptable measure of the negative component of the rate base, the full amount of neither the depreciation reserve nor the reserve requirement should be deducted from historical cost in determining the starting rate base.

In developing the Plan it has been unnecessary to consider the acceptability of the Gilbert estimate of reasonable annual depreciation expense. It is not proposed that the annual provision for depreciation be subject to control by the Plan.*

It is unnecessary, also, to consider the reasonableness of the estimated reserve requirement, unless the reserve requirement as at January 1, 1942, is the appropriate measure of depreciation as a negative element of the rate base.

* The Gilbert study may be viewed as a serious effort on the part of the New Jersey Power & Light Company to comply with the Board's order of November, 1937. The study will be useful in connection with future depreciation proceedings.

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Relationship between Existing Depreciation Reserve and Reserve Requirement

The conclusion of the Gilbert Report is that the reserve requirement for depreciable electric plant in service was forty-two per cent in excess of existing depreciation as at January 1, 1942. It is necessary to consider the reasons assigned for this relationship, since they involve a question of the adequacy and correctness of the estimate of existing depreciation.

Certain of the reasons for the estimated divergence between existing depreciation and the reserve requirement, determined upon a straight line basis, were stated by the Report as follows:

> "For any particular group of property items it is apparent that the impact of certain of the major factors that may cause the ultimate retirement of a considerable proportion of the individual units is felt only at the moment of retirement of the specific components and, until such moments arrive, there exists no loss in value from these several causes. Thus, a distribution pole that is to be destroyed by accident, such as lightning stroke, collision, or otherwise, up to the moment of the accident is depreciated only to the extent of the physical deterioration that actually has developed in it, plus whatever loss in value may have occurred because of possible inadequacy, obsolescence, etc. Similar analogies can be drawn in respect to all types of property elements.
>
> "From the foregoing it is apparent that the actual loss in value existing in the physical property of a utility system at any particular time does not, and cannot reflect the future effect of discrete events which when they occur, cause the immediate 'complete depreciation' and retirement of individual components, or groups of property elements. Furthermore, these events are non-cumulative in respect to time in their development. On the other hand, experience has demonstrated that such events do occur and that provisions must be made to meet them when they happen.
>
> "In order to accomplish the latter end it is necessary * * * to accrue, at a uniform rate, a fund which will be sufficient to cover the reasonable expectancy of losses arising from all causes. * * * The reserve fund accumulated * * *, generally known as 'depreciation reserve,' includes amounts which (1) reflect the cumulative development of actual depreciation, or loss in value of the property; and (2) the cumulative accruing of funds to provide a reserve, or insurance fund to offset the expectancy of retirements resulting from causes that do not detract from actual physical value until the moment of their occurrence." (Gilbert Report, p. 37.)

This reasoning correctly rejects the idea that a "properly computed" depreciation reserve is at any time the "best measure" of existing depreciation. The Board's representatives recognize, as does the Gilbert Report, that the purpose of accounting for depreciation is to assign plant costs to periodic expense over the useful life of the property, by one or another of the administratively acceptable methods, and that only by accident or the

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result of periodic reappraisals is the depreciation reserve the same as the existing depreciation at any given time.

The Board's representatives are of the opinion that the conclusion is otherwise, in some respects, based upon unsound premises and that the difference between existing depreciation and the reserve requirement found in this case by Gilbert Associates is excessive. It was not possible to reconcile these differences in theory, but as will appear in connection with the discussion of the depreciation reserve, the lack of agreement with respect to the concepts was not a barrier to finding a reasonable starting rate base.

The Gilbert estimate of accrued depreciation is based upon the theory that "the impact of the major" causes of depreciation "is felt only at the moment of retirement of the specific components, and until such moments arrive there exists no loss in value from these several causes." In illustration, it is pointed out that a distribution pole which is to be destroyed by collision or lightning is not depreciated from this cause until the occurrence.

On the contrary, we believe it is error to conclude that depreciation does not occur prior to the moment of retirement of items of plant where the incidence of the causes of retirement is predictable.

The excess of reserve requirement over existing depreciation is described by the Gilbert Report as offsetting the "expectancy of retirements resulting from causes that do not detract from actual physical value until the moment of their occurrence." Aside from the possible unintentional implications of the term "physical value," the Board's representatives believe that the definition of existing depreciation should not disregard the fact that value is the present worth of prospective future productive capacity of assets.

Assume a discovery to have been made recently, which it is known will result in improvement in design of electrical equipment which probably will not be commercially available for five years, but which at that time will make existing units uneconomical. The units in the existing inventory which perform the same function have been in service for fifteen years; the depreciation from physical causes is minor and the existing depreciation from functional causes, if measured by reference to the operating and investment costs of the most modern units now commercially available, is only about eighteen per cent. The theory of the Gilbert Report is that the existing depreciation from functional causes is limited to the eighteen per cent, in spite of the fact that the prospective service life is five years instead of a much longer term.

The illustration suggests the following conclusions:

1. Depreciation from functional causes materializes irregularly and relatively abruptly, not uniformly over the service lives of the units.
2. The existing depreciation is not the same as it would be if improvements in the arts had not been made or were not expected to be made, so that the existing units could be assigned longer prospective service lives.

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3. Measurement of existing depreciation by comparison with new units of the most economical design available in the market is measurement in one dimension only; the method neglects the time element. For the same reason that annual income prospectively available thirty years in the future has a lesser present value than the same annual income expected within five years, the negative present value resulting from prospective retirement at the more remote date is less than that resulting from prospective retirement within the near future.

Of course, the existence of depreciation because of future "discrete events" depends upon their predictability. The foregoing illustration of the distribution pole does not indicate that the time of incidence of the cause of retirement is non-predictable. Although the time of retirement of an individual distribution pole from casualty is "non-predictable," the average number of annual casualties among an aggregate of poles is predictable within relatively close limits.

It is not clear to what extent the excess of reserve requirement over existing depreciation is regarded as provision for the effect of "non-predictable" causes of depreciation. Admittedly, there is the possibility and probability of loss of service value from casualty, obsolescence or requirement of public authority not now foreseeable. However, to the extent that the causes in question are in fact non-predictable, they should not be provided for by an additional element in annual depreciation expense.

There is the possibility of *supersession* of electric facilities as the result of inventions not yet conceived. When there is no basis of prediction, casualties and other causes of retirement must be considered generally as elements of the uncertainty which is incident to carrying on the business. Compensation for such uncertainty or lack of knowledge is (or should be) recognized in rate regulation by allowing a component in the fair rate of return over and above pure interest and compensation for investment management. If there were no such uncertainties the fair rate of return might be only two or three per cent.

The fault of the Gilbert theory is expressed by the dilemma that (a) in the degree that the time of prospective retirement of plant units is unpredictable within reasonable limits, the cost is an element of business uncertainty and not an element of depreciation expense, and (b) in the degree that the time of retirement is predictable with sufficient definiteness as to furnish a basis for accounting action the impact of the causes is felt in advance of the "moments of retirements."

Depreciation Reserve

The Gilbert Report contains no reference to the gross electric and automobile reserve of $5,941,694 as at January 1, 1942. It was contended by the Company that existing depreciation is the only acceptable measure of depreciation for the purpose of rate base determination.

The argument that the depreciation reserve is not deductible in determining the rate base was based upon the doctrine of the Supreme Court

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that it is the property of the utility which is devoted to the public service and that "The revenues paid by the Customers belong to the Company * * *".* The argument and conclusion neglected the later decision in *Lindheimer* vs. *Illinois Bell Telephont Company,"* ** which is concerned with the injustice to the consumers of including liberal depreciation expense allowance without recognizing the resulting large depreciation reserve as a negative component of the rate base:

> "According to the practice of the Company, the depreciation reserve is not held as a separate fund but is invested in plant and equipment. As the allowances for depreciation, credited to the depreciation reserve account, are charged to operating expenses, the depreciation reserve invested in the property thus represents, at a given time, the amount of the investment which has been made out of the proceeds of telephone rates for the ostensible purpose of replacing capital consumed. If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."

The representatives of the Board contended that a failure to give consideration in this proceeding to the accumulated reserve would result in inequitable treatment of customers.

The existing reserve of this Utility was established and accumulated after the institution of State regulation; the charges to expense were recognized in rate making proceedings and the Utility unquestionably earned in each year at least a fair return after the allowance for depreciation. The present book reserve largely represents recovery of invested capital out of revenue; it has operated to retain in the business funds in amounts equivalent to the credits in excess of net retirements. These funds were available and in practice have been used to finance additions to the plant and equipment of the Utility, and thus to reduce or postpone the necessity of raising new capital through flotation of additional securities.

To the extent that the reserve was accumulated by means of charges against customers, it represents recovery of invested capital. To the extent that this recovery is in excess of existing depreciation, the Utility incurs an obligation to the customers because of the productive capacity of the additional investment funds.

The important issue of whether or not there should be consistency between depreciation expense and depreciation in the rate base thus was directly presented. The measure of consistency, however, is a rational

* *Board of Public Commissioners* vs. *New York Telephone Company*, 271 U. S. 23.
** 292 U. S. 151, 168-9 (1934).

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relationship and not necessarily the deduction of the existing depreciation reserve from the rate base undepreciated.

It would be unfair to investors to hold that the annual obligation, on account of invested capital recovered in excess of existing depreciation, is measurable at the over-all rate of return. The assets reflected by the balance in the depreciation reserve are required by regulatory policy and practice to be withheld from the investors and retained in the business; they are generally in the form of utility plant.

The utility is entitled to compensation for management of the investment and for performance of the risk-taking function. Unless the enterprise is reasonably compensated, management might be expected, in the absence of regulatory restraint, to reduce the risk and responsibility by investment in government bonds or other relatively risk-free securities.

Deduction of the balance in the depreciation reserve is, in effect, the same as charging the income of the utility with interest at the over-all rate of return. Deduction of only a portion of the balance in the reserve is equivalent to charging the utility with a rate of return on the reserve balance lower than the over-all rate of return allowance. Selection of procedure is a matter of administrative practicability only.

It is concluded that the appropriate reward for risk and responsibility taken under the circumstances of the operations of this Utility is one-half of the allowable rate of return.

The consideration as to the existence of a customer interest in the reserve was found to be generally persuasive by the representatives of the Company, and it was agreed that the deduction for depreciation in determining the starting rate base should be the sum of (a) the estimate of existing depreciation, and (b) one-half of the excess of the depreciation reserve for electric plant over estimated existing depreciation, after deduction of the following items, all as at December 31, 1943:

	Amount
1. Transfers from surplus to depreciation reserve	$540,000
2. Estimated remaining balance of offset to recorded appraisal appreciation	115,539
3. Estimated unrecorded retirements and retirement adjustments	214,543
4. Estimated depreciation accrued on recorded appraisal appreciation at the annual depreciation rates charged since the appraisal appreciation was recorded on the books	682,065
Total	$1,552,147

The first two items reflect credits to the depreciation reserve for which the offsetting charges were to accounts other than depreciation expense. The third item represents the net of credits for over-retirements and charges on account of plant physically retired but not retired on the books. It includes the estimated charge, previously mentioned, of $300,000 to reflect non-retirement of acquisition adjustment costs related to property physically retired between dates of acquisition and December 31, 1943.

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The fourth item accepts for the present purpose the Company's contention that it is related to the recorded write-up and not to the component of rate base represented by the original cost of utility plant. It is understood that the treatment of this item for the purpose of determining a reasonable starting rate base does not control disposition in the original cost proceeding.

The gross electric and automobile reserves were $6,584,077 at December 31, 1943. Subtraction of the adjustment total of $1,552,147 leaves a balance of $5,031,930. The estimate of existing depreciation is $3,345,362 and one-half of the difference between this amount and the foregoing balance is $843,284. The deduction for depreciation is the sum of the two latter amounts, or $4,188,646.

The propriety of this treatment of the excess of depreciation reserve over estimated existing depreciation is to be tested by reference to the reasonableness of the starting rate base in view of all the facts and circumstances.

In general, it should be understood that the treatment given a particular item neither creates a precedent to guide treatment of similar items in other proceedings nor reflects necessarily the opinions of the Board's representatives as to the soundest possible application of regulatory principles.

CONTINUING RATE BASE

(Paragraph 4 (b) to (j) inclusive)

The rate base for each successive year is the starting rate base, including a working capital allowance, plus net additions to utility plant, minus (or plus) the net increase (or decrease) in the depreciation reserve and minus the accumulated amortization of amounts included in the rate base but not subject to depreciation under the System of Accounts. Thus, the continuing rate base will be determined by the results of accounting processes. It is understood that the Board's authority to review the propriety of the inclusion of capital expenditures in the rate base in unaffected by adoption of the Plan.

The Gilbert Report (p. 8) proposes that "to the rate base of $18,124,921 as at December 31, 1941, shall be * * * (3) added or deducted seventy per cent of the difference between the depreciation reserve, as recorded on the Company's books at December 31, 1941, and the amount in the said reserve at the end of the particular test year * * *."

This proposal was based upon (a) the view that depreciation from certain causes does not exist until the time of retirement, and (b) the conclusions that the existing depreciation is approximately seventy per cent of a reasonable reserve requirement and that the annual depreciation charge during the next five years should be computed at 2.28 per cent of historical cost of plant exclusive of land. (Gilbert Report, p. 9.)

The earlier draft of the Plan was revised to eliminate any provision for determination of annual depreciation expense. Depreciation rates are subject to continuous regulatory control by the board.

Further, the representatives of the Board were of the opinion that the starting rate base should be adjusted by addition or subtraction of the

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entire amount of the decrease or increase in the depreciation reserve. This view prevailed although the representatives of the Company did not necessarily accept our reasons.

The general considerations are the same as those discussed above in connection with the starting rate base, except that the existing depreciation reserve is larger than the reserve requirement and there is no reason why the future annual provisions for depreciation should be either unreasonably high or unreasonably low.

A depreciation reserve resulting from careful application of the straight line or any other method, will be at any time only an approximate representation of existing depreciation. However, it should be as close an approximation as is reasonably possible. This conclusion rejects the principal reason advanced by Mr. Davis for divergence. We believe that in the case of this Utility, the depreciation reserve, reasonably determined on a straight line basis will have a sufficiently close relationship with existing depreciation that for rate making purposes it may be treated as if it were a measure of existing depreciation.

Working Capital (Paragraph 4(d) and (e))

The Gilbert Report suggested that it may be "desirable to provide for yearly changes in the Company's materials and supplies inventory and in working cash requirements." It was agreed that the working capital component of the rate base should be flexible so as to recognize changing conditions.

The proposal was that to the rate base, as at December 31, 1941, there be "added or deducted the difference between working capital requirements in the amount of $500,000 at December 31, 1941, and the sum of the Company's materials and supplies inventory at the end of the test year and the computed cash requirements for the said test year."

The Board's representatives suggested that application of the formula would be simpler if the working capital allowance were omitted from the "starting rate base" and a full working capital allowance added in determining the rate base for each test year. It also was suggested that the method of computing the cash requirements should be stated in the Plan. It was concluded that the allowance should be the sum of (a) the average of book cost of materials and supplies, including fuel, on hand at the end of each monthly accounting period during the test year, and (b) one-ninth of operating expenses for the test year, excluding taxes, depreciation expense, debits for interchange energy received and power purchased, and credits for interchange energy delivered and power sold. Detailed calculations of the flow of revenue and expenses together with a determination of the requirements for petty cash, minimum bank balances and prepayments indicated a working cash requirement equal to approximately one-ninth of operating expenses, exclusive of the items above noted. One-ninth of annual operating expenses is equivalent to about the expenses of an average forty-one day period. The inclusion of approximately forty-one days' fuel expense in working capital is somewhat more liberal than is warranted by the facts.

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Paragraph 4 (e) provides that cash continuously on hand as the result of income tax and other tax accruals is an offset to what would otherwise be cash working capital requirements. Availability of cash from this source decreases the amount of capital which it is necessary for the investors to provide.

It will be noted that the materials and supplies component is the average of the twelve month-end balances of book cost of the materials and supplies inventories. It is believed that the average is more appropriate than the year-end balance only, because it avoids the effect of seasonal fluctuations and any possible incentive to build up year-end inventories.

IV. BASIC RATE OF RETURN

Definition of Rate of Return

On grounds of practical economic policy, the 'fair rate of return' is the percentage which when applied to the established rate base equals an annual return sufficient, but no more than sufficient, to attract at *a reasonable price* the capital required to supply the public demand for utility service.*

The leading decision of the United States Supreme Court recognizes this economic basis of the fair rate of return:

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally. "Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past

* For general discussions of rate return determinations, see *The Problem of the Rate of Return in Public Utility Regulation*, Federal Communications Commission, Telephone Rate and Research Department, June 1938; and *Relation of Capital to Utility Rate of Return* by Malcolm G. Davis, Public Utilities Fortnightly, March 18, 1943.

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losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it."*

This statement of the Court recognizes (a) the existence of the many alternative opportunities available to investors, and (b) the fact that varying degrees of risk inherent in the available opportunities influence the investors' comparisons.** The commissions have tended to adhere in rate proceedings to some conventional rate of return, such as six or seven per cent, departing from such a standard only when it obviously is inapplicable. The techniques for determination of a fair rate of return have not always been refined, and detailed evidence concerning the facts of the particular case often has not been available.

Therefore, in order to develop a formula for annually determining a basic rate of return, which can be expected to remain fair and reasonable in the continuing operation of the Plan, it has been necessary to make studies of a more technical and detailed nature than is customary in formal rate cases.

It is believed that the rate of return provisions of the Plan are consistent with the standards expressed by the Supreme Court in the opinion quoted above. The annual return allowance will be "sufficient to assure confidence in the financial soundness of the utility" and enable it to obtain at favorable cost rates the investment funds needed to finance extensions and improvements. The allowance is equal to investors' expectations of returns from investments in other "business undertakings which are attended by corresponding risks and uncertainties." The allowance thus excludes any item of excessive return.

Under the terms of the Plan the annual fair return is the basic return plus such additional amounts, if any, as are not required to be credited to the stabilizing reserve and are otherwise available for general corporate purposes. If earnings in excess of the basic return and available for general corporate purposes were to continue indefinitely, they would be in excess of a fair return. Since such earnings are annually the basis of rate reductions, according to the terms of the sliding scale formula, they are within the limits of a fair return.

Measures of Capital Cost

Since the credit position and financial strength of the Utility depends upon the return rather than either the rate base or rate of return allowance, the fair rate of return cannot be considered independently of the base to which it is to be applied.

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* *Bluefield Co.* vs. *Public Service Commission*, 262 U. S. 679, 692-695 (1923).

** In his famous concurring opinion in the *Southwestern Bell Case*, (262 U. S. 276, 291) Mr. Justice Brandeis defined 'fair return' as follows:

> "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital."

Although it sometimes is said to require a different method, this standard is substantially the same as that laid down in the Bluefield opinion, if it is recognized that the definition refers to the prudent investment basis, and it is assumed that the capitalization is similarly limited. What is a reasonable rate of return depends very largely upon the kind of rate base to which the rate is applied.

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In fixing the rate base for the purposes of the Plan dominant weight has been given to the evidence of prudent investment. The measures of the basic rate of return, as adopted for the Plan, are consistent with the historical cost determination of rate base.

With respect to the return on capital represented by fixed income securities (bonds and preferred stock), the interest rates to be paid by the Company, as well as the total annual requirements, have been fixed by contract between the utility and the investors at the time of the investment.* Such contractural requirements represent all that the investors in such securities expect to receive. The burden on the consumers should be equal to these requirements, but need not be larger.

The historical cost of fixed income capital may be calculated directly from the corporation's accounting records, and is expressed as a ratio between the annual obligations and the proceeds realized by the Company from the security issues in question.

A different situation exists with respect to common stock capital. When the stock was sold, no contractual or fixed rate of return to investors was established. The very essence of the position of common stockholders is that they are entitled to the earnings remaining after all prior requirements have been met, and only to such earnings.

Since there is no historical expectation of a fixed return on common stock, the basis for allowance of equity return may properly be made so as to satisfy the criterion that the return shall be sufficient to attract capital to the business, as needed. Application of this criterion is subject to the further condition that the terms upon which such new capital is obtained shall be such as to leave unimpaired the asset and earnings equities of the capital already invested. These conditions can be satisfied only if the returns currently demanded by investors in comparable investment opportunities are allowed.

The relationship between earnings available per share and the representative market price of the stock is the best available measure of investor requirements. The market price may be expressed as the amount that investors are willing to commit to the enterprise in order to obtain a dollar of available earnings in view of the risk and uncertainty involved in the particular investment.

A sound basis of rate control permits any public utility to earn a reasonable margin over and above the amounts required for fixed charges and regular dividends. A utility generally does not make common dividend payments equal to one hundred per cent of its net income; its credit position is improved if some part is left "to be passed to the surplus account." *United Railways* vs. *West,* 280 U. S. 234, 251 (1930). This is the reason for the accepted standard that the measure of investor requirements is the relationship between earnings and market price instead of between dividends and market price.

The Electric Department of New Jersey Power & Light Company obviously has no security market experience available as direct evidence in establishing the historical cost of debt or preferred stock capital (although

* If dominant weight had been given to cost of reproduction in fixing the rate base, the consistent measure of the fair rate of return would ordinarily require use of the current cost of capital represented by fixed income securities, assuming a reasonable and economic capital structure.

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such experience is available on a *Company* basis), or the current cost of equity capital. Direct evidence of the current cost of equity capital is not available for the further reason that the Company is a subsidiary of a holding company. Its common stock is not outstanding in the hands of the public and is not bought and sold so as to permit expression of investor appraisals of its value. Therefore, the equity capital component of the basic rate of return is determined by reference to earnings-price ratios representing returns "on investments in other business undertakings which are attended by corresponding risks and uncertainties." (*Bluefield Company* vs. *Public Service Commission.*)

The fact that the Company operates a small gas department does not seriously affect the validity of the use of experienced corporate costs in determining the return rates to be applied to the Electric Department. The historical cost of debt and preferred stock capital to the combination company is an acceptable substitute for what would be the cost to the Electric Department if it were separately capitalized.

In the case of the debt component, the historical cost rate is the annual cost rate actually experienced by the Company in obtaining from investors the given proportion of its capital under the existing contractual arrangements. This rate is included in the overall basic rate of return in a proportion equal to the ratio of debt capital to total net capital. Similarly, the experienced cost of preferred stock capital and the current cost of equity capital are included in the basic rate of return in proportions equal to the respective ratios of preferred and common stock capital to total capital.

The rational basis of the formula is discussed below. So far as is known, no previous sliding scale arrangement has included provisions to adjust the rate of return on the basis of changes in the cost of capital. It is believed that this is one of the most constructive provisions of the Plan. The several adjustments are made in order to achieve a more exact result. Since this part of the Plan is an innovation in public utility regulation, it is hoped that it will be viewed sympathetically and that if defects develop they will be removed by the process of revision provided by Paragraph 35.

Debt Capital Component

The Plan provides that the debt capital component of the basic rate of return is the historical cost rate for debt capital, multiplied by the ratio of debt capital to total capital. Debt capital is understood to be represented by any secured obligation with a term of more than five years. Notes and other obligations with a term of five years or less are not includible.

The historical debt capital cost rate is defined as the percentage ratio of annual requirements to net proceeds to the Company from debt issues. Annual requirements are in turn defined as interest plus amortization of debt discount or premium, expense and call premium. The annual requirements, therefore, include all experienced costs of debt capital. As is generally understood, premium and discount are adjustments of the annual interest rate. Similarly, commissions and incidental expenses are a part of the difference between the nominal interest rate and the effective cost rate.

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Amortization of premium, discount and expense on a straight line basis to original date of maturity of each issue is the method adopted for all future issues of debt capital. It gives an acceptable distribution to annual capital cost and is administratively simple.* In the event of refunding, the unamortized debt discount and expense related to the refunded issue will continue to be amortized for rate making purposes to the original date of maturity. Call premiums, discount and expense, or premiums related to the refunding issues will similarly be amortized in equal annual amounts over a period equal to the original term of the new securities.

In the event of retirement of bonds without refunding, the identifiable or estimated amount of debt discount and expense (or premium) related to the retired principal amount of bonds is to be excluded in determining the annual requirements of debt capital. Since the annual cost per dollar of debt capital remaining in the capitalization is not increased by the transaction, the purpose of this adjustment is to maintain the debt capital cost rate unchanged.

The effect of such a retirement of debt without replacement is to decrease the proportion of debt capital and to increase the proportion of equity capital in the capitalization. The debt capital component of the basic rate of return would be decreased. The equity capital component would be increased but not necessarily in proportion to the increase in amount of equity capital, since the equity capital return rate would be lowered somewhat.

The amount of debt discount and expense and call premium experienced in connection with past issues and not yet amortized in accordance with the Company's past amortization schedules and acceptable for the purpose of the Plan is specifically stated. This balance will be amortized to the date of maturity of the present four and one-half per cent bonds of 1960. Excluded from this starting amount is $421,598 of unamortized debt discount and expense and call premium related to $4,905,000 of bonds called and retired in 1943. This reduction of debt capital was related, in part, to the elimination of the Company's investment portfolio, representing holdings in affiliated Companies, and resulted in an adjustment of the Company's capital structure to a reasonable and sound basis as related to its utility property and operations.

The unamortized costs related to the $3,820,000 principal amount out of the total $4,905,000 of bonds are excluded from the balance of unamortized debt discount and expense as at January 1, 1944, because the proceeds of this issue were used for the non-utility purpose. These unamortized costs also would be excludible because related to bonds which have been retired and not refinanced. In addition to the $360,777 of unamortized debt discount and expense thus excluded, a further amount of $60,821 is excluded from the balance at January 1, 1944, for the second reason only.

In accordance with applicable decisions of the Federal Power Commission,** as well as several state commissions, unamortized debt discount and

* The historical cost rate computed on a straight line basis decreases gradually over the life of outstanding bonds. A sinking fund method would give a uniform annual historical cost rate but the computations would be undesirably complex.

** Re: *Pennsylvania Water and Power Co.*, 35 PUR (NS) 324.

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expense related to refunded bonds is charged to surplus concurrently with the retirement of the bonds.* This treatment is for accounting purposes; it is consistent with the general standard of conservatism which encourages the writing off of costs related to closed transactions.

Regardless of the propriety of the accounting treatment, a similar treatment is not appropriate in rate making. For accounting purposes it may be appropriate to charge unamortized debt discount and expense to surplus in a lump sum instead of amortizing the balance gradually over what would have been the life of the retired bonds. In either case, the debt discount and expense is a cost of debt capital and a charge against earned surplus. In either case, and regardless of whether the old bonds were exchanged for new bonds or paid off in cash obtained by issuing new bonds, it is a part of the cost of supplying utility service. The unamortized debt discount and expense could be charged against customers in a single year but that treatment would cause an unnecessary fluctuation in the rates for service. Since the usual purpose of refunding prior to maturity is to reduce the total annual cost of debt capital, the appropriate treatment for rate making purposes is to continue the amortization over the period originally provided.

The treatment of unamortized debt discount and expense required for the purposes of the Plan does not control the accounting disposition of the item. The required treatment is not inconsistent with the applicable system of accounts, however, and it may be advantageous to follow the same practice for both purposes.

The earlier drafts of the Plan provided that the basic rate of return for 1942 and 1943 should be seven per cent, and that thereafter, unless the outstanding four and one-half per cent bonds should be refunded, the debt capital component of the basic rate of return should be determined by reference to a published index of yield on utility bonds of "AA" quality. The existing historical debt capital cost rate of about 5.0 per cent is an extraordinarily high cost rate in view of the long continued low level of interest on bonds. It probably is true that in the circumstances, including the receivership of Associated Gas & Electric Company and of Associated Gas and Electric Corporation, the tax litigation, the character of the Company's investment account, and need to reduce the amount of outstanding indebtedness, the Company has never been in a position where it could have refunded its bonds. Nevertheless, the Board's representatives felt that under the circumstances the customers should not be required indefinitely to carry the burden which was thus created.

In view of the fact that the indebtedness now has been reduced by call of a part of the outstanding bonds, and there is reason to expect that the bonds now outstanding will be refunded in the near future, the proposed penalty provision included in the earlier drafts has been eliminated.

Preferred Stock Capital Component

The historical cost rate in the case of preferred stock capital is defined as the percentage ratio of annual dividend requirements to preferred stock capital. Since preferred stock is issued for an indefinite term, only divi-

* Re: *Washington Gas Light Co.*, Minority Opinion, Nov. 8, 1943, p. 42.

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dend requirements are included in the annual cost. Preferred stock capital is par or stated value plus premiums, minus financing expenses and minus discounts when issuance of preferred stock at a discount is legal.

The preferred stock component of the overall basic rate of return is the historical cost rate multiplied by the percentage ratio of preferred stock capital to total capital.

Equity Capital Component

The equity capital component for each test year is defined by the Plan as the equity capital return rate multiplied by the ratio of equity capital to total capital. The use of earnings-price ratios and the method of determining equity capital return rate are discussed below.

The use of surplus and the value of common stock as stated on the books, for the purpose of weighting the equity capital return rate is an acceptable and proper procedure because of a prospective further adjustment of the Company's capitalization. It is intended that regardless of the date at which the adjustment of the Company's capitalization may become effective, it shall be considered for the purpose of the Plan to have become effective as of January 1, 1944. It is believed that the requirements of the applicable system of accounts and the Board's general authority to regulate accounting are adequate assurance that the amount of equity capital determined according to the definition for the purpose of the Plan will remain reasonable.

The equity capital return rate, or rate of return upon equity capital, for each year is based upon the rates of return (earnings-price ratios) required by comparable situations, adjusted to (a) the basis of the capitalization of the Company and (b) the average level of the market for equity capital over a period of the preceding three years.

The first factor in the determination of the equity capital return rate was developed from an extensive analysis of a number of electric utility operating properties which, as a group, may be considered to be reasonably comparable to New Jersey Power & Light Company. The second factor, which provides the measure of the *trend* of the 'cost' of equity capital is based upon the market behavior of a group of public utility operating companies' common stocks, selected primarily on the basis of the broadness of their markets. Annual differences in the average level of the earnings-price ratios of these stocks are translated into fluctuations of the equity capital return rate provided by the Plan.

Calculation of Earnings-Price Ratios

As has been stated, no direct evidence of the cost of equity capital to the Electric Department of the Company is available and it is necessary to estimate the cost rate by considering the earnings-price ratios for common stocks having broad markets and comparable investment qualities.

It is understood that the earnings per share will be calculated for the ten barometer common stocks after such adjustments of income as commonly are made by an informed security analyst on the basis of information available in the published statements. For instance, the effect of an extraordinary tax adjustment will be eliminated before determination of

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earnings available per share. The definition of earnings-price ratio provides that the earnings-price ratios shall be determined for the preceding test year by use of the market prices and income statements available on March 15th for the test year or the latest twelve months, from standard sources (such as individual company reports, Moody's, Standard and Poors, and Bank and Quotation Record) and that the earnings-price ratios thus determined shall be maintained for use in the two subsequent annual proceedings without being modified to reflect any subsequent adjustments of such income statements.

Selection of the Barometer Group

The rate of return (expressed as earnings, not dividends) expected by equity investors in other enterprises "attended by corresponding risks and uncertainties" is the measure of the fair return to the equity investors in the Electric Department, but the problem is to find enterprises of this class for which representative market quotations are available.

A total of only about thirty-five publicly owned common stocks are in the list from which the selections must be made. Since the function of the barometer group is to make available an index of the movement (not necessarily the level) of the cost of equity capital, the following criteria are of first importance in the selection:

1. The common stock should be traded in the market in sufficient volume and regularity that the established prices are representative of investor appraisals.
2. The common stock should have been publicly owned for a sufficient time that knowledge of its income experience is generally available and it is 'seasoned.'

The group of ten utility capital stocks has been selected primarily with reference to these criteria.

Representativeness

The earnings-price ratios of the selected ten utility common stocks are the measure of changes in current equity 'capitalization rates'; they indicate the number of dollars of equity investment which can be expected in the market for each dollar of prospective earnings. Short run market fluctuations, or the presence of unusual factors, such as a probable tax structure change, may make unrepresentative the earnings-price ratios of a given date or of a short period.

Therefore, the earnings-price ratios are subjected to an extended process of averaging as a means of eliminating divergencies and variations and bringing the result closer to the true equity capitalization rate. First, the earnings-price ratio for any one common stock is determined by use of the average of the monthly highest and lowest market prices during the year. Second, the influence of accidental divergencies and extremes is minimized by use of the arithmetic average of the median four among the ten earnings-price ratios, which in the Plan is called 'yearly earnings-price ratio.' Third, the influence of short run factors which operate beyond a single year is moderated by use of a moving three-year average of the yearly

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earnings-price ratios, which in the Plan is called 'average earnings-price ratio.'

As a final precaution, it is provided that the yearly earnings-price ratio shall be taken as no more than nine and no less than six and one-half per cent. For instance, earnings-price ratios in excess of nine per cent might result from a temporary discounting of current earnings in anticipation of increased expense levels. Earnings-price ratios less than six and one-half per cent might be caused by a wave of speculative buying. These influences, even though present for two or three years, should not influence the equity capital cost rate.

The yearly-earnings price ratios might press upon these limits as the consequence of a long-term trend, in either direction, in the cost of equity capital. It is provided, therefore, that in this eventuality the limits are subject to reconsideration. (Paragraph 11.)

The purpose of the procedure is elimination of fluctuations resulting from short-lived attitudes of optimism and pessimism in the market, and adjustment of the basic rate of return to long-term trends in the cost of equity capital.

Comparability

Since the first criteria in selection of the barometer group are the considerations of representativeness, further attention must be given to means of obtaining comparability with New Jersey Power & Light Company.

A large measure of comparability is obtained by limitation of the group to electric or electric-gas combination companies. Second, the ten include only utilities operating in the Northeast, since there are regional differences in the cost of capital.* Third, operating companies which are also functional holding companies are excluded.**

The barometer group is generally comparable, but the *average earnings-price ratio* requires three adjustments before it may reasonably be used as the *equity capital return rate*. These three adjustments are accomplished simultaneously by application of the appropriate *capital structure factor*. The first is for the influence of capital structure on the earnings-price ratio. The second is to reflect the consideration that New Jersey Power & Light Company is a utility of medium size whose common stock probably would be considered a slightly less desirable investment than the common stock of the average company in the group of ten. The third adjustment is addition of a margin to reflect cost of financing.

Effect of Leverage

It will be noted that the criteria which guided the selection of the barometer group did not recognize the effect of proportion of equity

* The production capacity of capital and the relative supply of locally available investment funds varies among regions and the resistance of capital to moving from one region to another is overcome only at a price.

** Provision is made in the Plan for substituting other common stocks in the barometer group if market prices or earnings per share should not be available for common stocks in the initial group. The 'order of preferences' guiding such substitutions does not include all the criteria recognized in making the initial selection. It was believed better to omit the subjective criteria, lest they involve the possibility of disagreement in administration of the Plan. Of course, if there is agreement between the Board and the Company, other factors affecting representativeness and comparability may be considered in making such substitutions.

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capital on the earnings-price ratios. Because of the residual character of equity return, its security and stability vary directly with the proportion of total income available for common stock after all prior capital charges and requirements have been met. Therefore, everything else being equal, the degree of risk inherent in equity investments and the related earnings-price ratios vary inversely with the proportion of equity capital in the capitalization.

It would have been impossible to obtain comparability in this direction by including in the barometer group only utilities with capital structures similar to that of New Jersey Power & Light Company. In the first place, the total number available for selection is inadequate and, secondly, provision must be made for adjustment to changes in the capital structure of New Jersey Power & Light Company.

In order to develop an adjustment formula, a statistical study was made by Gilbert Associates of factors influencing common stock earnings-price ratio. After discussion and further analysis along lines suggested by Mr. Herz of the Board's staff, agreement was reached as to the composition of the group of utility common stocks from which the probable relationship between earnings-price ratio and proportion of equity capital could be derived. Several analyses of different groups gave results consistent enough to provide a basis for agreement.

It should be noted that not all electric and gas utility common stocks for which market quotations are available are suitable for the analysis of this leverage factor in market price determination. The total number of common stocks available for such analyses is small. The earnings-price ratios for some of the stocks are influenced by independent or local factors so as to make them unacceptable for application of commonly used statistical methods. As a result, quotations for only twenty-five of the total of about thirty-five available issues were given weight in reaching the results finally embodied in the Plan.

The relationship varies somewhat with the business cycle and with other influences, such as prospective sharp changes in the tax structure. The analysis was made separately for each of the years from 1937 to 1941 inclusive, and the results for each of the years 1940 and 1941 were found to be generally similar. The results for these years are used to establish the adjustment formula, since the period is more nearly 'normal' than the other years studied.

Adjustment for Other Risk Factors

Selection of the companies for the analysis groups was based, to the fullest extent possible, upon the criterion of comparability. Since it was necessary that the groups be large enough to permit study of the effect of leverage on the earnings-price ratios, some companies included were of smaller size* and geographically more diversified than the barometer group of ten. The curve expressing the relationship between earnings-price ratio and per cent equity capital was obtained by the method of least squares,

* Since New Jersey Power & Light Company is substantially smaller in size than the average of the barometer group, an attempt was made to measure quantitatively the relationship between size of enterprise and earnings-price ratio. The results were negative, perhaps because of statistical inadequacy of the available data. It is reasonable to believe that such a relationship exists, but that it is of relatively minor importance.

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a process of averaging. Therefore, the average earnings-price ratio at any given per cent of equity capital is influenced somewhat by companies with less favorable risk characteristics than those of the barometer group.

At the same per cent of equity capital, the yearly earnings-price ratio of the barometer group, for 1940 and 1941, was slightly below the curves representing the analysis groups. This margin is reflected in the capital structure factor. That is, it is assumed, and review of results from 1937 to 1942 inclusive indicates that the assumption is sound, that the relationship between the median four of the barometer group and the average of the analysis groups will remain constant. Therefore, the function of the barometer group in the formula is to act as an index of changing market levels.

Common Stock Financing Costs

The measure of the annual cost of equity capital is the capitalization rate plus a margin for cost of financing. The margin includes discounts and commissions to underwriters and expenses incident to the issuance of stock. If the stock is sold directly to stockholders by means of rights, a margin between market price and subscription price is necessary.

Full information is available from Securities and Exchange Commission reports in regard to financing costs experienced in common stock underwritings since the passage of the Securities Act of 1933. The price to the issuer, the underwriter and the public is reported in the case of all electric and gas utility common stock issues. Although issues of utility common stock have not been numerous, it is possible to establish with reasonable assurance the margin which must be added to the capitalization rate to equal the cost rate to the Company. The studies show that the financing costs, expressed as a percentage of the market price (or gross proceeds), decrease with the size of the issue, vary directly with the degree of risk inherent in the particular business and tend to increase somewhat with a decline in the per cent of equity capital in the capitalization.

The New Jersey Power & Light Company is now a subsidiary of a holding company and its common stock has not been sold publicly. Its status as a holding company subsidiary, however, does not decrease its cost of providing service to the extent of eliminating the cost of common stock financing. If the holding company is to be in a position to perform its function of supplying equity capital to its subsidiary, it must sell its own common stock to the general public. The proceedings under the Holding Company Act of 1935 affecting the continued existence of the holding companies, of which New Jersey Power & Light Company is a subsidiary, have not been concluded. The identification of the holding company system of which it will remain a part is unknown. The question of whether or not in the future its parent company will be able to supply equity capital to the Company at a lower cost than the Company might experience if it were to sell its common stock to the general public is not determinable.

The Plan disregards the fact that the Company is a holding company subsidiary and in determining the equity capital component of the rate

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of return, a margin for cost of financing, which would be reasonable if the Company's common stock were owned by the general public, is allowed. This margin ranges from six to eight per cent of what would otherwise be the cost of equity capital, depending upon the per cent of equity capital in the capitalization. This margin has been included in the capital structure factors.

V. BASIC RETURN

It is the fair return which is most significant in rate making and not either the rate base or the fair rate of return standing alone. Section V of the Plan defines the basic return as an annual amount equal to the rate base multiplied by the basic rate of return for the test year, minus three per cent of the balance in the stabilizing reserve at the beginning of the test year. The fair return provided by the Plan is the basic return plus such amounts of additional return as may become available for corporate purposes under the provisions affecting the stabilizing reserve and adjustment of rates.

The deduction of three per cent of the balance in the stabilizing reserve is for the purpose of recognizing that the credits to the reserve represent a qualified advancement of investment funds by customers. Instead of charging this three per cent adjustment against the basic return, the amount might have been credited to the reserve. The latter method, however, might build up the reserve unnecessarily during a long period of no return deficiencies.

The stabilizing reserve should not be used to reduce the rate base upon which the return is computed. Funds equivalent to the balance in the reserve are not required to be invested in utility plant; in fact, it may be desirable that some funds be retained in relatively liquid form. If invested in readily marketable securities of high quality, the earning capacity of the reserved funds is limited to the interest yield of such securities. Application of the stabilizing reserve to reduce the rate base is equivalent to charging the Utility with interest on the balance in the reserve at the fair overall rate of return on the business. Such an interest rate would be excessive in view of the productive capacity of the assets.

In view of the treatment provided by the Plan for the investment of funds advanced by customers, they are not entitled to a substantial compensation for risk. Neither do they assume a responsibility for management of the investment funds which would justify a higher rate of return. The equitable relationship between customers and stockholders is maintained by a charge against the basic return equivalent to the return on relatively risk free securities, not the overall rate of return weighted by the risk inherent in common stock investments.

This annual credit on behalf of the customers does not depend upon a residual balance of earnings after prior obligations but is a deduction from the basic return before interest requirements.

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VI. STABILIZING RESERVE

Paragraph 14

The purpose of the stabilizing reserve was discussed in the first section of this report. That discussion will not be repeated here but the reasons for some of the specific provisions will be outlined.

It is understood that the Board, by such specific action as is necessary, will authorize the Company to set up on its books such accounts as may be advisable in connection with the administration of the Plan, if such accounts are not provided by the applicable system of accounts.

The stabilizing reserve is a 'reserve' in the accounting sense of the term and is not required to represent a fund of cash or liquid assets. Assets equal in amount to the balance in the reserve are not required to be segregated on the assets side of the balance sheet. Their management is a responsibility of the Company subject to the general regulatory powers of the Board.

Amounts transferred to earned surplus in conformity with provisions of Paragraph 19, for the purpose of stabilizing the return, become available to the Company as the basis for the payment of common dividends or other general corporate purposes. When the funds which are held in the business by credits to the reserve have been invested in utility plant, cash may not be available for the payment of dividends when such transfers are made to earned surplus to compensate for deficiencies of return. Therefore, it may be desirable for the Company to invest a portion of the assets represented by the reserve in readily marketable securities, in order to permit realization of the cash necessary for the payment of dividends during periods when the Company's treasury position would otherwise make such payments impractical.

All outstanding common stock is owned by a single stockholder, however, and circumstances may exist where the Company will find it advantageous to invest all the related funds in electric plant. In such a situation the Company might find it necessary to restrict or forego normal dividend payments.

Paragraph 15

The initial Company contribution of $975,000 to the stabilizing reserve as of December 31, 1943, by transfer from earned surplus, is an amount agreed upon in view of all the pertinent circumstances.

The consideration of the Plan has continued for a period of almost two years, and the electric operating income of the Company during this period, although more than a fair return on the basis of the determinations made for the purposes of the Plan, remained the property of the Company. There is no legal means by which in a rate case proceeding the Board might make a rate reduction retroactive. Nevertheless, the Company agreed that the starting balance in the stabilizing reserve should include approximately the amount which would have been credited if the Plan had been effective during 1942 and 1943, plus an amount, approximately equal to one and one-half per cent of the rate base, contributed out of earnings prior to 1942. The contribution of this amount out of

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earnings prior to 1942 was for the purpose of recognizing the fact that existence of a reserve balance of less than one and one-half per cent of the rate base might be the basis for increases in charges for service.

In addition, the starting balance in the stabilizing reserve is larger than it otherwise would be as the means of compensating for advantages received by the Utility from other provisions of the Plan. In particular, in the opinion of the Board's representatives, expenses chargeable to customers should be decreased because of reduction of Federal income tax liability available to operating subsidiaries of a holding company as the result of ability to file a consolidated return. Admittedly, these tax 'savings' are temporary, and it is impossible to estimate them promptly or accurately. Therefore, a roughly equivalent customer advantage is obtained by means of a larger initial balance in the reserve than would otherwise be acceptable.

The customer's equitable interest in the reserve balance is recognized (a) by the requirement that interest at three per cent on the balance be deducted from what would otherwise be the basic return, (b) by the fact that the reserve is to be used only to compensate for return deficiencies which otherwise might be the basis of rate increases, and (c) by the provision that in the event of termination of the Plan one-half of the existing balance in excess of $250,000 will be taken as the measure of subsequent benefits to be obtained by the customers through the medium of billing credits. The circumstances of the initial contribution are recognized by the provision defining the Company's share in any existing balance in the stabilizing reserve in the event of termination of the Plan.

Paragraph 16

The full amount of any additional return for a test year is required to be credited to the stabilizing reserve until the balance in the reserve is equal to four and one-half per cent of the rate base at the end of the test year. Thus no part of additional return is available as an incentive to efficient management until the reserve is substantially full. The reserve will be more quickly restored during the revival phase of the business cycle, however, and the Company gains an increased assurance of a stabilized return.

Paragraph 17

The nature of an extraordinary charge which would reduce the balance in earned surplus to less than the amount of a quarterly preferred stock dividend requirement is uncertain. While it is not possible to foresee any situation which might call for the use of the stabilizing reserve in the manner permitted by Paragraph 17 of the Plan, it is believed that the provision may improve the Company's credit position to the ultimate benefit of its customers. The customers' interest in the reserve is protected by the requirement that the amounts 'borrowed' be restored by charges to earned surplus (accumulated out of earnings available for corporate purposes) before any common dividends may be declared.

It will be noted that the reserve cannot be drawn upon to pay a succession of periodic (presumably quarterly) preferred stock dividends. In

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other words, it is not the purpose of this paragraph to protect preferred dividends against the effect of impaired earning capacity, but only against the effect of a charge resulting from an extraordinary capital loss.

Paragraph 20

This paragraph provides for making up return deficiencies incurred during a limited period in order to obtain the advantages of:

1. an increased assurance of an adequate return at all times, and
2. avoidance of rate increase which otherwise might be required in the trough of a severe business depression.

The period for which recoupment is permitted out of subsequent additional return is limited to two years because any accumulated interest in future additional returns ought to be limited and because adjustment of rate levels may be desirable if returns are deficient for a longer period.

VII. ADJUSTMENTS OF RATE SCHEDULES

Paragraphs 21 to 27 specify the conditions under which rate adjustments will be made and provide for the computation of the amounts of such adjustments as related to additional or deficient return and to the balance in the stabilizing reserve.

Rate reductions are required when the amount in the stabilizing reserve exceeds four and one-half per cent of the rate base, and rate increases are in order when the balance in the reserve has dropped below one and one-half per cent of the rate base at the end of the year. If the reserve balance, after credits for additional return, or after debits for return deficiencies, is between one and one-half and four and one-half per cent of the rate base, no rate changes are to be made. These provisions tend further towards increased stability of rates to customers.

The studies made in connection with the Plan show that as a consequence of business cycle fluctuations, the pendulum effect of the formula on rate levels might tend to swing too far in either direction if rate adjustments are deferred until the reserve is either full or wholly depleted.

On the upswing of the earnings pendulum the full amount of the additional return is credited to the stabilizing reserve until the reserve reaches the upper sub-limit of an amount equivalent to four and one-half per cent of the rate base at the end of the test year. It is probable that in some test years only a portion of the additional return will be needed to fill the reserve to the four and one-half per cent level. In such case, one-half of the remainder of the additional return is credited to the reserve and the other half of the remainder becomes the basis for rate reductions. In other words, the 'basic reserve requirement' (if any) is first taken out of any additional return and one-half of the remainder of additional return becomes the basis for application of the sliding scale formula.

When the balance in the stabilizing reserve nears its upper limit of six per cent of the rate base, it is possible that one-half of the additional return would 'over-fill' the reserve. Then the credit to the reserve is only that portion of additional return required to bring the reserve to the six

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per cent level, and the full amount of the remainder of additional return (adjusted, if necessary, for rate changes during the test year) becomes the basis for calculations of future reductions in return.

On the downswing of the earnings pendulum a corresponding dampening effect is provided. The stabilizing reserve shall be drawn on to make up the full amount of any return deficiency until the reserve is exhausted. When the reserve has declined to a level equivalent to one and one-half per cent of the rate base, the Company is permitted to make rate increases. It may file revised electric rate schedules designed to increase the return by one-half of any return deficiency occurring during the preceding test year which depletes the reserve below the one and one-half per cent level. When and if the stabilizing reserve becomes entirely depleted the Company is permitted to file revised schedules designed to increase the return by the full amount of any return deficiency experienced.

In this manner rates may begin to be increased before the reserve is wholly depleted and the resulting rate increases are less abrupt than otherwise would be the case. The option of making such increases is left with the Company, which may exercise its judgment concerning the probable trend of economic conditions at the time a rate increase is permitted by the Plan.

In order to avoid minor rate adjustments, which would be administratively difficult to place into effect, the Plan provides that neither reductions nor increases in rates shall be made unless the estimated effect on annual operating income is at least $10,000.

Paragraph 22

The Plan provides for yearly determinations of the experienced return of the Electric Department and the amounts of related 'additional return' or 'return deficiency.' These determinations cannot be completed for several months after the end of any particular test year. For this reason it is provided that any indicated rate adjustments should become effective by April 1st (if possible) of the year following the test year.* This provision is necessary because it would be administratively impossible to make adjustments of rate levels, based upon experienced return of a test year, effective immediately at the beginning of the following year.

Thus, it is apparent that the experienced return of any test year during which a rate adjustment has been made will not reflect the full annual effect of the revised rates. If rates were reduced during the year the experienced return would be higher than the earnings position under the revised rates; similarly, if rates were increased during the year the experienced return would not fully reflect the earnings position established by the higher rate levels. Adjustments in rates in the subsequent year, if made on the basis of the actual experienced returns without adjustments to give effect to the date of prior rate revisions, would result in a cumulative over-correction of experienced return on the basis of application of given sliding scale percentages otherwise reasonable.

In order to avoid over-correction of rate levels the Plan provides that experienced return and the accompanying additional return or return

* See Section VIII of the Plan; Paragraphs 29, 30.

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deficiency of each test year shall be adjusted to reflect the estimated full year application of any revised rates made effective during the test year. The resulting adjusted amounts are the ones used as the measures of any changes to be made in rates during the year following a test year in accordance with the provisions of the Plan.

Paragraph 23

Additional return in a test year, adjusted as above described for a full year's application of any revised rates made effective during the year, forms the basic measure of a rate reduction to be made during the year immediately following. However, in order to provide a reasonable incentive for managerial effort in expanding sales, improving operating efficiency and effecting economies, an additional return is not converted immediately during the following year, by means of reduced rates, into a reduction of experienced return to the full extent of the additional return experienced. Thus, the Plan provides that a variable proportion of any additional return (the proportion depending upon its magnitude in relation to rate base) is to be translated into reduced return during the following year so that, if all other factors remain constant, it would take four or five years to eliminate completely an amount of additional return.

The percentage factors to be applied to the additional return of each test year, in the determination of reduction of return in the subsequent year, have been established at the following levels:

For the amount equivalent to the first one per cent or less of rate base	60 per cent
For the amount equivalent to the next one per cent of rate base	75 per cent
For the amount exceeding the equivalent of two per cent of rate base	85 per cent

The total reduction of experienced return to be made effective during the immediately following year is the sum of the proportions as determined according to the above formula.

The determination of the foregoing percentages necessarily is based upon judgment, in which recognition is given (a) to the desirability of providing reasonable incentives to managerial achievement and (b) the purpose of maintaining rates at reasonable levels. Thus, on first consideration it might appear that a 50%-50% division of any additional return would be equitable. Upon further analysis, however, it is apparent that beyond some point on the scale of additional return the efforts of management have progressively less effect, so that progressively larger proportions of additional return can properly be translated into rate reductions in subsequent years.

In selecting reasonable percentages consideration was also given to the effect of the unavoidable lag of three or four months in placing reduced rates into effect. The experienced return in a test year during which rate reductions have been made is higher than would have been the case if reduced rates could be made effective at the first of the year. Thus, the

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actual 'additional return' available to the Company for corporate purposes in such a test year is a larger amount than the adjusted figure used as the basis for reducing rates. This justifies a scale of percentages higher than might otherwise be reasonable.

Assuming stable operating results and no change in the basic return, analyses of the effect of several different adjustment ratios indicate that the overall effect of variations in the percentages, within a reasonable range, is (a) to affect only slightly the length of the period required to reach the basic return level, and (b) to vary within relatively narrow limits the cumulative additional return received by the Company over the period required to reach the basic return level. The following examples, to illustrate the conditions referred to, are based upon an assumed constant rate base of $20,000,000, a first year additional return of $300,000, uniform sales and costs during the period required to bring rates to the basic return level, and reduced rates becoming effective on April 1st of each test year.

	Percentage Assignment of Additional Return to Reduction of Experienced Return		
	Flat 50 per cent	Variable 60-75-85 per cent	
	Unadjusted for Rate Reduction	Unadjusted for Rate Reduction	Adjusted for Rate Reduction
Basic Assumptions:			
Rate base	$20,000,000	$20,000,000	$20,000,000
Additional return 1st test year	$300,000	$300,000	$300,000
Results of Application of Formula to Stable Operations:			
Test year of last rate reduction	5th	4th	5th
Additional return after 1st test year	$300,074	$186,197	$243,840
Additional return on an annual basis after last rate adjustment	$3,223	—$8,737	$6,720

One of the significant facts indicated by the above examples is that if adjustment ratios in excess of 50 per cent are used it is increasingly desirable that experienced return for each test year be adjusted to give effect to full twelve months' application of rate changes that may have been made during the test year. Unless such adjustments are made, the experienced return position of the Utility could be converted from an 'additional return' to an undesirable 'return deficiency.'

Paragraph 24

Paragraph 24 provides that upon application by the Company and with Board approval the amount of additional return available as the basis for a rate reduction may be returned instead to customers by credits on bills

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rendered for service. Among the circumstances in which a billing credit may be more desirable than a rate reduction is a probable increase in the cost of service in the immediate future, a probable decrease in the demand for service, or great uncertainty as to the probable return.

Paragraph 25

This paragraph provides for rate increases which may be made if the balance in the stabilizing reserve after giving effect to the operations in any year is less than one and one-half per cent. In determining the magnitude of any rate increases the experienced return for the test year is adjusted for the effect of any rate changes during that year, in a manner similar to that heretofore described.

So long as there is some balance in the reserve, only one-half of the return deficiency (after adjustment for any rate changes effective during the test year) may be made the basis for increased rates. To the extent that any return deficiency exceeds the balance available in the stabilizing reserve before debits for such deficiency, the full amount of such excess (after adjustment for any rate changes effective during the test year) becomes the basis for increased rates.

Paragraph 26

It is within the discretion of the Company not to file revised schedules providing for electric rate increases. The circumstances in which the Company might consider it undesirable to file schedules providing for higher rates include the existence of market conditions in which higher rates might have the effect of curtailing demand or decreasing utility operating income. Or, it might be anticipated that the condition of return deficiency will be of short duration and that the benefit of the rate increase would be outweighed by its disadvantages.

It is believed that these considerations, together with the provisions of Paragraph 20, will make relatively remote the likelihood of rate increases under the Plan.

VIII. ADMINISTRATION OF PLAN

Paragraph 28 provides that as soon as practicable after the end of each test year the Company shall submit to the Board a verified report showing, for the test year, the information which may be re-required for administration of the Plan. It is understood that, to the extent that the purpose is thereby served, the statements may be in the form of advance copies of schedules from the annual report of the Company to the Board. It is expected that the Board's staff will make an investigation in order to determine the includibility of particular operating expense or capital items under generally accepted rate making standards. This informal investigation may be largely concluded prior to the submission of the required report.

It is understood that at the discretion of the Board a public hearing may be held annually for the purpose of considering the financial results of operations during the preceding test year and for the purpose of giving

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formal expression to the application of the Plan. Paragraph 29 provides that the annual proceeding shall be completed at a date which will permit the revised rate schedules, if any, to become effective if possible on April 1st of the year following the test year. The flexibility is provided because of the uncertainty that the proceeding may be concluded in all instances by April 1st. It is expected, however, that after the first two or three annual proceedings there will exist on both sides an intimate knowledge of the issues likely to arise in the proceedings. Studies may be made at any time during the year in anticipation of the required annual proceeding.

It is suggested that the computations as to the basic rate of return for the preceding test year may be made independently by the Board's staff and by the Company. In the event of differences in the results of these independent computations, they should be reconciled if possible prior to the formal proceeding. The Company will take the initiative in such revisions of its electric tariff and rate schedules as may be required from time to time to make the Plan effective. In this connection it will be necessary that the Company prepare periodically such frequency distributions of bills and consumption for the various classes of electric service as are necessary to provide reasonably close estimates of the revenue effect of contemplated rate schedule revisions, on the basis of customers and sales during each test year.

The first annual proceeding under the Plan, during the first months of 1945, will determine the basic return and experienced return for 1944 and the rate adjustments required. It is provided that this determination of basic return and experienced return, and each successive annual determination for the preceding test year, shall be conclusive when accepted by the Company and shall not be reopened at a latter date on account of additional information, changed regulatory standards or other reasons. The new circumstances may be reflected in the next annual determination; the administration of the Plan will be a continuing process and this degree of finality of determination is a contribution to its stability.

IX. DURATION AND REVISION

Regardless of the date of its formal approval, the Plan is designed to be effective as of December 31, 1943.

Its term is not limited to any fixed number of years but will continue in effect without any act, agreement or proceeding being required to this end. The Plan should have an indeterminate life because a fixed term unnecessarily limits its potential usefulness. As a substitute for a fixed term the Plan provides for modification or revision at any time when changed circumstances make such modification or revision desirable. (Paragraph 35.)

It is provided that written notice of intention to terminate may be filed by either the Board or the Company at any time during a year but not later than sixty days following the determination of the application of the provisions of the Plan to the operations of the preceding test year. The purpose of requiring several months' notice is to provide opportunity for considering the merits of any controversy and the effect on the public

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interest. If a notice of intention to terminate becomes effective, it does so at the end of the test year with respect to all provisions of the Plan excepting determination of the balance in the stabilizing reserve at the effective date of termination and its disposition according to the provisions of Paragraphs 33 and 34.

It may be desirable to state the opinion of the Board's representatives concerning the relationship between the process of administering the Plan and the process of revising its provisions.

1. Neither in New Jersey nor elsewhere can a sliding scale contract or other method of rate regulation, such as the Plan, supersede the requirements of law and statute, or release the commission from its duty to fix just and reasonable rates. An administrative body such as the Board cannot vest or divest itself of jurisdiction. On the contrary, adoption and administration of the Plan would be steps in the general process of establishing and maintaining just and reasonable rates and thereby exercising the powers delegated to the Board by statute.

2. The statute is silent as to the method which may be adopted for the purpose of establishing and maintaining just and reasonable rates. It requires no particular method of valuation or rate of return determination; no particular formula for determination of the fair return is required to be applied by the Board. Therefore, it is believed that the Board is free within its statutory powers to adopt a particular method, such as the proposed Plan, if it believes that the method is advantageous and will establish or maintain just and reasonable rates. It could not do so by contract with the utility because the Board has no power to divest itself of regulatory authority by contract.

3. The requirement that rates be just and reasonable obviously is not met by the provision in the Plan itself as to how it may be modified or terminated. The requirement is met, however, by appropriate Board action under such a provision and it will be the duty of the Board to act whenever, because of changed circumstances, the provisions of the Plan would yield unreasonable results.

4. The distinction between the process of administering the Plan and the process of revising its terms is one of procedure instead of one of substance. It may be said that the validity of new rates arrived at under any sliding scale arrangement must be tested by the rules of law generally applicable to rate making, not solely by the provisions of the sliding scale arrangement. The dilemma obviously does not exist so long as the formula or method yields reasonable results.

5. Therefore, it is the responsibility of the regulatory authority continually to review the formula or method to the end that it will continue to yield reasonable results. This process of reviewing the provisions of the method or formula should be orderly and always disassociated from the annual process of applying the method or Plan. The ends of effective procedure, administrative stability and fairness require that the process of changing the rules be divorced from the process of determining the results of their application for a single test year. For the same reason, if the Plan is terminated by the procedure provided by Paragraph 32, neither the Board nor the Company should resort to another method of establishing reasonable rates until after the date of termination.

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EXAMPLES OF DETERMINATIONS UNDER THE PLAN

The data used in these examples are hypothetical and have no relation to the operations of New Jersey Power & Light Company. No attempt is made to present examples of all possible cases that might arise under the Plan.

The following examples show the methods of applying the provisions of the Plan in arriving at certain determinations. For convenience of identifying the various provisions and steps applicable in working out the examples references are made to the Report or Plan in the following styles: to the Report (Sec. IV) and to the Plan (Par. 9). This does not imply that the data used are in any sense related to the operations of New Jersey Power & Light Company. These typical determinations under the Plan are based on hypothetical operations for a test year "E."

A. Determination of the 'equity capital return rate.'

B. Determination of the 'basic rate of return.'

C. Determination of the amount of rate changes.

Case 1—When the stabilizing reserve is nearly filled.
Case 2—When the stabilizing reserve is near the 4½% level.
Case 3—When the stabilizing reserve is nearly empty.
Case 4—When the stabilizing reserve is near the 1½% level.

A. Example of determination of the equity capital return rate. (Pars. 9, 10 and 11.) (Sec. IV.)

Company Number	Earnings-price ratios for each year (Median four denoted by *)				
	"A"	"B"	"C"	"D"	"E"
1	7.8	7.4	7.9	10.8	13.3
2	9.5	8.4	7.6	8.1*	8.6*
3	6.2	5.6	5.7	6.6	7.8
4	6.3*	6.4*	7.5*	8.2*	7.5
5	6.0	6.4*	5.7	7.9*	8.4*
6	6.9*	7.4	8.4	9.4	9.5*
7	7.2*	6.8*	6.8*	6.8	7.9
8	5.8	5.7	5.3	6.9*	8.9*
9	6.7*	6.2	5.9*	6.0	12.3
10	8.3	6.3*	7.0*	8.3	11.7
Yearly E/P ratio (Par. 11)	6.78	6.48	6.80	7.78	8.85
Average E/P ratio (Par.10)	....	....	6.69	7.02	7.81

Capital structure factor for 30.9% equity capital (Par. 9) .. 1.32

Equity capital return rate for test year "E" (Par. 9) 10.31%

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B. Example of determination of basic rate of return. (Pars. 5, 6, 7 and 8.) (Sec. IV.)

	Capitalization		Cost of Money		
		Per cent	Annual	Per cent	
	Amount	of total	Cost	Actual	Weighted
Debt capital (Par. 6)					
Bonds, Series A 3.0% ..	$7,000,000		$210,000		
Bonds, Series B 3¼%	3,500,000		113,750		
Unamort. D.D. & E. ..	(995,000)		53,639		
Net debt capital	$9,505,000	52.5	$377,380	3.97	2.084
Preferred stock capital (Par. 7)					
4¼% stock—stated value	$3,850,000		$163,625		
Discounts and Expense	(835,000)		.....		
Net preferred stock capital	$3,015,000	16.6	$163,625	5.43	0.901
Equity capital (Par. 8)					
Common stock	$4,250,000				
Surplus	1,350,000				
Total Equity capital	$5,600,000	30.9		10.31	3.186
Total capital	$18,120,000	100.0			
Basic rate of return					6.17%

( ) Denotes subtractive amount.

C. Example of determination of amount of rate changes.
(Pars. 13-27 incl.) (Sec. V, VI, VII.)
Basic assumptions:

(a) Rate base for test year	$20,000,000
(b) Basic rate of return	6.17%
(c) Basic return before adjustment (Par. 13)	$1,234,000
(d) Stabilizing reserve—full level (Pars. 16, 18)	1,200,000
4½% level (Par. 16)	900,000
1½% level (Par. 25)	300,000

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Case 1

In the event the additional return is more than sufficient to bring the balance in the stabilizing reserve to the 6% level. (Par. 16.)

Specific assumptions or calculations:

(a)	Balance in stabilizing reserve, January 1, Year "E"		$1,105,000
(b)	Experienced return for year "E"		1,430,000
(c)	Basic return: Item (c) under "C"	$1,234,000	
	Less: 3% of Item (a) (Par. 13)	33,150	
			1,200,850
(d)	Additional return: [Item (b) minus Item (c)]		229,150
(e)	Adjusted experienced return based on rate reduction effective 4-1-"E" (Par. 22)		1,390,000
(f)	Adjusted additional return [Item (e) minus Item (c)] ...		189,150
(g)	Amount required to fill the reserve ($1,200,000 minus $1,105,000)		95,000
(h)	After crediting stabilizing reserve with $95,000 the remainder of additional return is available to the Company in its surplus [Item (d) minus Item (g)]		134,150
(i)	Adjusting ratio (Par. 23) $\frac{134,150}{229,150} = 0.5854$		
(j)	Basis for future reduction in return: (0.5854 x $189,150)		110,728
(k)	Applying the formula of Par. 23 to Item (j) which is less than 1% of the rate base, the calculated reduction of future experienced return is 60% of $110,728		66,437
(l)	Because taxes based on revenues and income absorb about 45 cents out of each dollar of incremental operating revenue, the calculated reduction in return [Item (k)] will be accomplished by a rate reduction in year "F" of $66,437 ÷ 0.55, or		120,794

Case 2

In the event the balance in the stabilizing reserve is near the 4½% level and the additional return is slightly more than the basic reserve requirement. (Par. 16a.)

Specific assumptions or calculations:

(a)	Balance in stabilizing reserve, January 1, Year "E"		$825,000
	Note: No rate changes would have taken place during the test year because the balance in the stabilizing reserve is between the 1½% and 4½% levels. (Par. 22.)		
(b)	Experienced return for year "E"		1,330,000
(c)	Basic return: Item (c) under "C"	$1,234,000	
	Less: 3% of Item (a)	24,750	
			1,209,250

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(d) Additional return [Item (b) minus Item (c)]	120,750
(e) Amount to be transferred to stabilizing reserve ($900,000 — $825,000) (Par. 16a) to meet the basic reserve requirement	75,000
(f) Excess of additional return over basic reserve requirement [Item (d) minus Item (e)] (Par. 16b)	45,750
(g) One-half of Item (f) is transferred to stabilizing reserve (Par. 16b)	22,875
(h) One-half of Item (f) is available to the Company in earned surplus (Par. 18) and becomes the basis for future reduction in return (Par. 23)	22,875
(i) The ratio defined in the first sentence of Par. 23 does not apply in this case since no rate changes were made during the test year.	
(j) Applying the formula of Par. 23 to Item (h), which is less than 1% of the rate base, the calculated reduction of future experienced return is 60% of $22,875	13,725
Note: This is greater than the exempt limit expressed in Par. 27, therefore, a rate reduction is in order.	
(k) Because taxes based on revenues and income absorb about 45 cents out of each dollar of incremental operating revenue, the calculated reduction in return [Item (j)] will be accomplished by a rate reduction in year "F" of $13,725 ÷ 0.55, or	24,955

Case 3

In the event the balance in the reserve is less than the 1½% level and the return deficiency is greater than such balance.

Specific assumptions or calculations:

(a) Balance in stabilizing reserve, January 1, Year "E"		$110,000
(b) Experienced return for year "E"		1,086,000
(c) Basic return: Item (c) under "C"	$1,234,000	
Less: 3% of Item (a)	3,300	
		1,230,700
(d) Return deficiency [Item (c) minus Item (b)]		144,700
(e) After transferring the balance in stabilizing reserve to earned surplus (Par. 19) there remains an unrecouped return deficiency [Item (d) minus Item (a)] of		34,700
(f) Adjusted experienced return based on rate increase effective 4-1-"E" (Par. 22)		1,117,000
(g) Adjusted return deficiency [Item (c) minus Item (f)] ...		113,700

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(h)	Rate increases depend on the adjusted return deficiency ($113,700). First part of allowable increase in return is one-half the balance in stabilizing reserve [Item (a)] (Par. 25b)	$55,000	
	Second part is full amount of the difference by which the reserve balance fails to make up the adjusted return deficiency [Item (g) minus Item (a)] (Par. 25c)	3,700	
	Total allowable increase in return		58,700
(i)	Because taxes based on revenues and income absorb about 45 cents out of each dollar of incremental operating revenue the calculated increase in return [Item (h)] will be accomplished by a rate increase in year "F" of $58,700 ÷ 0.55, or		106,727

Case 4

In the event the balance in the stabilizing reserve is more than the 1½% level and the return deficiency is less than such balance and the balance in the reserve after adjusting for the return deficiency would be less than the 1½% level.

Specific assumptions or calculations:

(a)	Balance in the stabilizing reserve Jan. 1, Year "E"		$360,000
	Note: No rate changes would have taken place during the test year, because the balance in the stabilizing reserve is between the 1½% and 4½% levels. (Par. 22.)		
(b)	Experienced return for year "E"		1,100,000
(c)	Basic return: Item (c) under "C"	$1,234,000	
	Less: 3% of Item (a)	10,800	
			1,223,200
(d)	Return deficiency [Item (c) minus Item (b)] and amount to be transferred from stabilizing reserve to earned surplus (Par. 19)		123,200
(e)	Amount of reserve balance in excess of the 1½% level is to be excluded in determining the amount of rate increases [Item (a) minus Item (d) under "C"] (Par. 25a)		60,000
(f)	Fifty per cent of difference between Item (d) and Item (e) is the amount by which future return may be increased; (Par. 25b) one-half of $63,200		31,600
(g)	Because taxes based on revenues and income absorb about 45 cents out of each dollar of incremental operating revenues, the calculated increase in return [Item (f)] will be accomplished by a rate increase in year "F" of $31,600 ÷ 0.55, or		57,455

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No. 2266

In the Matter of the Application of New Jersey Bell Telephone Company for Permission to File Revised Tariffs to Become Effective on and After May 1, 1944.

Frank H. Sommer, Deputy Attorney-General, for the Board; *Thomas Glynn Walker,* for the Company.

BY COMMISSIONERS CONLON AND BOSWELL:

The New Jersey Bell Telephone Company has filed with the Board six new and revised sheets of its Toll Tariff, bearing an effective date of May 1, 1944, and 54 new and revised sheets of its General Exchange Tariff, effective May 1, 1944, and subsequent billing dates in May.

Reductions have been made in (1) collect call rates in an estimated amount of $20,000; (2) overtime rates of $25,000; (3) rates for extension station service of $254,000; and (4) mileage charges applicable to private line service and channels, and also mileage charges applicable to exchange and foreign exchange service of $421,000.

The total of the proposed reduction in rates amounts to $720,000 and effects decreases in the monthly bills of some 80,000 customers.

The filing is the culmination of a series of rate conferences with the company following the settlement effective January 1, 1943, of the American Telephone & Telegraph Company rate case before the Federal Communications Commission—Docket No. 6468.

As a result of the aforementioned Federal Communications Commission settlement, it was estimated that New Jersey Bell would receive additional revenue amounting to $597,000 per annum based on the 1942 volume of business, viz.:

Net effect of Long Lines changes		$946,000
Less: Increased Connecting Company Payments	$27,000	
Less: Reduction in Associated Companies Interstate Rates	322,000	
		349,000
Total		$597,000

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The amount of additional revenue to be derived by New Jersey Bell from the Federal Communications Commission settlement on the basis of the volume of business in 1943 was estimated at $704,000, or some 18 per cent higher than the amount based upon the 1942 volume of business.

The negotiations heretofore referred to finally resulted in the Company's proposal involving an annual reduction in revenues by approximately $720,000. In addition to the amount of revenue reductions involved in this proposal the Company placed into effect on March 1, 1944, a reduction of approximately $6,000 to conform night rates on intrastate toll calls with a change in night interstate rates effective on the same date. Hence revenue reductions involved in revised rate filings made by the Company since the Federal Communications Commission settlement total approximately $726,000. This corresponds to a revenue reduction to customers of 121.5 per cent of the additional revenue received by New Jersey Bell from the Federal Communications Commission settlement based upon the 1942 volume of business and 103.6 per cent based upon the 1943 volume of business. The Company's proposal compares favorably with reductions made by all other Associated Companies following the Federal Communications Commission settlement and, with the exception of the State of Wisconsin, exceeds that approved by any other State in the country.

The Company presented its proposed allocation of the reduction to the Board and such allocation has been studied and analyzed over a period of several weeks.

The use of an amount equivalent to the revenue reduction, involved in the present proposal for a reduction in basic exchange rates, rather than in the manner proposed, was particularly explored by the Board.

It does not seem desirable to depart from the present policy of conforming intrastate rates to interstate rates for comparable service, and since a very substantial amount of the total proposed revenue reduction is required for such conforming adjustments, the remainder is not sufficient to make any significant reduction in basic exchange rates.

The present exchange rate structure is based upon studies made more than twenty years ago. Consequently, prior to any overall change in basic exchange rate levels, there should be a more

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thorough re-examination of applicable principles in relation to present and, more particularly, probable post-war exchange service requirements and characteristics in order to establish a reasonable and proper basis for classification of exchanges and the fixing of basic exchange rates. Such studies are now receiving the attention of the Company's rate department and the cooperation and suggestions of the Board's staff in this respect will be utilized.

No other Associated Company has used the additional revenues resulting from the Federal Communications Commission settlement as the basis for a reduction in basic exchange rates.

In view of the foregoing, the proposed tariff revisions as hereinabove described are accepted for filing subject to protest by any interested party.

Dated, April 18, 1944.

Commissioner Jamieson dissents.

DISSENTING OPINION

BY COMMISSIONER CRAWFORD JAMIESON:

I am opposed to the acceptance of the settlement of the New Jersey Bell Telephone Company's proposal of reducing rates of two special groups of users by $725,000 as inadequate and unsound.

Four hundred twenty thousand dollars of the amount is to go in reductions to private line users. Practically, none of this goes to residence or the average business consumer. It reduces the rates of telephone users who have private telephone wires from one office or agency to another. A very large percentage of the reductions affect only a few big users such as the large radio stations.

Two hundred sixty thousand dollars of the settlement will result from reducing the price of extensions from 75c to 60c per month. Only $103,000 of this goes to residence users and that only to those who have more than one telephone instrument in their home.

It can readily be seen that the reductions have been made to the users of telephones who are in least need of it. The average consumer is getting no part of the reductions in spite of the fact that the average telephone consumer in New Jersey pays one of the highest rates in the nation. I wanted all the extra money

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obtained by New Jersey Bell, by reason of the Long Lines settlement of $50,700,000 with A. T. & T., to come to New Jersey consumers and in a fair and equitable manner by reducing exchange rates—the basic monthly bill of all residence users. As a member of the committee which negotiated the Long Lines settlement, it was my understanding that all of the money would go to consumers and that the State Commissions—not the Telephone Company—was to determine which rates would be reduced.

While my motion to continue our examination of the affairs of the New Jersey Bell with the $15,000 set aside last fall by the State House Commission was passed by our Board, last week, I believe our examiners will be severely hampered by a "gentleman's agreement" made by our Board with New Jersey Bell as part of the settlement. The majority of our Board agreed not to conduct separation of costs study for the duration of the war. I firmly believe this "off the record" feature of this settlement will be very harmful and I strongly disapprove of it.

Lewis T. Hayner, the expert retained a year ago by our Board to study and advise us of the effect of the Long Lines settlement on New Jersey Bell concurs with me in my disapproval of the proposal.

Dated, April 18, 1944.

No. 2267

Central Railroad Company of New Jersey—Application for Permission to Discontinue the Full-Time Agency Station at South Lakewood, New Jersey.

E. J. Harrington, for the Central Railroad Company of New Jersey; *W. D. McCloskey,* for Ocean County and James D. Holman; *E. C. McGrew,* for American Cranberry Exchange.

BY THE COMMISSION:

This matter is before the Board for approval of the discontinuance of the full-time agency at South Lakewood, Ocean County, New Jersey. After notice to interested parties, hearing was held on March 27, 1944, and it appears that the application has been induced by dwindling revenues and the desire to conserve manpower.

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South Lakewood is a station on the Southern Subdivision of the Central Railroad of New Jersey, located by operating direction 3.3 miles west of Lakewood and 4.6 miles east of Lakehurst. The applicant proposes to retain the station building without an agent and to continue the stopping of passenger trains as at present. Less than carload shipments of freight will be handled at Lakewood and carload freight will originate and terminate at South Lakewood as at present but the bills of lading will be handled by the agent at Lakewood. When necessary, the agent at Lakewood will travel to South Lakewood to handle bills of lading for carload shippers.

Objections to the discontinuance were made by the Board of Chosen Freeholders of Ocean County; James D. Holman, a cranberry shipper; and the American Cranberry Exchange.

The revenues and expenses for 1940, 1941, 1942 and January to July, 1943, were shown to be:

	Year 1940	*Year* 1941	*Year* 1942	*Jan.-July* 1943
Revenues:				
Gross C. L. Freight Revenue ...	$28,161.83	$40,651.87	$41,272.10	$12,460.34
Gross L. C. L. Freight Revenue	159.23	328.49	293.95	66.67
Gross Passenger Revenue	199.50	192.35	181.31	240.24
Gross Telegraph Receipts	5.97	5.59	2.26	.56
	$28,526.53	$41,178.30	$41,749.62	$12,767.81
C. R. R. of N. J. proportion of gross revenue:				
C. L. Freight	$25,616.05	$37,587.71	$34,723.21	$12,072.70
L. C. L. Freight	44.82	74.01	64.45	24.40
Passenger	199.50	192.35	181.31	240.24
Telegraph Receipts	1.95	1.83	.74	.18
	$25,862.32	$37,855.90	$34,969.71	$12,337.52
Expenses:				
Wages of Agent	$1,710.03	$1,783.88	$2,028.80	$1,135.68
Payroll Taxes	102.60	107.03	121.73	70.98
Fuel for Heating Station	18.60	13.95	15.45	.....
Insurance on Structure	1.72	1.72	1.72	1.00
Taxes on Structure	53.42	21.60	24.00	14.00
	$1,886.37	$1,928.18	$2,191.70	$1,221.66

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The number of carloads forwarded and received from 1926 to 1943 was as follows:

CARS FORWARDED

Year	*Sand*	*Cran-berries*	*Poles*	*Feed*	*Box Shooks*	*Coal*	*Lumber*	*Stone*
1926	3,932	30						
1927	4,647	10						
1928	3,856	21						
1929	4,279	18						
1930	3,097	35						
1931	1,478	12						
1932	573	16						
1933	564	20						
1934	661	12	99					
1935	711	22	65					
1936	876	13	49					
1937	1,025	17	64					
1938	693	7	49					
1939	701	18	9					
1940	579	9	0					
1941	765	12	38					
1942	642	12	52					
1943	359	11	56					

CARS RECEIVED

1934				34				
1935				24				
1936				19				
1937				1	2			
1938				1	0			
1939				2	2			
1940				8	2	2		1
1941				0	2	2		
1942				2	2	3		
1943				0	2		2	

Revenues from less than carload freight and passenger and telegraph business are small but the Central Railroad of New Jersey proportion of gross revenue from carload freight is substantial. While the carload business shows a peak in the year 1927 of 4,647 carloads of sand as compared with only 359 carloads of sand in 1943, the sand carload business has remained fairly constant since 1932. Carload shipments of cranberries forwarded have fluctuated since 1926 from a peak of 35 carloads in 1930 to 7 in 1938. In 1943, 11 cars were shipped but it appears that increased loading requirements imposed by the Office of Defense Transportation for the conservation of freight cars

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have resulted in the use of approximately 2 cars where 3 would be used in normal times, so that if normal loadings of cranberries had been made in 1943, the number of cars would have been approximately 15 or 16 instead of 11.

The Board is conscious of the present manpower shortage and also of the fact that the Company is in the process of reorganization and the necessity of minimizing expenses wherever possible. However, it is the Board's opinion that, unless there is a more marked decrease in business at this station, the agency should be continued. The application is, therefore, denied without prejudice to the right of the Company to renew its application if the trend of revenues further declines.

Dated, April 25, 1944.

No. 2268

New Jersey and New York Railroad Company—Application for Approval of the Discontinuance of the Agency and Abandonment and Removal of the Station Building and the Discontinuance of Passenger Train Stops at Hillsdale Manor, New Jersey.

Grover R. James, for the New Jersey and New York Railroad Company.

BY THE COMMISSION:

In its decision of December 27, 1940, on the application of the Trustees of the New Jersey and New York Railroad Company for approval of the discontinuance of the agency at Hillsdale Manor, removal of the station building, and discontinuance of passenger train stops, the Board permitted the discontinuance of an agency and the stopping of passenger trains at Hillsdale Manor but, with regard to the removal of the station building, stated

> "A different question is presented with respect to the request for removal of the station building. We understand that negotiations are pending between the municipality and the railroad to preserve the building as a civic center or for community purposes without expense to the railroad. While these negotiations are pending, decision on the application for removal will be withheld with the right reserved to the applicant to renew the application if the negotiations fail of consummation."

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Application is now before the Board for removal of the station building, by letter from Mr. H. R. Adams, Superintendent of the Railroad, on behalf of Mr. Peter S. Duryee, Trustee. On hearing after due notice, at which no objections were entered, it appears that the municipality does not desire to acquire the station building and that the Company has received an offer for purchase of the building from an individual.

Considering the evidence the Board is of the opinion that the building is no longer necessary and approval is hereby given to the Trustee to demolish or otherwise dispose of the building formerly used as the Hillsdale Manor Station.

Dated, April 25, 1944.

No. 2269

In the Matter of the Application of the Borough of Seaside Park in the County of Ocean for an Order Directing the Pennsylvania Railroad Company to Furnish Adequate and Proper Railroad Service Between Said Borough and Camden, N. J., During the Summer Season of 1944, and

In the Matter of the Application of the Borough of Island Heights in the County of Ocean for an Order Directing the Pennsylvania Railroad Company to Furnish Adequate and Proper Railroad Service Between Said Borough and Camden, N. J., During the Summer Season of 1944.

Walter Carson, for the Borough of Seaside Park and the Borough of Island Heights; *Windsor F. Cousins,* for the Pennsylvania Railroad Company.

BY THE COMMISSION:

This matter is before the Board on separate petitions of the Borough of Seaside Park and the Borough of Island Heights for an order directing the Pennsylvania Railroad Company to furnish adequate and proper train service between Camden and these boroughs in Ocean County during the summer season.

In addition to the formal applications of these boroughs, the Board has received other informal complaints about the service furnished by the Company during the summer of 1943 on this line, commonly known as the Atlantic Division of the Pennsylvania Railroad, running from Camden to Point Pleasant. According to the summer schedule proposed to be effective June 17, 1944, the service during the summer of 1944 would be essentially

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the same as that of 1943 and, therefore, subject to the same complaints.

After notice to the interested parties, hearing was held on June 12, 1944. It appears that the main issue is the morning and evening weekday service provided during the summer season for shore residents commuting to Camden and Philadelphia area on business.

The line in question runs between Camden and Point Pleasant, running through Mount Holly, South Pemberton and Toms River and other communities on the line. The portion of the railroad between Camden and South Pemberton is principally in a local commuting territory and is used mainly for commutation to and from the Camden area. To serve the needs of this area there are three local trains in the morning beginning at Pemberton and terminating at Camden, and, reversing the order, there are three trains in the evening beginning at Camden and terminating at Pemberton, making all local stops between these two points. In addition to these three short-line trains there is a fourth train westbound in the morning starting from Point Pleasant making twenty-nine stops and terminating at Camden and, in the evening there is an eastbound train beginning at Camden and terminating at Point Pleasant making thirty-two stops. This has been the all-year-round service on the line which is 72 miles in length. The complaining towns and others in the vicinity between Toms River and Point Pleasant are principally summer residence towns so that during the fall, winter and spring seasons the service above described may be fairly sufficient to meet the need.

Prior to the summer of 1943, the extra load of passengers imposed on the railroad by the summer seashore residents induced the Company to put on an additional local train in the morning and evening between Camden and Pemberton to take care of the local commuter traffic so that the morning and evening seashore trains could operate as expresses through the local commuter territory; that is, between Camden and South Pemberton. In the summer of 1943 the Company, without conference with and approval of the Board, contrary to the usual practice, discontinued the operation of the shore train as an express during the summer months as above described. It also extended the schedule of the shore train by 22 minutes in the morning and 30 minutes in the evening.

The undisputed evidence shows that even with such extension of schedule the shore trains were hardly ever on time at either

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terminal. Out of 52 trips by each train in the months of July and August, 1943, these trains were late as much as 58 minutes, the train from Camden to the shore points having failed to operate on time in any single day during the month of July and but twice during the month of August. The train from the shore point to Camden operated on time twice in July and 10 times in August. This, notwithstanding the extended time as provided for on the schedules. The result was that for a trip of 72 miles more than 2 hours were consumed, in many instances requiring over 5 hours of travel a day for commuters from Point Pleasant to Camden-Philadelphia area to make their round trip.

One explanation offered by the Company for these frequent and extraordinary delays was movement of troops in and out of Fort Dix, directly above Pemberton. It appears, however, that such troop movements account only in minor part for the delays and that such delays occurred irrespective of such troop movements and were in large part due to the local operation of the shore train through the Camden-Pemberton territory. It also appears that the existing condition of inadequate and improper service is not altogether a matter of recent origin. The evidence shows that the service has progressively deteriorated over a period of years.

It further appears that during the summer months of 1943 the seashore train was lengthened by the addition of extra cars and a similar plan is intended for the summer of 1944. The nature of the complaints is not directed to a lack of seats on the trains in question but to the unreasonableness of the schedules and time consumed to commute to the Camden area. The addition of cars, therefore, does not answer the complaint.

The Board is not unmindful of the severe strain under which the carriers are laboring through the war effort to meet the demands of passenger service. Adequate and proper service in war-time must be measured by different standards than during peace-time. The service now rendered is, however, neither adequate nor proper even under war-time standards and is, in effect, a denial of service.

The sole explanation offered by the Company is that it does not have the engine, the car equipment, and the crew to make up the train for local service between Camden and Pemberton in the event that the shore train is made express between these two points. This explanation of the Company is not very convincing

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and the Board is not impressed thereby. By making the shore train an express between Camden and South Pemberton its load will be lessened to the extent of the local commuters between these two points, making it possible to release the additional extra cars on the shore train and thus in turn supply, at least in part, equipment necessary for a local train. Under these circumstances it will only be necessary for the Company to supply an additional engine and crew for the morning and evening run between Camden and Pemberton.

The testimony is entirely silent as to what, if any, study or effort had been made by the railroad to secure the needed equipment in spite of the fact that the Company does not deny that the present schedule does not render proper and adequate service.

From all of the evidence the Board has reached the conclusion that the schedule put in effect on June 17, 1944, with respect to the morning and evening trains operating between Point Pleasant and Camden does not furnish adequate and proper service. From that evidence the Board also concludes that the local service between Camden and Pemberton provided by said schedule is required for adequate and proper service.

Now, therefore, the Board HEREBY ORDERS AND DIRECTS the Pennsylvania Railroad Company to operate the morning and evening shore trains between Camden and Point Pleasant as express trains through the local territory between Camden and South Pemberton, stopping only at Mount Holly, and, also to operate a substituted train between Camden and Pemberton, making the local stops, to continue to provide adequate and proper service in this territory to carry the war workers and other local passengers. This Order is to be effective on and after July 6, 1944, to September 17, 1944.

Dated, June 27, 1944.

Commissioner Conlon does not concur.

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No. 2270

In the Matter of the Application of Somerset Bus Company, Inc., for Approval of New Schedule of Fares on the Newark-Somerville Service 140, Newark-Plainfield Service 141, and Newark-Westfield Service 142.

James F. X. O'Brien, for Somerset Bus Company, Inc.; *William H. Blake* and *J. H. Mulhern,* for Public Service Coordinated Transport; *E. J. Harrington,* for Shelton Pitney and Walter P. Gardner, Trustees of the Central Railroad Company of New Jersey; *Benjamin C. Gurnik,* for Town of Irvington; *Charles Wagner,* for Township of Union.

BY THE COMMISSION:

This is an application by Somerset Bus Company, Inc., for permission to file a new schedule of tariffs on its operations between Newark, Plainfield, Westfield and Somerville. The applicant's lines are divided into seventeen (17) fare zones. Between all zones where reduced round-trip fares are published the present tariffs provide for a one-way fare in a stated amount and a round-trip fare at a cost of the one-way fare plus ten cents. This is a method of fare collection which is unique with this Company and is not in effect on any other bus operation in the State.

The purpose of the application is to eliminate the present method of computing round-trip fares and to establish in lieu thereof one-way fares so that they shall in each case be one-half of the proposed round-trip fares.

Schedule I attached to the application shows that the change in net revenue to the Company under the proposed fares will be negligible. The applicant contends that the present tariffs have proved cumbersome and discriminatory and have resulted in public inconvenience. The evidence indicates that this contention is correct, and that the public can be better served by the new tariffs which will eliminate all round-trip fares without materially increasing or decreasing the cost of round-trip riding.

No substantial objection was interposed by the municipalities affected. The principal objection emanates from Public Service Coordinated Transport, over portions of whose lines the applicant is in direct competition. The objector contends that the history of the operation of its lines and the applicant's lines, as indicated by the many previous decisions of the Board affecting

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the two operations, discloses that Public Service Coordinated Transport, having been the primary operator in the field, was originally protected by the Board by the establishment of fares for Public Service Coordinated Transport which were generally lower than those of the applicant. The claim is that this situation originated many years ago by the permission to the applicant to run a "de luxe" line from Newark to Somerville which, by reason of the higher fares charged, was not in competition with Public Service Coordinated Transport; that through the course of years the differentials in the fares between the two operations have gradually been eliminated and that the result has been that the two lines have eventually come into direct competition. There seems to be considerable merit to this contention, but, on the other hand, there seems reasonable ground for finding that the alleged encroachments by the applicant have resulted primarily from the changes in the traveling habits of the public and the incidental changes in the public necessity and convenience. It is admitted by all parties of interest that the applicant's proposed one-way and round-trip fares in no instance are less than those of Public Service Coordinated Transport in the areas serviced by both the applicant and Public Service Coordinated Transport.

Considering the situation entirely from the aspect of convenience, there is no question but that the public will, in general, benefit by the establishment of the proposed fare schedules. If the business of the Public Service Coordinated Transport is adversely affected it will not be by reason of the proposed changes of its competitor's fares, but merely by reason of the fact that the public may more conveniently pay the new fares proposed by the applicant. The Board cannot reasonably give protection to the objector in the premises merely by maintaining cumbersome fare schedules on a competing line to the exclusion of the benefits that will accrue to the public.

On the basis of the foregoing considerations, the Board finds and determines that the proposed change in schedules of the applicant are in the public interest and will accept the proposed fare schedule for filing, to take effect on August 1, 1944.

Dated, July 17, 1944.

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No. 2271

In the Matter of the Petition of Henry K. Norton, Trustee of the Property of New York, Susquehanna and Western Railroad Company, for an Order Determining That the Grade Crossing Carrying East 39th Street Over the Railroad of New York, Susquehanna and Western Railroad Company, in the City of Paterson, Passaic County, New Jersey, Be Closed, Discontinued and Vacated.

G. R. James, A. L. Kline and *F. C. Kronauer,* for the Trustee of the New York, Susquehanna and Western Railroad Company; *George Diamond* and *Vincent Scanlon,* for the City of Paterson.

BY THE COMMISSION:

The Board of Public Utility Commissioners has this matter before it on petition of Henry K. Norton, Trustee of the New York, Susquehanna and Western Railroad Company, dated July 28, 1944, for an order requiring the petitioner to eliminate the grade crossing of the tracks of the New York, Susquehanna and Western Railroad Company and the public highway known as East 39th Street, in the City of Paterson, County of Passaic, State of New Jersey.

After notice as required by law, hearing was held on August 17, 1944, and it appears that (1) East 39th Street is a public highway other than a State highway in the City of Paterson, County of Passaic, State of New Jersey; (2) two main line tracks of the New York, Susquehanna and Western Railroad Company cross the highway at grade; (3) the crossing is dangerous to public safety and public travel on the highway is impeded thereby.

A plan was submitted by the Railroad Company which provided for the elimination of this crossing by closing it to public travel and diverting highway travel over a street to be constructed to the north of the tracks to connect with a public highway known as Vreeland Avenue. The connecting street will be 50 feet wide, consisting of a paved width of 30 feet between curbs and two sidewalk areas, each 10 feet wide. The highway pavement will consist of an asphalt top on a 6-inch stone base and a concrete sidewalk is to be built on each side of the street 5 feet in width. The connecting street, as measured along its center line, will be approximately 138 feet long. The Railroad Company estimated

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the cost of this plan to be $7,293.55, including the land necessary for the connecting street.

No objections were offered to the plan proposed by the Railroad Company and the City Engineer for Paterson testified that the City has agreed to the vacation of East 39th Street as a public highway within the right-of-way of the Railroad Company with the understanding that the connecting street will be built to divert traffic between East 39th Street and Vreeland Avenue.

A member of the Board's staff, Mr. J. I. Leonard, Principal Engineer, Division of Railroads, testified that he had examined the crossing at East 39th Street, that it is hazardous, and that the plan proposed by the Railroad Company is a proper plan to effect the elimination of the grade crossing.

CONCLUSIONS

The Board finds that the said East 39th Street is a public highway other than a State highway, crossing at grade in the City of Paterson, County of Passaic, and State of New Jersey, a railroad operated by Henry K. Norton, Trustee in Bankruptcy for the New York, Susquehanna and Western Railroad Company; that the crossing is dangerous to public safety; and that public travel is impeded thereby.

The heretofore described features for eliminating the grade crossing are shown on a plan entitled

"N. Y., S. & W. R. R. Co.
LAYOUT AT VREELAND AVE. STA.
PATERSON, N. J.

Office of Chief Engr.	Paterson, N. J.
Scale 1" = 20'	January 29, 1943
Val. Sect. 3 N. J.	Sheet No. 7
Made by G. C. W.	Checked by O. A. C. T.

Rev. Aug. 9, 1944
Rev. July 26, 1944

DRWG. No. F2-42-1"

which the Board finds to be a proper plan for the elimination of this grade crossing and hereby approves it.

The Board will set the first day of November, 1944, as the date for beginning the work, and three months thereafter, or the first day of February, 1945, as the date for its completion.

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This proceeding was brought under Revised Statutes 48:12–61 to 48:12–67, inclusive, which provide that the expense "of such alterations, changes, relocation or opening, including damages to adjacent property and the cost of removing, relaying or relocating any municipal pipes, conduits or subways" shall be paid 50 per centum by the railroad company involved and 50 per centum by the Board, and further

> "Where the order of the Board shall require changes in or the removal of the property or constructions of a street railway, telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company, co-partnership or individual, each shall at its or his own expense move or change the location or grade of their property or constructions in conformity with such order; * * *"

An Order in accordance herewith will issue.

Dated, August 21, 1944.

ORDER

On petition of Henry K. Norton, Trustee of the property of New York, Susquehanna and Western Railroad Company, the Board of Public Utility Commissioners called a hearing by virtue of the powers conferred on it by Revised Statutes 48:12–61 to 48:12–67, inclusive, to determine whether the highway known as East 39th Street, in the City of Paterson, County of Passaic, State of New Jersey, which crosses at the same level the railroad operated by New York, Susquehanna and Western Railroad Company, is dangerous to public safety or that public travel on such highway is impeded thereby and what, if any, order shall be made by said Board for the elimination of said crossing by substituting therefor a crossing not at the grade of such public highway, either by carrying such public highway under or over such railroad or by reconstructing such railroad under or over such public highway or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in the place of the one ordered vacated, and to determine any and all other matters which may be involved and the determination of which may be within the power of said Board in the separation of the grades of said highway and of said railroad.

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The Board having fixed a time and place for hearing before it, and having given notice thereof to said city, county, the Trustee of the property of the New York, Susquehanna and Western Railroad Company, and all other corporations, copartnerships and individuals interested therein, all in accordance with the provisions of said Revised Statutes, and all of the parties in interest who appearing having been heard, the Board filed a Decision on August 21, 1944 of its findings and determinations, which said Decision is made a part of this Order by reference thereto herein, and it

Now appearing to said Board that East 39th Street is a public highway other than a State highway, that the said public highway and the New York, Susquehanna and Western Railroad Company in the City of Paterson, County of Passaic, cross each other at the same level, and that such crossing is dangerous to public safety and that public travel on the said highway is impeded thereby and that said crossing should be altered according to a plan approved by the Board, which said plan, having been prepared and approved, now, therefore, it is on the twenty-first day of August, 1944,

Ordered, and the said Board of Public Utility Commissioners, by virtue of the power and authority vested in it by the aforesaid Revised Statutes, does

HEREBY ORDER the Trustee of the property of the New York, Susquehanna and Western Railroad Company to alter such crossing according to the plan therefor annexed and made part hereof, which plan is entitled

"N. Y., S. & W. R. R. Co.

LAYOUT AT VREELAND AVE. STA.
PATERSON, N. J.

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by substituting therefor a new street north of the railroad connecting said East 39th Street with Vreeland Avenue, and by vacating the remaining part of said East 39th Street within the lines of the right-of-way of said railroad and by performing all such work required according to and as shown on said plan.

Any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, whose property or constructions it may be necessary to change or remove to carry said plan and this Order into effect, shall change or remove the same according to said plan.

AND IT IS FURTHER ORDERED that the said Trustee of the property of New York, Susquehanna and Western Railroad Company, the City of Paterson, Board of Chosen Freeholders of the County of Passaic, Public Service Electric and Gas Company, Western Union Telegraph Company, New Jersey Bell Telephone Company, and all other parties to this proceeding, and each and every one of them proceed with due diligence to the execution of this Order and comply with all of the requirements thereof and the duties imposed upon them thereby and by the said Revised Statutes under which this Order is made and the laws of this State, and to that end, they and each of them, exercise in good faith all of the powers conferred upon them and each or any one of them, by the laws of this State,

AND IT IS FURTHER ORDERED that the said Trustee of the property of the New York, Susquehanna and Western Railroad Company begin the actual work of construction required in the performance and execution of this Order on or before the first day of November, 1944, and continuously carry on same thereafter and perform and fully comply with the directions and requirements of this Order and complete all of the work thereunder required to be done within three months thereafter or by the first day of February, 1945.

This Order shall become effective immediately.

Dated, August 21, 1944.

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No. 2272

In the Matter of the Application of James K. Allardice, Receiver of The Lakewood Water Company, for Approval of the Sale of the Property and Franchises.

James K. Allardice, Receiver of The Lakewood Water Company, appointed by order of the Court of Chancery of New Jersey under date of August 21, 1944, in a matter then pending in the said court between Jersey Central Power & Light Company, a corporation, Complainant, and The Lakewood Water Company, a corporation, et als., Defendents, by petition dated August 22, 1944, applies to the Board of Public Utility Commissioners for approval of the sale and conveyance of all of the properties, facilities and franchises of the said The Lakewood Water Company to John H. Ware, Jr., in accordance with the terms of a contract executed on the 18th day of August, 1944, between the said The Lakewood Water Company and John H. Ware, Jr., and in accordance with the terms and conditions of an order of the Court of Chancery of New Jersey entered on the 21st day of August, 1944, in the above-mentioned cause, all of which are attached to the said petition and described in Schedules A and C thereof. Accompanying the petition are also copies of resolutions of the Board of Directors of The Lakewood Water Company and the Stockholders of The Lakewood Water Company authorizing the said sale. The said application, together with its attachments is made a part hereof by reference thereto.

Hearing was held on the said petition on the 24th day of August, 1944, and testimony introduced for and on behalf of the Petitioner in support of his petition, from all of which it appears that:

On the 19th day of August, 1944, The Lakewood Water Company by unanimous consent of its Stockholders filed a certificate of dissolution in the Office of the Secretary of State of New Jersey.

Theretofore, to wit, on the 18th day of August, 1944, The Lakewood Water Company, under and by virtue of a resolution of its Board of Directors and of its Stockholders, had entered into a contract with John H. Ware, Jr., for the sale of all of its properties, facilities and franchises.

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On the 21st day of August, 1944, the Petitioner was appointed Receiver in dissolution of The Lakewood Water Company by order of the Court of Chancery of New Jersey and was by the said order authorized and directed to complete and consummate the contract for the sale of the properties, facilities and franchises of The Lakewood Water Company to John H. Ware, Jr., acting as a Receiver in Dissolution in place of the Trustees in dissolution.

The purchase price provided for in the said contract is the sum of three hundred sixty-five thousand dollars ($365,000). The said contract, among other things, provides for adjustment of all accounts as of closing date, and further provides for the purchaser to purchase from the seller all of the seller's accounts receivable from customers of the seller as of closing date and to pay therefor ninety-eight per cent (98%) of the amount thereof.

It also appears from the testimony that the Jersey Central Power & Light Company is the owner of all of the outstanding capital stock of The Lakewood Water Company with the exception of Directors' qualifying shares, and is likewise the owner of all of the outstanding bonds issued by The Lakewood Water Company.

The proposed sale is a step consistent with and pursuant to divestment requirements of the Securities and Exchange Commission for the divestment of the properties in question.

In view of the position of the Jersey Central Power & Light Company as sole owner of all of the outstanding stock and bonded obligation of The Lakewood Water Company, the result of the transaction will be in effect a payment to Jersey Central Power & Light Company in return for the securities of The Lakewood Water Company now held by it and to be surrendered or canceled in the process of liquidation.

The Board of Public Utility Commissioners, after hearing upon notice and due consideration, now determines that the proposed sale of the properties, facilities and franchises of The Lakewood Water Company by the Petitioner, James K. Allardice, Receiver, to John H. Ware, Jr., is for a fair and reasonable consideration, and further that the said John H. Ware, Jr., constituted a body politic and corporate by the statutes applicable thereto, is fit and able to render safe, adequate and proper service and therefore that the proposed sale is not contrary to the public interest, and no reason to the contrary appearing,

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HEREBY GRANTS said petition and APPROVES of the sale of the said properties, facilities and franchises to John H. Ware, Jr., in accordance with the terms and provisions of the contract of sale dated August 18, 1944, and in accordance with the Order of the Court of Chancery dated August 21, 1944.

This certificate is issued subject to the following provisions:

1. That if the said sale of the properties, facilities and franchises of The Lakewood Water Company is not fully consummated within sixty (60) days of the date of this certificate, this certificate shall become null and void and of no effect.

2. That satisfactory proof of the retirement of all of The Lakewood Water Company's First Mortgage Six Per Cent (6%) Gold Bonds, Series A, in the total principal amount of Three Hundred Forty-eight Thousand Three Hundred Dollars ($348,300) as required by the terms of the aforesaid contract shall be submitted to the Board within sixty (60) days of the date of this certificate.

3. That this certificate shall not be construed as fixing for any purposes other than for the approval of this application, directly or indirectly, any value of the tangible or intangible property to be sold by the applicant.

4. That this approval is without prejudice to the authority of the Board or of the State with respect to rates, valuations, services or any other matters as concerns the properties, facilities and franchises to be sold.

5. That all existing books and records of The Lakewood Water Company shall be turned over to John H. Ware, Jr., upon the consummation of the transaction herein approved.

6. That all accounting entries to be made either by Jersey Central Power and Light Company or John H. Ware, Jr., in order to reflect the transactions herein approved shall be submitted to the Board for approval prior to being recorded on said books.

7. That John H. Ware, Jr., submit to the Board within sixty (60) days of the date of this order, satisfactory evidence of his organizing a new corporation to carry on the business of The Lakewood Water Company in accordance with the statutes applicable thereto and particularly in accordance with R. S. 48:3–21.

The applicant and the purchaser shall file with the Board within ten (10) days of the date hereof, and in any event before the consummation of any of the transactions herein approved, a verified acceptance of this certificate and of its provisions, insofar as such provisions respectively relate to them.

Dated, August 24, 1944.

Commissioner Jamieson dissents for reasons to be hereafter filed.

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DISSENTING OPINION

BY COMMISSIONER JAMIESON:

Application by James K. Allardice, Receiver of The Lakewood Water Company, for approval of the sale of all of the properties and franchises of The Lakewood Water Company to John H. Ware, Jr., was filed with the Board of Public Utility Commissioners on August 23, 1944. A majority of the Board voted to comply with the request of the applicant to grant a hearing on the application on August 24. A certificate approving the application was ordered by a majority of the Board on August 24, 1944.

Under the usual procedure of the Board of Public Utility Commissioners, an application of this importance would have the study, investigation and consideration of the Board and its staff for a period of several weeks, if not months.

The usual custom of the Board is to recess from hearings during the month of August and there had been such a declared policy for this year.

The testimony in this case is that the only purpose to be accomplished by a hasty decision this week in this matter is the avoidance of the payment of $320,000 in excess profits taxes to the Federal Government by establishing a tax loss prior to the anticipated purchase by NYPANJ, a holding company, of all of the stock of the Jersey Central Power and Light Company, owner of all of the stock of The Lakewood Water Company, at an auction sale in New York on August 28.

The uncontradicted testimony of all witnesses, which include an official of the selling Company and the purchaser, is that the public interest would in no way be harmed by a decision at any time within the next two months.

On the other hand further consideration of this application would be beneficial to the public interest. The purchase price of this Company is $365,000. The net income on investment on The Lakewood Water Company for the past twelve months was $29,500. This is obviously an excessive rate on $365,000 because in a large majority of decisions by utility commissions it has been held that a fair rate on water utilities is 5 per cent. If the testimony is to be believed that $365,000 is a fair and reasonable price, the rates of this Company should be adjusted downward

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considerably. There should be sufficient delay in making this decision to have the new company submit a new schedule of rates. The purchaser has not, as yet, formed his new company and the effect of this hasty decision by the majority means that the consumers of The Lakewood Water Company will pay a greatly excessive rate for service for a protracted period of time pending negotiations for reductions or the institution of a rate case to enforce reduced rates. The corresponding effect therefore of the decision is to permit the new purchaser to earn a very excessive rate of return during that protracted period of time.

The Jersey Central Power and Light Company, which proposes to evade the payment of this $320,000 tax bill, has just had its most prosperous year in the last decade due to war expenditures by the Federal Government. The Internal Revenue Act was passed by Congress for the express purpose of having such unusual wartime profits help carry the burden of war costs through excess profits taxes. Under the spirit, if not the letter, of the Internal Revenue Act, this money should go into the Federal Treasury to help meet war expenses. This amount of money would buy one bomber, and two fighter planes.

I heartily disapprove of the action of our Board in greatly hastening its usual processes for the sole purpose of assisting a taxpayer to evade the payment of Federal war taxes.

I do not believe that this artificial "shot in the arm" is of material importance in the attempts of Jersey Central Power and Light officials to save that Company. The Company already is obtaining greatly excessive rates from its consumers. It has been a very sick Company ever since the criminal manipulations of its finances by officials of Associated Gas Corporation, of which it was a subsidiary. Its outstanding securities exceed by millions the value of its properties. It must be reorganized and it would be more beneficial to its security holders and consumers if the reorganization was not further postponed.

SUPPLEMENTAL MEMORANDUM

BY COMMISSIONER CONLON:

On August 24, 1944, in accordance with a resolution of the majority of the Board, I signed a certificate of approval in the above matter. Thereafter, on August 28, 1944, a dissenting

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opinion was filed by Commissioner Jamieson. Inasmuch as some of the statements contained in his opinion are not in accord with my conception of the facts, and in order to maintain the record of this proceeding in proper form, the Secretary is directed to file this memorandum with the original certificate and dissenting opinion and to make it a part thereof.

Several of the statements made by Commissioner Jamieson in his dissenting opinion will be taken up in order and answered.

1. *Haste in the Proceeding.*

Commissioner Jamieson states that the application in this matter was filed on August 23, 1944, heard on August 24 and determined the same day, without proper investigation and consideration by the Board and its staff. This is technically correct but factually false. The original application was filed in this matter on August 1, 1944, prior to which time there had been informal discussions with the Board's staff. The original application was made by The Lakewood Water Company. The Board's staff completed a detailed report of the matter and presented it to the members of the Board on August 3. Thereafter the matter was set down for hearing on August 10 and then adjourned until August 24. The application filed on August 23 was merely a restatement of the original application, but the Receiver appointed by the Court of Chancery for The Lakewood Water Company was substituted in place of the Company itself as applicant. This was made necessary by reason of the advice of the Board's counsel to the effect that the statutory requirements in the premises necessitated the appointment of a Receiver in dissolution. The supplemental petition in no wise altered the facts contained in the original application.

By August 24, the date of the hearing, the staff had completed to its satisfaction the entire investigation in the matter and had so indicated to the Board. The Board (or some of its members) had had several conferences on the matter and were thoroughly familiar with all of the details. At the conclusion of the hearing the staff unanimously recommended to the Board the approval of the application and no suggestion was made by anybody except Commissioner Jamieson that any delay in the disposition would be of help. It therefore appears that before this matter was disposed of it had had the consideration of the Board and staff

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for a period of from three to four weeks. The intimation by Commissioner Jamieson that the Board acted without due consideration is not in accord with the facts.

2. *Excess Profits Tax Saving.*

Commissioner Jamieson in his dissenting opinion makes the following statement: "The testimony in this case is that the only purpose to be accomplished by a hasty decision this week in this matter is the avoidance of the payment of $320,000 in excess profits taxes to the Federal Government." This statement is contrary to the fact and is in direct conflict with the testimony. The testimony showed that the purchase price of $365,000 was, in the judgment of the officers and directors of the Company, a fair price and the best that could be obtained, and that, subject to this Board's approval, the sale would be consummated regardless of any excess profits tax saving. (Testimony, page 38, et seq.) The testimony also disclosed that if the sale were perfected after the acquisition by NYPANJ Utilities Company of the balance of the common stock of Jersey Central Power & Light Company, any tax saving resulting from the sale would be spread over all of the Companies in the Associated System, while if the sale were consummated before the NYPANJ Utilities Company's purchase, the entire amount of the saving—between $264,000 and $320,000—would inure to the benefit of the Jersey Central Power & Light Company. Only one other company in the Associated System is within the jurisdiction of this Board. Therefore, in my opinion, it is obvious that it was our duty to see to it that this saving would benefit the local utility and not the utilities in the Associated System in foreign jurisdictions.

Commissioner Jamieson terms it "an evasion of taxes." There is no justification for such a statement. I conceive it to be the duty of the board of directors of any utility to see to it that every utility receives the benefit of such tax savings as legally accrue to it. It has been so held by the Courts, and, in my opinion, both the directors of the utility involved and this Board would be derelict in their duty if they deliberately allowed unnecessary taxes to be imposed upon a utility, particularly in view of the fact that the customers of the utility in the final analysis pay all of such taxes.

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3. *Reduction in Rates.*

Commissioner Jamieson in his dissenting opinion states that in view of the purchase price of $365,000 the return of this utility is excessive and "there should be sufficient delay in making this decision to have the new company submit a new schedule of rates."

No study has been made of this problem, and from a cursory examination such a statement is definitely unwarranted without the benefit of further examination. This Company has an original cost figure for its water and sewer properties of something over $900,000, so that from the aspect of an original cost rate base no reduction could possibly have been justified. The original cost investment is divided almost equally between water and sewer properties. The net return from the sewer operations is approximately $5,000 per annum, which under any conservative theory of rate-making is grossly inadequate. It may be that future studies will indicate that a reduction of the water rates is justified. In any case, if the rates to the water consumers were reduced to any material extent the Board might immediately have to consider the impact thereof upon the operation of the sewer service and consider whether or not an increase in the sewer rates should not necessarily have to be allowed. The net result might be merely a juggling of figures in view of the fact that the water and sewer customers are in almost all instances the same people.

In establishing a rate base for the purchaser company, the Board would undoubtedly be precluded by proper legal standards from adopting the purchase price of $365,000 as a rate base. Mr. Ware testified (Testimony, page 76) that the purchase—including incidental expenses—would require an initial outlay of approximately $400,000. To this there might be added an amount for working capital, and in addition to this Mr. Ware stated that he plans a capital expenditure up to and maybe exceeding $100,000 to improve the facilities of the Company.

On the figures now available, Dr. Foster, the Board's consultant, was of the opinion that a reduction was not justified at this time.

Whether or not the rates of the Company should be reduced is a matter for the Board's consideration in the usual course. The fact remains that there was nothing before Commissioner Jamieson to justify the statements made in his dissenting opinion,

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either from any staff reports or from any study that he himself had made.

He states that the decision should have been delayed pending such a study of the rates and that the approval of the application results in allowing the Company to charge excessive rates "for a protracted time." This argument is obviously captious. If the decision had been delayed pending a study of the rate structure, or if the decision were made and a study of the rates then prepared, the result is exactly the same. In either case the utility must necessarily be allowed to charge its present rates pending the study.

4. *Effect Upon Jersey Central Power & Light Company.*

In this respect Commissioner Jamieson makes three statements which are not justified by any information before the Board. They are the following:

> (1) The Company already is obtaining greatly excessive rates from its consumers.
>
> (2) The Company's outstanding securities exceed by millions the value of its properties.
>
> (3) The Company must be reorganized and it would be more beneficial to its security holders and consumers if the reorganization was not further postponed.

Whether or not the above statements or any one of them is true is not now within the knowledge of Commissioner Jamieson, nor does he have sufficient facts upon which to base a rational judgment. On May 23, 1944, the services of Dr. J. Rhoads Foster were engaged by the Board for the primary purpose of examining into all of the aspects of the affairs of the Jersey Central Power & Light Company. In accordance with that arrangement, by July 19 he had prepared a preliminary report which was forthwith transmitted to each member of the Board. In that preliminary report Dr. Foster answered none of the above questions. He did indicate the problems involved and laid out a proposed procedure for his future investigation. In his letter of transmittal he said the following: "I will be available to proceed with this work immediately whenever the Board indicates its approval or disapproval of the proposed procedure." Since that time Commissioner Jamieson has given no indication either of having examined Dr. Foster's report or of having approved or disapproved his suggestions. On August 22 last, I personally inter-

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viewed Dr. Foster and in the absence of any indication from Commissioner Jamieson as to his opinion, I took it upon myself to instruct him to proceed with his examination in accordance with his suggestions, subject to some minor changes which I proposed and with which he was in accord. In following these instructions the first thing he is to do is to prepare a rate conference report. It is true that the rates appear to be too high, but not until the Board is in receipt of this report will it have sufficient information upon which to base an opinion as to whether or not the rates of the Company are excessive and, if so, to what extent.

At the same time Dr. Foster is considering the possibilities involved in a reorganization of the Company, which we understand the directors are trying to avoid. Dr. Foster's research will be directed particularly to the determination of the advisability of a reorganization from the standpoint of the customers and the preferred stockholders, a large percentage of whom are consumers of the Company living within its territory. This study is complex and until it is completed it is impossible for Commissioner Jamieson or anybody else to have a rational opinion on the matter. As a matter of fact, the institution of a proceeding for a capitalization reorganization of the Company is solely within the jurisdiction of the Securities and Exchange Commission. While this Board must at the proper time pass upon many aspects of a reorganization, it cannot, under the statute initiate any such proceeding.

There is nothing before the Board to indicate, as stated by Commissioner Jamieson, that the outstanding securities of this utility exceed by millions the value of its properties. That may or may not be a fact, but he was personally present in my office on August 24 when Dr. Foster made the oral statement that from the research he had thus far made he was presently of the opinion that there was some equity in the Company over and above the bonds and preferred stock.

This memorandum is filed by me so that the record may clearly indicate my position in the matter and my conviction that the statements above referred to in Commissioner Jamieson's dissenting opinion are misleading.

Dated, August 30, 1944.

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No. 2273

In the Matter of the Application of Jersey Central Power and Light Company for Approval of the Sale of Property Known as the Electric Building, Situated in the City of Asbury Park, New Jersey.

Autenrieth & Wortendyke (by *Joseph F. Autenrieth*), for Petitioner.

BY COMMISSIONERS CONLON AND BOSWELL:

Jersey Central Power & Light Company by petition dated August 7, 1944, applies for approval of the sale of property in the City of Asbury Park, known as the Electric Building, to Tastyeast, Inc., in accordance with the terms of a contract attached to the petition and made part thereof.

A hearing was held on the application on August 24, 1944 and testimony was introduced in support thereof. From such testimony it appears that the property in question is owned by the Petitioner and consists of a tract of land with an eleven-story office building thereon which is occupied in part by Petitioner for commercial offices and other Company purposes, and in part rented to others.

The price fixed by the contract of sale is $175,000. In said contract the Petitioner agrees to lease all of said premises from the purchaser for two years at an annual rental of $7,500 and to assume all operating expenses, taxes and maintenance costs. The rental of $7,500 per annum fixed by the proposed lease appears to be no more than a reasonable net return upon the proposed investment of $175,000 by the purchaser.

Two questions arise. *First,* whether or not the continued ownership of said property by Petitioner is necessary to enable it to furnish proper and adequate service. The proposed lease enables the Company to continue in its present use of the property and to determine within the leasehold period whether other and more advantageous arrangements may be made to house the utility operations which are now carried on in the premises. That such arrangements can be made affirmatively appears from the record. Therefore, it is entirely clear that continued ownership is not necessary to enable the Petitioner to furnish adequate and proper service.

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The *second* question is whether or not the purchase price and terms of sale are reasonable and the best now obtainable. The testimony shows that the property was listed for sale with realtors dealing with shore business properties; that various offers to purchase were made; that the Petitioner actively sought to negotiate mortgage loans for prospective purchasers, and finally the offer of Tastyeast, Inc., was accepted as the most advantageous which could have been obtained. There is no affiliation or relationship between the Petitioner and Tastyeast, Inc. It therefore appears that acceptance of the offer of Tastyeast, Inc., followed upon a bona fide and vigorous effort of Petitioner, continued over a period of several months, to secure the highest possible price for the property.

Ordinarily these findings on the questions involved would, without more, result in the issuance of a certificate giving the Board's approval to the proposed sale.

However, the record discloses other facts which cannot go unnoticed.

The ownership of the property was acquired by the Petitioner immediately prior to the sale now proposed and for which approval is asked. The purchase price paid by the Petitioner was $925,000. The price so paid would in the absence of special circumstances have bearing upon the reasonableness of the price for which the Petitioner now proposes to sell the property.

The difference between the amount paid ($925,000) and the amount to be received ($175,000) by the Petitioner entailing prima facie a loss of $750,000 requires affirmative explanation.

The purchase by Petitioner was not approved by this Board, nor under the statute was the Board's approval required. The statute leaves purchases to the bona fide judgment of the management as representatives of the holders of the Company's securities. Such judgment binds such holders. Questions of the propriety of purchases made come before this Board only indirectly in proceedings relating to rates, capitalization, accounting, etc.

The testimony shows that at the time of Petitioner's purchase the property was subject to a lease effective January 1, 1927, for twenty-five years, terminating December 31, 1951, and so having more than seven years to run at the time of Petitioner's purchase. This lease was entered into between Electric Building Corporation and Eastern New Jersey Power Company, affiliated companies and subsidiaries of Utilities Power & Light Company.

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The lease required a net cash payment to the lessor of $78,000 per year and the additional payment by the lessee of all taxes and operating and maintenance expenses. In 1931 the lessee, Eastern New Jersey Power Company, was acquired by Jersey Central Power & Light Company, the Petitioner, which Company assumed the obligations of the lease.

In 1940 through purchase in bankruptcy proceedings involving Utilities Power & Light Company, the property was acquired by Morris Golde and Louis Golde, from whom Petitioner purchased as aforesaid. There is no relation between the Goldes and Petitioner other than that of lessor and lessee.

The burden of cost to the Petitioner under the lease was $111,095 for the year 1942 and $106,487 for the year 1943. Increases in expenses of building operation indicate that the burden will approximate $110,000 for 1944 and subsequently. That this has been and would continue to be an inordinate cost for the space in the building occupied by Petitioner for Company purposes admits of no question under the testimony.

The purchase of the property by Petitioner terminated the lease obligations. The lease to be taken by Petitioner as a part of the sale proposed to be made by it will have the overall effect of reducing Petitioner's rental payment from $78,000 a year to $7,500 a year, a reduction of $70,500.

According to the testimony, release from the burden of the existing leasehold obligations was one of the factors that moved Petitioner's Directors to approve (a) the payment of $925,000 for the purchase of the property and termination of the existing lease, (b) the immediate sale of the same property for $175,000 and (c) the taking of a lease from the purchaser for two years at (an annual rental lower than the previous rental) a reduction of $70,500 in annual rental burden.

Another factor motivating such action of Petitioner's Directors was, according to the testimony, the advice of tax experts that by such purchase and such sale involving an apparent loss of $750,000 the income and excess profits tax liability of the Petitioner for the year 1944 would be reduced by $641,250 under the existing tax laws.

Still another factor, according to the testimony, was taken into account by Petitioner's Directors in determining its action was that the transactions of purchase and sale would effect total savings of approximately $388,600 in Petitioner's operating expenses from the present time to December 31, 1951.

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Again, according to the testimony, the action of the Petitioner's Directors was influenced by the general financial effects of the transactions. These, while resulting in depletion of earned surplus by $108,750 as of December 31, 1944, will ultimately result in a net increase in earned surplus of approximately $300,000 and will also, as before noted, establish a basis for reducing operating expenses $70,500 a year for two years and $95,000 a year for five and one-third years.

The advice of the tax experts consulted as to tax savings may prove erroneous. If this should be the case it follows that in acting upon such advice the Petitioner's Directors represented the stockholders and that any failure of expectation of reduction of tax liability will affect the stockholders only through adverse effect upon the earned surplus account. As for the customers of the Petitioner, in the event of such failure in anticipated tax savings the indicated savings in operating expenses will nevertheless and inevitably ultimately flow to them in the making of rates.

Question might arise as to why the sale is to be made at this time and why it is not deferred to a later time when it is possible that a better price might be obtained under more favorable realty market conditions. Of course, there is no assurance, and possibly there is no reason to expect, that more favorable realty market conditions will exist at a time in the near future. The testimony further answers this question. NYPANJ Utilities Company now owns about one-third of the common capital stock of Petitioner. The remaining two-thirds are in the hands of a Trustee under an indenture securing debentures of the bankrupt and liquidated National Public Service Company. The debentures are in default and the Trustee has announced a sale of such stock at public auction. It is the purpose of NYPANJ Utilities Company to bid in this stock. In that event it will become the owner of all of the capital stock of Petitioner. In the event of such purchase Petitioner's tax status will change from that of a taxpayer having an excess profit tax net income taxable at 85.5 per cent thereof and making a separate tax return to that of a taxpayer required by law to participate in the joint return of its holding company under such circumstances that its taxable income will be taxed at a rate not exceeding 40 per cent and may be as low as 25 per cent. For taxable income deduction purposes the loss to Petitioner on the proposed sale is $750,000. If this loss is experienced while Petitioner is in its present tax status the tax

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liability of the Petitioner will be reduced by $641,250. If the capital loss is not experienced until after the acquisition of Petitioner's common stock by NYPANJ the reduction in tax liability will fall an estimated $187,500, a difference of $454,000.

It might be suggested that the transactions herein considered have "tax evasion" for their purpose. There is in the suggestion implication that in this respect the transactions are reprehensible. To maximize income by taking advantage of an opportunity to reduce the annual cost of building quarters in the fullest possible degree is not reprehensible but is the duty of the management of the utility. To maximize income by reducing prospective tax liability by taking advantage of a deduction from taxable income allowed by law is not reprehensible. On the contrary, the duty of the Directors of the Company to both its stockholders and its customers requires that they consider all available and lawful means of reducing capital losses and minimizing both operating expenses and taxes. An attempt by the Directors to conduct the affairs of the Company so as to create an unnecessary and illusory excess profits tax liability would be reprehensible conduct and would result in a misleading statement of income.

The matters taken into account by Petitioner's Directors and influencing their actions were matters primarily for managerial judgment. There is not in the record the slightest indication that such judgment was not fairly exercised. The facts show no reason why, if under the statute it could, this Board should ignore and set aside the judgment of those to whom the holders of the securities of Petitioner have primarily entrusted their interests.

It is apparent that the sum of $925,000 paid in purchase has no relevancy to or bearing upon the fair value of the property in the present or to the amount that could reasonably be expected to be realized in sale at this time and under prevailing conditions.

As before noted the transactions will not disadvantageously affect the customers of Petitioner but will be of benefit to them. In further assurance that the full advantages which will accrue to Petitioner as the result of this transaction will flow to customers, in such amount and form as the Board will hereafter determine, an appropriate provision will be incorporated in the certificate of approval requiring that an amount, equal to the amount by which it has been testified that the excess profits tax liability of the Petitioner will be reduced, be segregated in earned surplus and held for such disposition as the Board may approve or direct.

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The proposed sale being proper and reasonable, a certificate of approval will be issued in accordance herewith.

Dated, August 30, 1944.

Commissioner Jamieson dissents.

CERTIFICATE

Jersey Central Power & Light Company, a corporation of New Jersey, by application dated August 7, 1944, requests authority from the Board of Public Utility Commissioners to sell the property owned by it, known as the Electric Building in Asbury Park, New Jersey, to Tastyeast, Inc., in accordance with the terms and provisions of a certain contract attached to the petition. Said petition with its attachments by reference thereto is made a part hereof.

The Board of Public Utility Commissioners, after hearing upon notice and due consideration, now determines and concludes that the proposed sale is proper and reasonable, and

HEREBY APPROVES of the sale and conveyance of the property as described in accordance with the petition.

This certificate is issued subject to the following provisions:

1. That if the sale of the property is not fully consummated within thirty (30) days of the date of this certificate, this certificate shall become null and void and of no effect.

2. That this approval is without prejudice to the authority of the Board with respect to rates, valuations, services or any other matters as concerns the Petitioner herein.

3. That all accounting entries to be made on the books of the applicant to reflect the transactions herein approved shall be submitted to the Board for approval prior to being recorded on said books.

4. That the applicant shall file with the Board, within thirty (30) days of the date hereof, a certified copy of the release of the property herein described from the lien of the mortgage encumbering said premises.

5. The Petitioner shall immediately segregate and freeze Six Hundred Forty-one Thousand Two Hundred Fifty Dollars ($641,250) of its existing earned surplus to be retained intact and held in a separate account for such disposition as the Board may authorize or direct in connection with any proceeding or determination with regard to the reasonableness of Petitioner's rates or for such other purpose as the Board may determine to be in the public interest.

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The Petitioner shall file with the Board within ten (10) days of the date hereof, and in any event before title to said property is transferred, a verified acceptance of this certificate and the provisions hereof.

Dated, August 30, 1944.

Commissioner Jamieson dissents.

No. 2274

In the Matter of the Application of Lehigh Valley Railroad Company for Approval to Remove Freight House Building and to Discontinue the Handling of Less Than Carload Freight and Express Freight at West Portal, New Jersey.

R. D. LaLanne, for Lehigh Valley Railroad Company.

BY THE COMMISSION:

The petition of the Lehigh Valley Railroad Company is for permission to make its freight station at West Portal, New Jersey, a prepaid non-agency station for carload freight only and to dismantle the freight building at that point. Hearing on the application was held on September 19, 1944, after due notice to interested parties.

The application was not opposed.

By Decision dated October 30, 1929, the Board approved the discontinuance of an agent at this point. It appears that the freight house building has not been used by the Company for several years. It has been broken into and misused by undesirable persons. An offer for removal of the building at no cost to the Company has been received which, if accepted, will save approximately two hundred dollars for the cost of demolition. For the past five years there has been no less than carload or express freight to or from this station with the exception of an inbound less than carload shipment during August of this year. This shipment consisted of about two thousand pounds of tools and equipment consigned to the person who has offered to remove the building for the Company and this shipment of material is intended to be used for that particular purpose.

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Upon consideration of the evidence the Board hereby approves of

(1) Making West Portal a prepaid, non-agency station for carload freight only; and

(2) Removing the freight house building at that point.

Dated, October 3, 1944.

No. 2275

In the Matter of the Complaint of Benjamin Ganek vs. New Jersey Bell Telephone Company In re Discontinuance of Service.

Barney Larkey, for Benjamin Ganek; *A. J. Bittig*, for New Jersey Bell Telephone Company.

BY THE COMMISSION:

The Complainant, Benjamin Ganek, of 44 Sherman Avenue, Newark, New Jersey, in formal complaint filed against Respondent, New Jersey Bell Telephone Company, alleges that Respondent, without proper justification, discontinued telephone service at premises occupied by Complainant and refuses to restore said service. The telephone service in question was not a private telephone and consisted of two public telephone booths operated by coins.

Respondent admits that it has discontinued service to the Complainant and that it has refused to restore it. It maintains that its action is in accord with its adopted practice, and that it is justified as a result of a raid made upon premises of the Complainant by Newark police, in which raid slips of paper allegedly pertaining to horse racing were discovered upon Complainant's premises. After the raid, the Complainant, Ganek, entered a plea of guilty to a criminal charge of possession of such slips.

It appears from the evidence that the Complainant and his wife maintain a "luncheonette" at premises 44 Sherman Avenue, Newark, New Jersey. On March 31, 1944, the Vice Squad of the Detective Bureau of the Newark Police Department made a raid upon Complainant's premises and upon search, on a shelf behind the counter, police found a slip of paper identified as a slip show-

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ing an interest in horse racing. The slip contained various figures representing sums of money. Another slip was also found on the premises containing the following: "Montclair 3-1504—$29.10—Joe—Play." Following such a raid a complaint was made charging that Benjamin Ganek, the present Complainant, had in his possession certain slips indicating his interest in a horse race in violation of section 634 of the city ordinance. Complainant pleaded guilty to this charge and was fined accordingly. Complainant in the hearing before the Board denied that he ever accepted any bets on horses. In view of the voluntary plea of guilty to the charge in the police court no credit can be given to his denial and, for the purpose of this proceeding, it must be assumed that he was guilty.

Upon notice of such raid and conviction, Respondent discontinued Complainant's telephone service. Respondent proved that as a part of its general exchange tariff it had adopted certain rules and regulations providing that in the event of improper use or abuse of the service for any transaction of business in violation of law, the Company may remove its equipment; and further, that the Company may do so upon objection to the continuance of the service made by or on behalf of any governmental authority.

The narrow question before the Board, therefore, is whether or not these rules are reasonable and whether they were reasonably applied.

As to the reasonableness of the rules, there can be no serious question in view of several statutory interdictions placing criminal and civil liability upon Respondent as a penalty for engaging in, or in aiding and abetting in gambling practices in violation of law. Reference is made to R. S. 2:135–2, R. S. 2:135–4, R. S. 2:147–4, R. S. 2:171–3.

Complainant, however, contends that, assuming the reasonableness of the rules, they were not properly and reasonably applied in the present instance.

Complainant maintains that he was not engaged in the business of accepting bets on horses; that at no time has he used the telephones in connection with accepting bets on horses or similar activities; and that he has no intention of making such use of telephones. He further maintains that his conviction on a charge of having an interest in placing bets on horses is no evidence of the

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use of the telephones for such purposes. That, in substance, is Complainant's argument. Concededly, there is no direct evidence before the Board that the telephones in question were used in the placing of bets on horses. Such an inference, however, may properly be made from the data on slips of paper found upon the premises and quoted above.

The Board holds, however, that justification of discontinuance and refusal of service rests not on the question whether or not the telephones were actually used for the illegal purpose described, but whether the Respondent's rules and regulations in the premises are reasonable and whether in the instant case they were reasonably applied so as to safeguard it from criminal and civil liability as aider and abettor in such unlawful practice. The Board cannot agree with Complainant that Respondent was under duty to show an actual use of the telephone for the improper purpose before discontinuing the same. The Board holds that if Respondent had reasonable cause for believing that its facilities were being used or will be used in furtherance of such illegal purposes, Respondent was justified in invoking its regulations and thus not assume the danger of rendering itself liable to statutory penalties of either a civil or criminal nature. (*Goodman* vs. *New Jersey Bell Telephone Company,* decided February 20, 1940—not reported. *Nevins* vs. *Southern California Telephone Company* (U. S. Dist. Ct. for the Southern District of California, 447702—not officially reported.).)

Supporting the reasonableness of the Respondent's conduct in the matter is the fact that the Police Department of the City of Newark, as represented by the Captain of the Detective Bureau, refused to give its approval to the restoration of the service. The Captain based his refusal, among other things, upon Complainant's past record of arrests and convictions on similar charges.

The Board does not find that Respondent's regulations are unreasonable or that their application in this case was arbitrary or discriminatory.

The complaint is therefore dismissed.

Dated, December 19, 1944.

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CONCURRING OPINION

BY COMMISSIONER JAMIESON:

I concur in the conclusion reached by the majority of the Board that the action of the New Jersey Bell Telephone Company in discontinuing telephone service to the Complainant, Benjamin Ganek, for the reason that he pleaded guilty to conducting gambling activities on the premises on which the phones were located. I do not concur, however, in the opinion filed by the majority of the Board.

There can be no doubt that it is well settled law that a telephone company must furnish service without discrimination to anyone abiding by reasonable regulations of the Company (R. S. 48:3–2 and R. S. 48:3–3). In paragraph 7, section 10 of the General Exchange Tariffs on file with this Board, the Company has a regulation that it may terminate service and remove its equipment from a customer's premises in the event that the service is used for the transaction of business in violation of the law. It is further provided that the Company may terminate the service upon objection by or on behalf of any governmental authority. The Company's position is that such a regulation is reasonable and necessary because of a provision in Revised Statutes, section 2:171–3, which reads as follows:

> "Sending messages or carrying packages in aid of illegal businesses. Any person, or any express, telephone, telegraph or other company or corporation, engaged in the business of carrying or transmitting packages, letters or communications within this state, whether by express, telegraph, telephone or any other means whatsoever that shall knowingly carry any message of a kind which shall further or promote the interest of any unlawful pursuit, or enable a person to carry on any business or practice declared illegal by any statute of this State, shall be guilty of a high misdemeanor."

The testimony discloses that it is the policy of the New Jersey Bell Telephone Company to discontinue service when there has been a conviction for gambling on the premises and not to reinstall telephone service until approval is granted by the police authorities.

Although the evidence that the phones in question were actually used as a part of the gambling in this case is weak, the action of the telephone company in discontinuing Complainant's service

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as a breach of the above rules is justified. It is necessary for the telephone company to establish proof of gambling, and not merely a breach of the rules of the Company, *Hiegel* vs. *New York Telegraph Co.,* 195 N. Y., supp. 332. The guilty plea plus other evidence introduced at the hearing was sufficient proof.

It is not that the policy of the Company is so strict that it is unreasonable, but rather that it is shockingly lax. The testimony discloses that the Company makes no investigation, either by way of inspection, check-up with the installation department, examination of monthly bills or review of the nature of the use, of telephones which may be used for gambling. No matter how long a record of arrests or convictions for gambling, the Company will install service to a bookmaker upon approval of a police agency. In this particular case the Company witness testified that the Complainant's phones would be restored if a police captain would approve it. The Company witness who testified as to policy admitted that if the police agency, which made the recent sensational raid on a horse-race gambling establishment in Union City would approve, the Company would reinstall the 35 telephones listed in almost as many individual names, and all located in seven rooms on the second floor of a night club.

While it is true that the statute does state that the company is guilty only if it "shall knowingly carry any message * * * or promote the interest of any unlawful pursuit * * *," it is no excuse under the law to escape knowledge by turning one's head away from obvious information. The laxity of the Company's policy is so great that it constitutes a cooperation with the "bookies" in the conduct of their illegal business.

I deem it to be my duty to point out this situation, and urge its correction, because in this critical war period there are 51,000 applicants for telephones in the State who cannot obtain service, while it is rather obvious that thousands of phones are being used to take horse bets.

Dated, December 28, 1944.

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No. 2276

In the Matter of the Application of the City of Long Branch, a Municipal Corporation in the County of Monmouth, for a reduction in the Rates of the Monmouth Consolidated Water Company, Body Corporate.

Ward Kremer and *Leo J. Warwick,* for City of Long Branch; *Clarence H. Dickey* and *Joseph F. Autenrieth,* for Monmouth Consolidated Water Company; *Frank H. Sommer,* for Board of Public Utility Commissioners.

BY THE COMMISSION:

This is an application filed on March 15, 1944, by the City of Long Branch, a municipal corporation, for a reduction in the rates of the Monmouth Consolidated Water Company.

The present rates are in effect by virtue of a decision of the Board of Public Utility Commissioners rendered on August 20, 1941. In substance the Board found a rate base of $5,600,000 and estimated that a fair return to the Company should produce annual gross operating revenues of $737,608 and operating income (i.e., net profit to the Company) of $309,130. This finding of the Board was affirmed by the New Jersey Supreme Court in a decision filed February 13, 1942, and reported in 128 N. J. L. 91. The Respondent filed a motion to dismiss the petition and the applicant has filed an answer to the motion. Oral argument has been had on the motion and extensive briefs have been filed.

This procedure has served to present explicitly before the Board the determination of the question as to whether or not the Board should entertain the application and proceed to a formal rate hearing. The Board's decision on this issue is discretionary and is imposed upon it by virtue of the provisions of the Public Utility Act which provides as follows:

> "The board *may:* a. Investigate upon its own initiative or upon complaint in writing any matter concerning any public utility." (R. S. 48:2-19.) (Italics ours.)

Ordinarily an application of this nature would be treated as a formal complaint for a reduction of existing rates and would result in a formal hearing. In view of the fact that the Board's determination is to dismiss the petition on the Respondent's motion, it seems proper to give detailed reasons for reaching such a conclusion.

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One of the elements of such a discretionary determination by the Board is whether, upon available information, it is reasonable to involve the parties in the expense incidental to a formal rate case. The last rate proceeding, terminating in 1941, resulted in an expense to the Company's customers of some $40,000 and a smaller but substantial amount of the municipalities involved in the litigation.

The Board is primarily an administrative agency and under the statute controlling its procedure is not bound by the strict rules of evidence. It has, therefore, taken into consideration in this issue information and records of which it has judicial notice. For that reason the Board has considered the record before it to contain not only the pleadings but also the following:

1. The decision of the Board of August 20, 1941.
2. The decision of affirmance by the New Jersey Supreme Court, reported in 128 N. J. L. 91.
3. The annual reports of the respondent Company to the Board for the years 1941, 1942 and 1943.
4. The reports from the books of the respondent made available to the Board and the Petitioner up to and including July 11, 1944, the date of the hearing in this matter.
5. The management contract effective July 1, 1944, between the respondent Company and the American Water Works and Electric Company and the order approving the same entered by the Board.

The Applicant contends that the Respondent's rates are too high and that they result in an excessive return to the Company. In its petition, its oral argument and its written briefs it offers six specific contentions to sustain its position. Each of them will be considered.

On the other hand, the Respondent contends that the issues here involved were all considered in the proceedings concluded by the Board's decision of August 20, 1941, less than three years prior to the instant application, and that no such change has been experienced in the Company's return as to warrant a re-examination of its rates.

The Applicant insists that this is not an application for a rehearing of the prior rate case. Its contention in that respect is answered adversely by an examination of the gross operating revenues, the operating revenue deductions and the operating income (amount available for return) of the Respondent for the years 1941 to 1943, inclusive, as compared with what the Board allowed in 1941 as a fair return for the Company, which deter-

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mination, as stated above, was affirmed by the New Jersey Supreme Court.

In the following schedule there is presented a calculation prepared from data in the Board's Decision of August 20, 1941, indicating that operations under the rates therein allowed (present rates) were estimated to produce an operating income (amount available for return) of $309,130, an amount that the Board determined was not unreasonable or excessive. There is also presented in comparable form a calculation showing the actually experienced operating income for the years 1941 to 1943, inclusive.

	Estimates made the basis of Board's Decision of Aug. 20, 1941	1941*	1942	1943
1. Operating Revenues	$737,608	$681,164	$742,823	$763,394
2. Operating Revenue Deductions:				
3. Operating Expenses and Depreciation	254,215	275,999	285,429	290,974
4. Taxes	171,263	145,394	153,955	171,174
5. Uncollectible Bills	3,000	3,000	3,000	.....
6. Total Operating Revenue Deductions	$428,478	$424,393	$442,384	$462,148
7. Operating Income (1-6)	$309,130	$256,771	$300,439	$301,246

From an examination of the above figures it is apparent that no such change has occurred in the fortunes of the Respondent as to bring its operating income up to the amount allowed by the Board in 1941 as being a fair return. There has been, of course, a decided increase in the Company's gross operating revenues but the ultimate inquiry of a rate case is directed not to the level of gross operating revenues, but rather to the amount available for return as indicated by the operating income so as to confine that figure reasonably within the zone of a fair return.

We are, therefore, forced to the conclusion that the present return of the Respondent is below rather than above the return allowed by the Board in its prior decision. Obviously, therefore,

* Operating results for 1941 do not fully reflect the effect of present rates since these rates became effective October 1, 1941.

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this application must be dismissed unless the Applicant indicates such changed circumstances as will require a reversal of the prior ruling of the Board. It goes without saying that the control over rates is a continuing obligation of this regulatory Commission and that this Board is not bound by any of its prior findings. If the Board were convinced that the former decision was in error, it would not hesitate to correct the error. However, that is not the applicant's contention. It contends in effect that the Board should give consideration to certain new factors in connection with the respondent's business which, it is contended, warrant a conclusion different from that previously reached by the Board.

These contentions of the Applicant will be discussed in order. It appears that only the first three have to do with conditions which are alleged to have changed since the last rate case. The last three all involve matters which were considered by the Board and categorically approved by the Supreme Court.

1. *Total increase in operating revenues in 1943 exceeded by 100 per cent declared by the Board in its prior decision to be just and reasonable.*
2. *Total water sales by the Company in 1943 exceeded by 45 per cent its total water sales for the year 1940.*

Neither of the above contentions is mathematically correct, although, as indicated by the income accounts hereinabove set forth, there has been a substantial increase both in the gross operating revenues and the total water sales of the Company. This fact, standing alone, has no bearing on the reasonable return to the Company because operating income and not gross operating revenues is the criterion of a reasonable return. It is sufficient answer to this contention to say that while the gross revenues have increased, the amount available for return has not, and, therefore, that the increase in the gross revenues is immaterial to the determination of the issue at hand.

An examination of the income accounts for the respective years indicates the reason for the result. It is, of course, due to the fact that the increase in operating expenses of this Company, as in many similar companies, has been greater than the increase in gross revenues. No suggestion has been made that the operating expenses of the Company are excessive or that there is any lack of reasonable economy in the conduct of the Company's business.

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While the gross revenues of the Company for the year 1943 exceeded the Board's estimate made in 1941 by $26,000, the operating expenses exceeded the same estimates by $36,000. These two items alone indicate the reason why the operating income of the Company is still less than the Board conceived at that time to be reasonable.

In view of the foregoing, the increase in gross operating revenues or of total water sales does not justify a re-examination of the rates of the Company in a formal proceeding.

3. *Management contract.*

The Petitioner contends that the operating expenses of the Company have or should have been reduced as a result of a management contract which was entered into by the Company with the American Water Works and Electric Company (its parent) which provides in effect that the management services shall be furnished at cost. This contract was accepted by the Respondent Company as the result of a joint proceeding instituted by this Board and the Securities and Exchange Commission. The contract was approved by the Board and went into effect on July 1, 1944.

The nature of the services to be provided under the new servicing arrangement are in many essential respects similar to those performed under the former arrangement. To a considerable extent the difference in the old and new servicing arrangement consists of provision for what is believed to be a more equitable basis for distributing the actual cost of rendering the service performed among the various operating companies by providing for:

1. A system of direct charges to the extent that costs can be identified and related to specific transactions.
2. A system of indirect charges for allocation on an appropriate basis of costs properly incurred but which cannot be separately identified and related to specific transactions.

It is also expected that the new arrangement will produce some reduction in servicing overheads as a result of the elimination from the servicing payroll and assignment to the holding company of the full amount of salaries of certain top holding company officers. The new servicing arrangement went into effect July 1, 1944. As yet sufficient experience has not been had with

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it to permit ascertainment of its effect on a particular operating company. The net effect of changes incorporated in the new arrangement may be such as to produce either an increase or a decrease in the aggregate annual cost to a particular operating company.

For the reasons above stated there is no available factual support for the contention that the new management contract can be expected to reduce the operating expenses of the Respondent Company either now or in the reasonably near future to such an extent as to warrant a re-examination of the rates in a formal proceeding.

4. *The Company's outstanding bond issue can and should be refunded at a lower interest rate.*

The respondent Company has outstanding a bond issue in the amount of $3,500,000 bearing interest at the rate of 5 per cent. The fixed charge on this indebtedness is $175,000 a year. The Petitioner contends that these obligations can and should be refunded at a lower rate of interest and that unless that be done, to quote from Petitioner's brief, "consumers are required to pay excessive rates in order that this utility may in turn pay excessive interest charges on its outstanding obligations."

It should be noted that the respondent Company is controlled by the American Water Works and Electric Company through the latter's ownership of all of its common stock. Under such circumstances the advantage to the common stockholder which would follow a reduction in the interest on its bonds is obvious. There must always be an incentive on the part of common stockholders to obtain the lowest possible interest rate on debt capital. To accept as a fact Applicant's assertion that Respondent can but apparently does not desire to refinance its bonds at a lower rate of interest requires the unrealistic assumption that Respondent's common stockholder is deliberately acting against its own best interests.

Regardless of the advisability of the Company's attempting to Refund its bonded debt at a lower rate of interest, the contention of the Petitioner that the present interest payment imposes an excessive burden on the consumers is not sound. The obligation of paying interest on funded debt is one which the Company bears out of operating revenues. It is not charged as an operating

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expense. The only effect which a lowering of the interest on the bonds might have is its effect upon the consideration of what should be a reasonable rate of return to the Company. One of the elements in such a determination might be the reasonable cost of money to the Company. For the year 1943 the Company had an operating income of $301,246 upon the rate base set by the prior decision of the Board of $5,600,000. This indicates a rate of return of 5.37 per cent. Regardless of the cost to the Company of its borrowed money, it cannot be said that this rate of return is above the zone of reasonableness. It is unnecessary and, of course, impossible in this proceeding to determine whether the Company should attempt to refinance its funded debt at a lower cost of interest, but in that respect it may logically be assumed that one of the matters which influences the Company in not making the attempt is that the Company is not presently enjoying what this Board a short time ago declared to be a reasonable return.

The same question was raised in the prior proceeding and its treatment by the Board was specifically approved by the Supreme Court in its opinion.

The situation as to the funded debt of the Respondent does not appear to be sufficiently changed since 1941 to justify a re-examination of the Company's rates in a formal proceeding.

5. *Original cost and rate base.*

An examination of the record of the 1941 rate case indicates that the Board received extensive testimony both from the Company and the objectors with reference to original cost rate base. In its decision in the matter the Board specifically discussed the relative contentions with relation to the original cost figures. Attached to the decision is a tabulation of the original cost figures presented by both sides. The Board also considered reproduction cost and the value of the Company's plant as an assembled, operating and going concern. The Supreme Court in affirming its determination as to the rate base of $5,600,000 said:

> "The first problem relates to value of the property as fixed for rate-making purposes. The Board considered cost, reproduction cost, and the value as an assembled operating and going concern. Experts testified on all elements and their testimony varied on most points. We can hardly say, however, that the Board's findings have no support in the proofs. The Board considered all the proper elements. *New Jersey Suburban Water Co.* vs. *Board of Public Utility Commissioners,* 123 N. J. L. 303.

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> In parallel columns annexed to the decision are to be found the varying estimates of the different witnesses called. The weight of the testimony was for the Board and these findings are supported by the proofs."

In spite of that pronouncement by the Supreme Court the Petitioner contends that, in view of recent decisions in the Federal Courts, particularly that of the United States Supreme Court in *City of Cleveland* vs. *Hope Natural Gas Company* and *Federal Power Commission* vs. *Hope Natural Gas Company,* 88 L. Ed. 266, the Board should now reconsider the elements upon which the rate base was established and give either dominant or exclusive consideration to the original cost of the Company's property. It contends that such consideration should be to the partial or exclusive elimination of any other element of value. In that respect the applicant's position is not clear. During the oral argument the following colloquy occurred (Record, page 41):

> "Commissioner Boswell: 'As I understand it, you do claim that under the circumstances of this particular case the original cost theory should be exclusively applied. Is that correct?'
>
> "A. (Mr. Kremer): '* * * I say in this case the proper thing would have been to apply it exclusively'."

However, in the Petitioner's brief, while arguing that original cost should be given dominant consideration in establishing the rate base, Petitioner says (page 10):

> "We do not contend that the formula of original cost should be applied as the exclusive formula to be applied in the valuation of public utility properties."

The Petitioner now contends that this Board should reconsider the principles laid down in the prior case and, in view of recent decisions, reverse the prior finding and reduce the rate base substantially by either the exclusive or dominant consideration of the original cost figure. None of the members of the Board who sat in the prior proceeding is a member of the Board at this time. For this Board to accede to the suggestion of the petitioner in that regard would mean a reversal of what has been judicially declared to be a proper application of the principles of rate-making. The Board is unwilling at this time to reverse the finding of a previous Board entirely upon the basis of adopting original cost as the sole or dominant element in arriving at a rate base. The applicant, in this regard, seeks not a finding on new evidence but, in effect, a rehearing on an issue already determined.

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In view of recent decisions, particularly in the Federal Courts, the Board undoubtedly in some future proceeding will be called upon to determine what, if any, specific or dominant effect the element of original cost should be given in determining a rate base. When that problem is presented it will, of course, be met. The Board declines to decide that it is properly presented in the instant proceeding.

The contention of the applicant in that respect standing alone does not warrant a re-examination of the Respondent's rates.

6. *Rate of return.*

In the Board's prior decision it determined that a rate of return of 5.52 per cent was not excessive or unreasonable. Petitioner now claims that upon the basis of a rate base fixed upon the original cost of the Company's property, its present return is at the rate of 6.6 per cent and that such rate of return is excessive. Its contention in this regard is answered in the discussion as to the consideration that should be given to the original cost figure as a rate base. It need not be repeated, except to say that on the rate base fixed by the prior Board the present rate of return of the Company is 5.37 per cent, which cannot be considered excessive.

The petition is dismissed.

Dated, December 19, 1944.

Commissioner Jamieson dissents.

DISSENTING OPINION

BY COMMISSIONER JAMIESON:

The City of Long Branch filed a petition with this Board on March 15, 1944, in which it charged that the Monmouth Consolidated Water Company, which is the water service company for Long Branch and other neighboring communities, was charging excessive rates to its citizens and the petition asked for hearing to substantiate the allegations of the petition. Under the usual procedure of our Board a date for hearing would be fixed and the necessary parties notified. The Monmouth Consolidated Water Company, however, in this case took a course which has been rarely, if ever, followed and filed a Motion to Strike the petition.

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The grounds for the Motion to Strike were as follows: That the Petitioner was attempting to obtain a rehearing of a rate case conducted before this Board in 1941; that the 1941 decision of this Board had been affirmed by the New Jersey Supreme Court by the Court dismissing a writ of certiorari and that the Supreme Court still had jurisdiction because a Remittitur had not been entered; that the Board could not properly permit this petition to go to final hearing because there had not been sufficiently material changes in the financial situation of the Company since the 1941 hearing; that the decision of the United States Supreme Court in the case of *City of Cleveland* vs. *Hope Natural Gas Company*, 88 U. S. L., Ed. 276, approving the fixing of a rate base by the original cost or prudent investment theory did not affect this case because approval of such a method of determining a rate base in New Jersey would be against the established law of this State; and that the fair value, or reproduction cost theory must be applied in a rate case according to the law based on the statute and decisions in New Jersey; that many allegations of the petition were untrue in fact. Other grounds were also included in the Motion to Strike but it is unnecessary to discuss them.

The Petitioner, in replying to the Motion, contended that the petition for a new hearing is a new case; that the Board is not deprived of jurisdiction by the failure of the entry of a Remittitur; that it should have the opportunity, at a hearing with testimony, to prove the truth of the allegations of the petition that there has been sufficient changes in facts and applicable law since the 1941 Board decision to warrant a hearing on its new petition; that it was within the discretion of the Board to permit a hearing on the petition; that the original cost or prudent investment method of finding a rate base has been, since the last hearing, approved by the United States Supreme Court in the *Hope Case,* supra; that the cost, or invested capital theory, of fixing a rate base has become generally accepted and could be proper and legal in New Jersey.

In a Motion to Strike the Defendant admits the truth of all of the facts well pleaded and all inferences of fact which can be legitimately drawn therefrom. This is a fundamental principle of law:

Bengivenga vs. *City of Plainfield,* 128 N. J. L. 418.
Campbell vs. *Pure Oil Company,* 15 N. J. Misc. 723 or 194 Atlantic 873.

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Aside from other reasons, on this point, alone, the Motion to Strike should be refused. While an administrative agency, such as our Board, is not required to strictly enforce the rules of evidence and is perhaps lenient with regard to some other legal principles, it cannot disregard the fundamental reasoning of the common law, and the law thoroughly established by decisions in this State, on Motions to Strike.

It is contended by the defendant Company that because the financial statement, submitted by it to the Board, does not show that it has an excessive rate of return, that this petition should be dismissed. If facts alleged in the petition are true, the rate of return would be different. The Petitioner charges, for instance, that the method and the amount of allowances for depreciation are improper and excessive. A change in the depreciation item, the exact amount of which is unknown, and about which nothing is mentioned in the 1941 Board decision, would change the figures in the financial statement. The amount of depreciation for this Company, according to the testimony in the 1941 case, is somewhere in the neighborhood of $1,000,000. If, for the purposes of this Motion, it is presumed that the allegations of the petition on depreciation are true, the case must go to hearing for the rate base would be materially changed.

If it is to be presumed that the charge in the petition that this Company pays an excess of $70,000 in bond interest over what it should pay, the case must go to hearing, for that amount is about 10 per cent of the total of the gross revenues and proof of this condition, all other factors eliminated, might mean a 10 per cent reduction in the water bills of 22,000 consumers. We cannot pass up this point by merely answering that bond interest is paid out of operating revenue. It is the responsibility of the Board to see that companies issue bonds, after bidding, for the lowest interest rate that can be obtained. It is common knowledge that companies of the type of the Monmouth Water could refinance at the present time with bonds bearing about 3 per cent interest. Cost of money is an important factor in present day rate regulation and our Board has recognized this in the *New Jersey Power and Light Company Case*. Can our Board now deny the Petitioner the right to prove that the Monmouth Company could and should refinance with a saving, as alleged, of $70,000 per year?

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The position taken by the Respondent, that the bond financing question was approved by the Supreme Court in Justice Bodine's opinion on the writ is unsound. The Court only stated that the conclusion reached by the Board was proper on the evidence submitted in that case. The Court commented that no proofs to sustain their contention on saving of bond interest were submitted by the municipalities. We cannot conclude that in another hearing there would be no proofs offered to sustain the allegations of this petition.

Although it was made the major point by the Defendant, this petition is certainly not an appeal from or a request to rehear a decision of the Board or the Supreme Court in the 1941 case. In that case the City of Long Branch was among thirteen defendants on a case of Monmouth to increase rates. The petition was filed November 14, 1940, and rates were fixed as of December 31, 1940. The Board decision was August 20, 1941, and the Supreme Court decision in October, 1942. An Order dismissing the writ of certiorari was filed in the Supreme Court and if a Remittitur was necessary, counsel for the Monmouth Consolidated Water Company, the same counsel now being in this case, should have filed it, for he was the prevailing party. Could it now be held by this Board that because of the failure of counsel to enter a Remittitur that the Supreme Court, not this Board, has had since 1942, and still has, jurisdiction over the regulation of this Company?

It would be equally unsound for this Board to hold that this application for a hearing to determine the present proper rate as of this time in 1945 is, in effect, an appeal to the Court of Errors and Appeals of the decision of the Supreme Court on the writ of certiorari on a hearing fixing a rate as of December 31, 1940. The Petitioner's statement that it seeks a new hearing is of some weight and the Defendant apparently does not seriously contend that this cannot be a new case, for on page 24 of the transcript of the oral argument of the Motion, counsel for Defendant says: "I think this, that technically perhaps you can have a rate case the next day, but I think the Board has no obligatory duty under the statute to hold such a rate case." And on page 25 of the same transcript the same counsel said: "* * * that case is closed. There can be a new case."

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The utility company takes the position, and the majority opinion agrees, that substantial changes in the financial structure of the Company since a previous rate case must be shown before a new hearing should be allowed. No authority in law for this position is given and I can find none.

If the factual contentions of the petition are presumed to be true for the purposes of this Motion, there would be changes in the rate of return. Furthermore, it is not denied that there was a 35 per cent increase in gross sales between the year 1940, the one used in the previous case, and 1942.

Even though it be conceded that there has not been important changes in the factual situation, substantially changed conditions in matters other than facts have occurred. This is one of the chief reasons advanced by the Petitioner for a new hearing. I believe this point is well taken and to overlook it would be an abuse of the Board's discretionary powers. These changed conditions, which have occurred since the previous hearing, may be grouped as follows:

1. Changes in pronouncements, attitude and personnel of the Board of Public Utility Commissioners of New Jersey.
   (a) The entire personnel of the Board membership has been replaced since 1941.
   (b) The Board has expressed an attitude of advocating the adoption of modern depreciation principles.
   (c) The Board's position on management contracts has been revised.
   (d) The Board has disapproved the use of testimony as to values on a reproduction cost basis for the duration of the war.
2. There has been enacted Federal Price Control Legislation.
3. There have been important decisions in utility cases by the U. S. Supreme Court and the N. J. Supreme Court and other tribunals.

In view of the complete change of the personnel of the Board, there is no reason to assume that its three new members, or a majority of them, would decide the questions which would be presented in a new hearing on the same basis or theory that similar questions were decided upon in a previous case.

The change in attitude on the important question of depreciation has been expressed by the Board in a decision, not yet reported, made in 1944 in the case of the New Jersey Power and Light Company. Also in 1944, the present Board advocated the adoption of certain progressive theories of depreciation by all State Commissions. This action by the Board was in the form

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of an affirmative vote on the adoption of the Report of the Depreciation Committee at the Annual Conference of the National Association of Railroad and Utilities Commissioners. There was nothing to indicate that such depreciation principles have ever been favorably considered by previous Boards in New Jersey and the Petitioner in this case had every reason to believe that when our Board recommended adoption of such principles, it would apply them in a particular case at a hearing.

Since the previous decision in the Monmouth Water Case in 1941, the United States Supreme Court has taken a stronger position than previously in that the Court approved in the *Hope Case,* supra, earlier opinions such as the following: In *Lindheimer* vs. *Illinois Bell Telephone Company,* 292 U. S. 151, the propriety of basing annual depreciation on cost was recognized. Chief Justice Hughes said in the *Lindheimer Case:* "If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return." See also the dissenting opinion in *United Railways* vs. *West,* 280 U. S. 234, 259-288.

Early in 1944 the Board joined with the Securities and Exchange Commission in an investigation of cost of management contracts of the American Water Works and Electric Company, the same holding company which had the management contract with the Monmouth Water Company until 1944. This move to investigate followed the taking of testimony in a rate case involving the Commonwealth Water Company, another subsidiary, which testimony disclosed that the water company was paying a very excessive amount under the management contract for the services rendered. On the day that hearings were to start in the investigation, the American Water Works Company agreed that all of its management contracts would be voided and the services

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rendered would be paid for at cost. The Petitioner in this case had reason, therefore, to believe that it would be given the opportunity to prove its allegation, in its petition, that the management contract fees allowed in the 1941 decision were excessive and that operating expenses of the Monmouth Company would be reduced accordingly.

In 1942 our Board took official recognition of the fact that testimony on the reproduction cost value of utility property, with inflated cost of commodities and labor, would not be indicative of fair value and passed a resolution that such testimony would not be considered in a rate case for the duration of the war. This ruling would certainly have an effect upon fixing a valuation of the Monmouth property at a formal hearing, for the 1941 Board decision was apparently influenced by reproduction cost testimony, if not definitely fixed on a reproduction cost basis.

Since the Board's decision in this case price control legislation to avoid inflation has been enacted by the Congress and specific provision was made to control the price of water and other commodities. While the decision in this case was, therefore, not a violation of the law, it was not in keeping with the spirit of the law. Furthermore, the decision was made three weeks subsequent to the request by the President to Congress on July 30, 1941, for enactment of price control legislation. The President said then: "Inflationary price rises and increases in the cost of living are today threatening to undermine our defense effort."

Whether one agrees with the minority opinion or one of the majority opinions in the *Hope Case,* supra, it must be recognized that this decision by the United States Supreme Court is one of the most important pronouncements on utility rate regulation in many years. I do not agree that the case determines that the original cost or prudent investment theory must be applied to the valuation of all utility property, which contention is made by the Petitioner. I do not agree either with the claims of the Respondent counsel that our State Courts would not be concerned with or influenced by the *Hope* decision. There is similarity in the wording of the statute construed in the *Hope Case* and the reasonable rate section of our statute (R. S. 48:2–21). It certainly can be argued logically that if the prudent investment theory was applied to a New Jersey utility by our Board, the New Jersey Courts would follow the same reasoning as the

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United States Supreme Court in the *Hope Case* and approve the propriety of fixing valuations by that method. The contention of the Respondent in this case that under the law of this State the reproduction cost or fair value method must be applied is fallacious.

There is no reason to conclude from the opinions of our Courts in the appeal of the 1942 decision of the *Monmouth Water Case* or the *Atlantic City Sewerage Co.* vs. *Board of Public Utility Commissioners*, supra, that a reproduction cost or fair value base must be fixed. In the opinion of Justice Bodine in the *Monmouth Case*, 128 N. J. Law 91, he said: "The Board considered costs, reproduction costs and the value as an assembled operating and going concern. Experts testified to all elements and their testimony varied on most points. We can hardly say, however, that the Board's findings have no support in the proofs. The Board considered all of the proper elements. In parallel columns annexed to the decision are to be found varying estimates of the different witnesses called. The weight of the testimony was for the Board and these findings are supported by the proofs."

In the *Atlantic City Sewerage Case*, 128 N. J. Law 359, Justice Heher said: "But the fair value base is not necessarily confined to the hypothetical depreciated reproduction cost grounded on prices obtaining at the time of the inventory. These are not synonymous terms. Each case is governed in this regard by its own circumstances. The Board is empowered to determine what in the particular situation is a just and reasonable return; and it must needs have a broad discretion in the exercise of that authority controlled by the statutory standard."

One of the Petitioner's principal contentions is that the proper basis for determining the value of the Monmouth Company property is by the prudent investment method. I believe that there cannot be a compliance with the requirement of the statute that rates must be "just and reasonable" under any other method of fixing valuation.

While different words are used, which are sometimes confusing, there are two main theories of fixing values of utility properties. One is reproduction cost, sometimes called fair value, and slightly varied, to be called "present value." The other theory is original cost or, with slight variations, prudent investment. Other methods, such as book cost, have been generally abandoned as inaccurate and obsolete.

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Under present day economic conditions it is not only unreasonable, but next to impossible, to fix a valuation of utility properties on a present day cost of reproduction basis. One of the elements, for instance, would be to find the cost of labor at the present rate for the number of man-hours used to construct a water pipe installed many years ago. Such labor cost would probably be several hundred per cent; but who is to say that the same type or amount of labor would be used, or whether the same method would be used, or whether either the material or the labor would have the same efficiency? Hundreds of men with picks and shovels would not dig a ditch today but the same work would be done in a comparatively short time with a modern motor driven ditch-digging apparatus. Under the reproduction cost principle, rates of utilities should go up or down according to trends of increases and decreases in costs of materials and labor. This results in lack of confidence in earnings by investors. Many investors were tragically misled in the 1920's because they judged the value of utilities securities by the inflated reproduction cost base earnings.

In the *Hope Case,* supra, at page 33, there is the following statement: "The 'present fair value' rate base, (is) generally in ill repute." On the same page of the same opinion there is the following footnote from the authority on utility regulation most generally recognized as the leading one in the United States:

> "The attempt to regulate rates by reference to a periodic or occasional reappraisal of the properties has now been tested long enough to confirm the worst fears of its critics. Unless its place is taken by some more promising scheme of rate control, the days of private ownership under government regulation may be numbered." 2 Bonbright, Valuation of Property (1937) 1190.

The prudent investment principle of valuation is fairer for both the investor and consumer. It permits a fair return on invested capital.

In the minority opinion of Mr. Justice Brandeis in the case of *Southwestern Bell Telephone Co.* vs. *Public Service Commission,* 262 U. S. 276, 289, 290, is a classical expression of the prudent investment principle. It is as follows:

> "* * * The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return. * * *

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> "The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the State in the performance of the public service; thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined."

In *St. Joseph Stock Yards Co.* vs. *United States,* 298 U. S. 38, 93, Chief Justice Stone and Justice Cardoza stated that the rule of prudent investment, as propounded by Justice Brandeis, "states the law as it should be."

One of the leading authorities on utility regulation, Prof. Irston R. Barnes, of Yale, sums up the advantages of the prudent investment principles as follows:

> "The prudent-investment principles may be analyzed from three points of view: the legal, the economic, and the administrative.
>
> Legally, the prudent-investment method begins with a different concept of property from that which is implicit in the present-value method. The present-value method tends to regard property rights of utility corporations as entirely equivalent to those which any private business might possess, at least with respect to the company's rights to reasonable earnings. It is said that the company may not be deprived of the value of its property, although any rate order which decreases the net earnings of the utility reduces the value of the property. On the contrary, the advocates of the prudent-investment program do not associate property rights with "value." The rights of the utility with respect to its earnings are measured in terms of the investment in the property. In their view, no taking of property occurs so long as the utility is allowed to earn the "cost of service," including the cost of its capital. There can be no "taking of property" because the investor has "agreed," by embarking his capital in the enterprise, that the utility's charges shall be reasonable. From a practical point of view, the concept of property to which the advocates of prudent investment adhere emphasizes the rights of the security holders rather than the rights of the utility as an abstract and independent entity.
>
> Economically, the principles of prudent investment depart from those that are fundamental to the fair-value method. Essentially, this difference is found in the fact that prudent investment rests its determination of rates upon actual past costs, while the present-value method calculates utility charges on the basis of actual costs only with respect to operating expenses, the costs with respect to the capital investment being hypothetical present costs. The prudent-investment program is more explicit than the present-value method in recognizing that the ability to attract new capital is the ultimate test of the reasonableness

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of the utility's earnings. And finally, the prudent-investment method would regulate charges according to the needs of the utility, as measured by the contractual interest on outstanding bonds, the stipulated dividends on the preferred stock, and the dividend rate on the common stock that was required to attract capital to that investment.

Inasmuch as the prudent-investment proposal arose from the administrative inadequacies of the present-fair-value method, it is not surprising that the scheme seeks to place the administrative tasks on the simplest possible basis. The stability of the rate base is combined with certainty as to the rate of earnings. Thus it is expected that the investors' added security will enable the utility to attract capital on terms equally, or more favorable than those which would prevail if the rate base were made to fluctuate with changes in prices." (The Economics of Public Utility Regulation—Barnes at page 566.)

While originally most State Commissions and other regulatory bodies fixed utility valuations on the reproduction cost basis, there are now but a few, outside of the South, which have not recognized the cost or prudent investment basis. The Interstate Commerce Commission, Federal Communications Commission, Federal Power Commission, and Civil Aeronautics Board all utilize the prudent investment method. The following are some State Commission opinions advocating the cost or prudent investment basis:

CALIFORNIA: *Pacific Gas and Electric Co.* vs. *California,* P. U. R. 1923C, 385, 405 (sustained by U. S. Supreme Court in 302 U. S. 388; 26 F. Supp. 507).

MASSACHUSETTS: *Middlesex and Boston Rate Case,* 2 Mass. P. S. C. R. 111. *Customers* vs. *Northampton Electric Lighting Co.,* 36 P. U. R. (N. S.) 353.

ARKANSAS: *Arkansas Power and Light Co.* vs. *McGehee,* 42 P. U. R. (N. S.) 65, 80.

DISTRICT OF COLUMBIA: *Re Potomac Electric Power Co.,* P. U. R. 1923D, 579, 584.

IDAHO: *Re Boise Artesian Water Co.,* 11 A. R., Idaho P. U. C. 155.

MAINE: *Butler* vs. *Lewiston A. & W. St. Ry. Co.,* P. U. R. 1916D, 25, 35.

MARYLAND: *Re Potomac Edison Co.,* 1933B, 6, 19.

MICHIGAN: *Re Michigan Bell Telephone Co.,* 10 P. U. R. (N. S.) 149, 165.

MONTANA: *Cavanaugh* vs. *Whitefish M. W. Utility,* P. U. R. 1922E, 198, 294.

NEW YORK: *Re Iroquois Natural Gas Co.,* P. U. R. 1919D, 76, 87-88. *Carlson* vs. *Jamestown Telephone Corp.,* P. U. R. 1920F, 645, 648. *Re Sea Cliff and G. C. Gas Co.,* P. U. R. 1921A, 211, 215.

NORTH DAKOTA: *Barth* vs. *Hughes and D. Electric Co.,* P. U. R. 1922A, 740, 747. *Re Midwest Power Co.,* P. U. R. 1922E, 22, 36-37.

OKLAHOMA: *Re Southwestern Bell Telephone Co.,* 9 P. U. R. (N. S.) 113, 136

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PENNSYLVANIA: *P. U. C.* vs. *Solar Electric Co.*, 24 P. U. R. (N. S.) 337, 360-362. *P. U. C.* vs. *Abington Electric Co.*, 28 P. U. R. (N.S.) 257, 260.

RHODE ISLAND: *Div. of P. U.* vs. *Narragansett Electric Co.*, 27 P. U. R. (N. S.) 106, 108-109.

SOUTH DAKOTA: *Morris* vs. *Northwestern Bell Telephone Co.*, P. U. R. 1922D, 769, 774.

WASHINGTON: *P. S. C.* vs. *Spokane Falls Gas Light Co.*, P. U. R. 1921C, 519, 523. *Dept. P. S.* vs. *Grays Harbor R. & L. Co.*, 12 P. U. R. (N. S.) 178, 200. *Re Puget Sound Freight Lines*, 35 P. U. R. (N. S.) 452, 455.

WISCONSIN: *Milwaukee E. R. & Light Co.* vs. *Milwaukee*, P. U. R. 1918E, 1, 25-26. *Marinette* vs. *City Water Co.*, 9 P. U. R. (N. S.) 308, 316.

In the majority opinion this problem of the method of fixing a rate base is recognized (see page 7) but is dismissed with the following words: "When that problem is presented it will, of course, be met. The Board declines to decide that it is properly presented in the instant proceeding." The petition filed in this cause charges that the rate base, upon which the Monmouth Company is now operating, is excessive by $1,618,095. In other words, it is claimed that the consumers of this Company are paying unjust rates to produce a return on a base almost 30 per cent above a proper investment cost base. In view of the action by the majority of the Board of allowing the Motion to Strike, and the resulting denial to the Petitioner of an opportunity to offer evidence and supporting legal argument, I cannot understand how it can be stated "when that problem is presented it will, of course, be met." The problem is before us and it is the duty of the Board to meet it by permitting a presentation of the Petitioner's case at a hearing.

In conclusion, I believe that for many reasons it would be an abuse of the discretion of the Board to dismiss the petition. The Motion to Strike should be dismissed.

Dated, February 16, 1945.

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NEW JERSEY SUPREME COURT

No. 207. October Term, 1938.

New Jersey Suburban Water Company,
Prosecutor,
vs.
The Board of Public Utility Commissioners, et al.,
Respondents.

Argued October 5, 1938. Decided

On certiorari.

Before *Justices Case, Donges* and *Porter.*

For the prosecutor, *McCarter & English* (*George W. C. McCarter,* of Counsel).

For the respondent Board of Public Utility Commissioners, *John A. Bernhard* (*Frank H. Sommer,* of Counsel).

For the respondent Town of Harrison, *Michael J. Bruder* (*Anthony P. Kearns,* of Counsel).

The opinion of the court was delivered by

PORTER, J.

The action of the Board of Public Utility Commissioners, Respondents, in the fixing of rate for water sold by New Jersey Suburban Water Company, Prosecutor, is before us on a writ of certiorari for review.

The Order of the Board in question was made under date of October 4, 1937, and fixed a rate of $99 per million gallons as the just and reasonable rate to be charged by the Prosecutor.

It is the contention of the Prosecutor that this Order should be set aside because the conclusions of the Board were improperly arrived at, in that the valuation of the Prosecutor's property as a rate base was contrary to the facts; as was also the amount of depreciation, its value as a going concern and its operating expenses, so that a fair return on its investment is not provided in the rate fixed.

It is also the contention that the said rate amounts to confiscation and deprives the Prosecutor of its property without due

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process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The petition of the Water Company to the Board for an increase in the rate raised issues of fact as to the right of the Petitioner for the relief prayed for. It had the burden of establishing its case. The evidence was conflicting. Much of it was given by experts. The Board is a fact-finding body and its function was to weigh the evidence, ascertain the facts and upon the same to fix a rate which would bring a fair and just return to the utility for the service rendered.

A careful examination of the testimony satisfies us that the Board was justified in its conclusions. No useful purpose is to be served in reviewing the testimony. Suffice it to say, that in our opinion there was ample testimony to support its findings as a reasonable conclusion and, therefore, this Court cannot substitute its judgment for that of the Board. Cf. *West Jersey and Seashore R. R. Co.* vs. *Board of Public Utility Commissioners,* 8 N. J. Misc. 212, 149 A. 269; *Fornarotto* vs. *Board of Public Utility Commissioners,* 105 N. J. Law 28.

In considering what was a fair return for the Petitioner it developed that its business had been greatly curtailed in recent years and that it was serving but two customers, the Town of Harrison and the East Newark Realty Co., a relatively small user, and that its facilities were much in excess of its present requirements. In fixing the base values for rate-making purpose the Board was justified in finding the present value of only that portion of the property which was used and useful, having regard to the value of the service rendered. Cf. *Borough of Ben Avon* vs. *Ohio Valley Water Co.,* 103 A. 744 (Pa.); *San Diego Land & Town Co.* vs. *Jasper,* 189 U. S. 439; *Long Branch Commission* vs. *Tintern Manor Water Co.,* 70 N. J. Eq. 71; *Spring Valley Waterworks Co.* vs. *San Francisco,* 165 Federal 667.

It appears that the Board took into consideration comparative rates allowed for the sale of water in adjacent communities as an "indicia of what may be termed reasonable value of the services and on the average the Board finds no rate existing in excess of $99 per million gallons." The Prosecutor contends that the Board considered cases not comparable and excluded testimony offered of really comparable situations. The comparability of other rates and the weight such testimony is to have is within the

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sound discretion of the board. Cf. *Public Service Gas Co.* vs. *Board of Public Utility Commissioners,* 84 N. J. Law 463; *Pennsylvania Power & Light Co.* vs. *Public Service Commission,* 193 A. 427.

Having concluded that the testimony justified the Board in fixing the rate complained of, it follows that there is no merit in the allegation of confiscation of property without due process of law.

The decision or Order of the Board is sustained and the writ is dismissed, with costs.

COURT OF ERRORS AND APPEALS

No. 61. May Term, 1939.

New Jersey Suburban Water Company,
Prosecutor-Appellant,

and

The Board of Public Utility Commissioners, et als.,
Defendants-Respondents.

Argued May 22, 1939. Decided September 22, 1939.

On appeal from Supreme Court.

For appellant, *George W. C. McCarter.*

For respondent the Board of Public Utility Commissioners, *John A. Bernhard* (*Frank H. Sommer,* of Counsel).

For respondent, Town of Harrison, *Michael J. Bruder.*

The opinion of the court was delivered by

PERSKIE, J.

This is a water rate case. Two major questions require decision.

First: Did the Supreme Court, as it is claimed, erroneously exercise its supervisory power and fail fully to discharge its duty in affirming an Order of our Board of Public Utility Commissioners under date of October 4, 1937, fixing a rate of $99 per million gallons of water?

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Second: Is the rate so fixed and determined, as it is claimed to be, unjust, unreasonable and confiscatory?

Appellant, New Jersey Suburban Water Company, hereafter referred to as Prosecutor (now insolvent and operated by a receiver in Chancery), entered into a contract on September 15, 1903, with the Town of Harrison, hereafter referred to as Respondent, because it is conceded that it is practically the only party affected, for the supply of its water. This contract fixed the rate at $82.50 per million gallons and was for a period of fifteen years with an additional ten-year option which Respondent exercised.

On August 5, 1924, the Prosecutor and Respondent extended or renewed their contract of September 15, 1903, for a further period of fifteen years, so that, as lastly extended or renewed, it will expire in 1943. The rate, however, was fixed at $104.25 instead of $82.50 per million gallons.

On September 27, 1928, the Board of Public Utility Commissioners, hereafter referred to as the Board, fixed the rate at $99 per million gallons, effective January 1, 1929.

On April 11, 1930, Prosecutor petitioned the Board for an increase in rate to $108.50 per million gallons; chancery litigation followed, and on April 2, 1936, Prosecutor amended its petition seeking an increase in rate to $140 with a surcharge of $14 and with an additional charge of $8.40 as against Respondent alone. For reasons presently unimportant, these applications were dismissed without prejudice.

Thereafter, on April 30, 1936, Prosecutor again petitioned the Board this time seeking a rate of $151.91 per million gallons. In addition thereto, Prosecutor separately petitioned the Board for a surcharge of $22 for a period of ten years to make up past deficiencies.

The Board conducted formal hearings on both petitions which, by consent, were heard together. Upon consideration of the proofs offered by the respective parties, the Board, on October 4, 1937, denied Prosecutor's petition for the surcharge; and, on the same day, the Board separately found and determined that the "existing rate of $99 per million gallons is not unjust or unreasonable under all the circumstances, and that, all the circumstances considered, $99 per million gallons is hereby determined, fixed and prescribed as the just and reasonable rate to be observed, imposed and followed by the Company."

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On application to review each determination, Mr. Justice Parker denied a writ to review the Board's denial of Prosecutor's petition for the surcharge but allowed a writ to review the Board's order fixing the rate of $99 per million gallons.

The Supreme Court affirmed the Board and dismissed the writ. 122 N. J. L. 54, 4 A. (2d) 47. In so doing, it said, inter alia, at pages 55, 56:

> "A careful examination of the testimony satisfies us that the Board was justified in its conclusions. No useful purpose is to be served in reviewing the testimony. Suffice it to say, that in our opinion there was ample testimony to support its findings as a reasonable conclusion and, therefore, this court cannot substitute its judgment for that of the Board."
>
> * * *
>
> "Having concluded that the testimony justified the board in fixing the rate complained of, it follows that there is no merit in the allegation of confiscation of property without due process of law."

Prosecutor challenges the propriety of the determination thus made. That challenge is divided into two major parts.

The first part claims that the Supreme Court did not fully discharge its duty in the manner required by law when it affirmed the action of the Board. The second part claims that the rate of $99 per million gallons, as fixed and affirmed, is unreasonable, unjust and confiscatory.

1. In support of the first part of its challenge, Prosecutor contends that the aforesaid quoted language of the Supreme Court fully justifies Prosecutor's claim that the Supreme Court did not, as it was bound to do under the law in this type of case, make an independent finding of the facts in reaching its determination that the order of the Board was justified by the proofs. *Public Service Gas Co.* vs. *Public Utility Bd.*, 84 N. J. L. 463, 87 A. 651, lastly affirmed 87 N. J. L. 581, 92 A. 606; *Erie R. R. Co.* vs. *Public Utility Board,* 85 N. J. L. 420, 89 A. 1001; *W. J. & S. R. R. Co.* vs. *Public Utility Board,* 87 N. J. L. 170 (at page 178), 94 A. 57; *Erie R. R. Co.* vs. *Public Utility Commissioners,* 89 N. J. L. 57 (at page 68), 98 A. 13, aff. 90 N. J. L. 672, 103 A. 1052; *Hackensack Water Co.* vs. *Public Utility Board,* 96 N. J. L. 184, 115 A. 528.

On the other hand, Respondent claims that the Supreme Court did make an independent finding of the facts and correctly applied the law thereto. In addition, relying on the very cases cited by Prosecutor and others presently cited, Respondent claims that when conflicting proofs support the conclusion that the action

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of the Board is not arbitrary but is based upon legal proofs, the Supreme Court does not substitute its judgment for the judgment of the Board. For the Board, in finding a rate, acts as a legislative agency in the performance of a legislative duty. Cf. *Inter-State Tel. Co.* vs. *Public Utility Board,* 84 N. J. L. 184, 86 A. 363; *Plainfield Union Water Co.* vs. *Board of Public Utility Commissioners,* 6 N. J. Mis. R. 267, 140 A. 785; *W. J. & S. R. R. Co.* vs. *Board of Public Utility Commissioners,* 8 N. J. Misc. R. 212, 149 A. 269.

The foregoing principles of law are, under the issues involved, in harmony with each other and with those pronounced by the Supreme Court of the United States. (See cases collated in *St. Joseph Stock Yards* vs. *United States,* 298 U. S. 38-94, at star page 51, 80 L. Ed. 1033, at page 1041.) But when, as here, the claim is made that the rate as found is confiscatory, i.e., Prosecutor is deprived of its property without due process of law contrary to the Fourteenth Amendment of our Federal constitution, then again, both by our decisions (see cases first cited for Prosecutor), and by the decisions of our Federal Supreme Court, the requirements of due process can be satisfied only if there is the right of appeal or review to a court with jurisdiction to make an independent finding both of the facts and the law. Cf. *Ohio Valley Water Co.* vs. *Ben Avon Borough,* 253 U. S. 287, 64 L. Ed. 908; *St. Joseph Stock Yards* vs. *United States,* supra.

With these principles in mind, it is argued that the necessary inference to be drawn from the quoted language of the opinion of our Supreme Court is that the Supreme Court did make the same factual finding that the Board made. That may be so. But whether it did or did not make the required factual finding is not altogether free from debate. We regard it unwise to consider and determine a constitutional question upon such a state of the record.

We could, of course, remand the cause to the Supreme Court to make a definite finding. But we have frequently acknowledged our power to pass upon the merits in fairly comparable circumstances (*Jordan* vs. *Borough of Dumont,* 105 N. J. L. 197, and cases collated at pages 198, 143 A. 843; *Harman* vs. *Reed,* 108 N. J. L. 191, 155 A. 145), and have at times exercised that power when we deemed it desirable to do so. *Smith* vs. *Carty,* 120 N. J. L. 335, at page 340, 199 A. 12. Since all proofs are

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before us, and since we are of the opinion that the protracted litigation of the issues here involved should be ended, we choose to adopt the course we have followed in *Smith* vs. *Carty,* supra, and shall consider and determine this cause upon the merits.

2. This brings us to the second part of prosecutor's challenge. It presents the pith of the issue. Is the rate, $99 per million gallons, unreasonable, unjust and confiscatory? Does it deprive Prosecutor of its property, as it claims, without due process of law contrary to the Fourteenth Amendment of our Federal constitution?

The Board found that the fair reproductive value of Prosecutor's property, used and useful, and with due regard to the reasonable value of the services rendered was $130,180.00. From that sum it deducted $83,315.00, as the estimated depreciation of the property, and to the balance of $46,865.00 it added $4,686.00 for going value, making a net value of $51,551.00. The Board allowed a rate of 6¾ per cent above the reasonable and fixed charges and, as already stated, the Supreme Court affirmed the Board.

Prosecutor challenges the propriety of the results reached both by the Board and the Supreme Court. The argument in support of its challenge is separately captioned under the following headings: "Rate base, depreciation, going concern, operating expense, fair return, comparative rates, confiscation, and what the court should do." We shall consider each in the order stated.

Rate Base. Prosecutor's property consists of a thirty-inch riveted steel main, five-sixteenths of an inch thick. It begins at a point where it connects with the main of the Passaic Valley Water Commission located at Belleville and Kearny Avenues, Kearny, N. J., and runs thence southward from or along Kearny Avenue a distance of about two and a half miles to a point just beyond the northerly limit of Harrison. Special facilities are provided to carry this main over two railroad crossings; one is the "Greenwood Lake Railroad Division of the Erie" and the other is the "Erie Railroad at the northerly limit of Harrison."

Prosecutor uses this main to transport water which it buys from the Passaic Valley Water Commission at $78 per million gallons and sells for $99 per million gallons, or at a gross difference of $21 per million gallons.

From the record submitted we learn that in its earlier years prosecutor had four major customers, viz., the Town of Kearny,

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with a population of about 40,000, the Borough of East Newark, with a population of about 4,000, the Town of Harrison, with a population of about 15,000, and the East Newark Realty Company (formerly Clark Thread Company).

In 1929, for example, Prosecutor sold to Kearny, East Newark and Clark Thread Company, 1,156,972,500 gallons of water, and it sold to Harrison 1,002,548,000 gallons of water, or a total of 2,159,520,500 gallons of water.

Gradually Prosecutor lost Kearny and East Newark as customers. Prosecutor concedes that the East Newark Realty Company is not under any contract to buy water from Prosecutor and that it is a very small customer, so small that it is practically negligible. Thus Prosecutor has virtually one remaining customer, namely, Respondent, the Town of Harrison, whose contract, as we already know, expires in 1943.

We learn more from the record. The proofs indicate that there is little, if any, likelihood of Prosecutor being able to recapture either Kearny or East Newark as customers; they having made other arrangements for their supply of water; that there is little, if any, likelihood of Prosecutor obtaining other customers; and that there is nothing presently to indicate whether Respondent shall or shall not continue as its customer after 1943.

In this posture of the proofs, which proofs are free from any substantial dispute, each side offered expert testimony as to the present value of Prosecutor's property on the basis of cost of reproduction. Without attempting to detail the many objections which each side raises as to the probative value of the testimony so produced by the other side, it will suffice, in our view of the cause, if we merely state the results reached by the respective experts.

Mr. Vermeule, for Prosecutor, fixed the fair value at $271,553.00. Prosecutor concedes that $260 should be deducted from this amount for two valves no longer used or useful, and a possible further reduction of $2,942.59 arising out of the dispute as to the actual length of the main.

For Respondents the following fair values were fixed: Mr. Potts, $163,292.00; Mr. Cleveland, $174,383.00 and Mr. Williams, $163,292.00.

In light, however, of Prosecutor's present and prospective business status and in light of the value of the services which it rendered, Respondents' experts concluded that Prosecutor's

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main was altogether too large. For a period of about two months Prosecutor used a 12-inch temporary by-pass pipe across the bridge (Ex. P-4) which pipe was sufficient to supply the water needs of "Harrison, East Newark and Clark Thread Works." Potts and Williams testified (respondent characterized their testimony as the "Potts' and Williams' theory") that only 50 per cent of Prosecutor's main was necessarily useful for the services rendered; that by the use of a small main plus increased pressure, claimed to be available by turning in the Great Notch reservoir which formerly served Prosecutor's line and is still attached thereto, double the daily ordinary and extraordinary needs of Respondent would be fully satisfied; and that because of these circumstances Respondent's experts reduced their appraisement 50 per cent. For example, Mr. Potts reduced the fair valuation of Prosecutor's property, used and useful, to $81,646.

Prosecutor, on the other hand, contends that the "Potts' and Williams' theory" is "untenable in law" and "unfounded in fact." That contention, generally stated, is based upon the premise that the main is not too large; that it has no right to exact from the Passaic Valley Water Commission the right to turn in the Great Notch reservoir; and that to do so would be neither practical nor safe. Prosecutor, moreover, stoutly contends that there is no basis, under the proofs, to support the Board's valuation of $130,180. In support of that contention Prosecutor especially emphasizes the fact that the Board in 1929 placed the fair value upon the same plant of $197,000 after deducting $20,000 for depreciation and including going concern value.

The rationale of the Board's action is best gathered from its decision wherein it said:

> "The testimony also shows that the present plant capacity is greatly in excess of the requirements of the Town of Harrison. The Board recognizes that it cannot alone determine the true and fair value of the property used and useful by a comparison with a similar plant. Nevertheless, if a company were to seek rates as a going concern on the basis of an initially overbuilt plant, this Commission would be obliged to only allow a rate which would give a fair return alone upon the value of the property insofar as it was used and useful. The value of the overbuilding; the excess over the value of the property which was used and useful would not be included in the rate base. It therefore follows that when a plant, by reason of the changed conditions and novel circumstances presented in this case, becomes analogous to an overbuilt plant, such excess in property not used and useful cannot be included in the estimate of a rate base."

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> "In 1929 this Board fixed the value of the company's property used and useful at $197,000.00. At that time the company served various municipalities and private consumers. Today the company has virtually one customer, without firm assurance of the long retention of that customer, and it therefore becomes the duty of the Board to determine the value of the property used and useful in relation to the present service rendered and that which might reasonably be rendered in the reasonable future. To obtain this objective the Board has calculated that the value of the property now used and useful is $130,180.00, * * *." (Cf. *San Diego Land and Town Co.* vs. *Jasper,* 189 U. S. 439, 447, 47 L. ed. 892, at p. 896; *Long Branch Commission* vs. *Tintern Manor Water Co.,* 70 N. J. Eq. 71, at p. 78, 62 A. 474, at p. 477.)

Neither industry of capable counsel, nor that of the Court, has produced an adjudication in an altogether like situation. This is not the case of a mistaken judgment in building too large a plant. Cf. *Elizabeth* vs. *Public Utility Commissioners,* 99 N. J. L. 496 (at page 498), 123 A. 358. Here the main was built sufficiently large to allow Prosecutor to carry out its contracts to supply the needs of its earlier customers. Now it finds itself with altogether too large a plant on its hands, with only one customer, and with little, if any, prospect for future betterment of its unusual and unhealthy business status.

The fallacy, as we see it, with Prosecutor's contention is that it, in effect, makes the cost of the reproduction of its plant, irrespective of the circumstances exhibited, the conclusive test of determining its present fair value. That is not the law. Reproduction cost, like historic costs and actual costs, "is a relevant fact requiring appropriate consideration," but does not furnish "an exclusive test." The weight to be given to reproduction cost "is to be determined in light of the facts of the particular case." Cf. *Los Angeles G. & E. Corp.* vs. *Railroad Comm.,* 289 U. S. 287, at pages 307, 308, 77 L. Ed. 1180, at pages 1193, 1194. Very aptly has it been held that "value depends upon use and is measured, or at least significantly indicated, by the profitableness of present and prospective services rendered that are just and reasonable as between the owner of and those served by the property." *Denver Union Stockyards Co.* vs. *United States,* 304 U. S. 470 (at page 479), 82 L. Ed. 1469 (at page 1478), and cases there cited.

We find it unnecessary to decide whether the Board was right in its reasoning that the present value of Prosecutor's plant was to be determined upon the analogous basis of an initially overbuilt plant; we are called upon to decide only whether the Board

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reached a proper, a right result. Cf. *Central R. R. Co. of N. J.* vs. *State Tax Dept.*, 112 N. J. L. 5 (at page 16), 169 A. 489, certiorari refused by United States Supreme Court, 293 U. S. 568, 79 L. Ed. 667.

With this objective in mind, we are satisfied, notwithstanding the fact that Prosecutor was necessarily obliged to use its main, double the necessary size, to serve Respondent, that Prosecutor is entitled only to a fair and just return based upon the fair valuation of that main, with due regard to its excessive size and with due regard to the fair and just value of the services rendered. A valuation so reached, we think, is fair and just both to the owners of, and those served by, the property. *Denver Union Stockyards Co.* vs. *United States,* supra; *Public Service Gas Co.* vs. *Board of Public Utility Comm.,* supra.

Thus, with due regard to the excessive size of Prosecutor's property, with due regard to the necessary use made thereof (and in that sense used and useful), and with due regard to that which is fair and just, as between Prosecutor and Respondent, we find, as a fact, that the fair valuation of Prosecutor's property is the sum fixed by the Board, namely, $130,180.00.

Depreciation. The Board calculated the item of depreciation at 2 per cent per annum for thirty-two years and reached a total depreciation of $83,315.00. This amount was reached upon the basis of a fifty-year life for the property and the Board indicated that its determined amount was "under the amount which (Prosecutor) itself had depreciated the property upon its books ($138,012.90) * * *." Prosecutor denies that the item of $138,012.90 set up in its report, under "amortization or retirement reserve" represents an existing fund set up for depreciation. But however characterized, Prosecutor concedes that it charged $33,000 to amortization but never in fact set it up; it admits that it earned this amount but paid it out in dividends. Prosecutor further claims, without supporting authority, that the item of $138,012.90 was set up at the direction of Federal Tax Authorities, and that it is non-existent; it is purely mythical. Be that as it may, we do not find it necessary further to labor this point, or the point that Prosecutor's present plight is largely due to the manner in which it manipulated and diverted its funds. The question is: do the proofs support the Board's determination? We think they do.

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Now, good, common judgment compels the conclusion that "a water plant with its additions, begins to depreciate in value from the moment of its use." *Knoxville* vs. *Knoxville Water Co.*, 212 U. S. 1 (page 13), 54 L. Ed. 371 (page 380). Especially is this so when, as here, practically all the pipe is buried in the ground with the exception of a short distance for which it is above the ground but submitted to locomotive gases. The proofs, moreover, disclose that 22,000,000 gallons of water leaked out of the main in a year and that Prosecutor was obliged to, and did, expend relatively substantial sums of money each year to repair leaks. For example, it spent $3,151.26 in 1929, $1,611.83 in 1930 and $2,337.25 in 1931. Additionally, experts for Respondent testified that in the engineering profession, fifty years is considered as the average length of life for a pipe line of the character here involved. The average length of life thus reached is not purely theoretical; it is based "on experience * * * practice * * * and study * * *."

It is, of course, true that the testimony of competent valuation engineers, who examine the property and make estimates in respect to its condition, is to be preferred to mere calculations based on averages and assumed probabilities. *McCardle* vs. *Indianapolis Water Co.*, 272 U. S. 400 (page 416), 71 L. Ed. 315 (page 327). But the testimony of Prosecutor's expert does not come within the stated rule.

He examined the inside of the pipe at the Erie R. R. in 1928, at the Greenwood R. R. in 1932, and at several cuts into the pipe made at points where it rested in the earth trench, beyond the above two stated places. Such examinations were, indeed, limited and spotty in character. His testimony, moreover, that he did "not think that any deductions should be made for depreciation, deterioration * * *" lacks persuasion; he, in fact, did make an allowance of $20,000 for depreciation.

We are satisfied that the deduction of $83,315.00 for depreciation is fully supported by the proofs. We so find.

Going Concern Value. Prosecutor concedes that "going concern value" is not really involved in this case. In view of that concession, this item requires no discussion.

Operating Expenses. Prosecutor complains on but two scores.

The first complaint concerns the item of taxation. The Board concluded "that municipal taxes properly chargeable are only

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those taxes upon property which is used and useful," and accordingly reduced the item of taxes in the operating expenses "in the ratio that the assessment on the property used and useful bears to the total assessment." In so doing, we hold, the Board was entirely correct; it exercised good judgment. The consuming public should not be forced to shoulder taxes on any property other than that which is used for or useful to it. If the taxes as assessed are, as contended, erroneously assessed, Prosecutor has its remedy.

The second complaint is that the Board made no allowance for amortization. Under the proofs of the case at bar, what has already been written under the heading of "Depreciation" is dispositive of this point. In the final analysis, as already observed, Prosecutor, under all circumstances, is only entitled to a fair and just compensation for the services which it renders.

Fair Return. Prosecutor insists that "no percentage less than 8 per cent will be adequate." We find no merit to this insistence. In light of all the circumstances exhibited in this cause, we find that the rate of 6¾ per cent is fair and just as between Prosecutor and Respondent.

Comparative Rates. The Board held that "* * * it must, under the circumstances of this case, take cognizance of existing comparative rates allowed for the sale of water in adjacent communities, and while it bears no absolutely controlling relation to the value of the service rendered by this company, it is an indicia of what may be termed reasonable value of the services and on the average the Board finds no rate existing in excess of $99.00 per million gallons."

The Board, under the circumstances, properly considered comparative rates in localities similarly situated. Cf. *Bluefield W. W. & Improv. Co.* vs. *Public Service Com.*, 262 U. S. 678 (page 690), 67 L. Ed. 1176 (page 1182); *Public Service Gas Co.* vs. *Board of Public Utility Bd.*, supra (at page 475 in 84 N. J. L. and at page 656 in 87 A. R.).

Confiscation. It is interesting to observe, for whatever value, if any, it may have, that Prosecutor carried its entire plant at the book value of $167,541.13, without deduction for depreciation; that as of January 1, 1935, it set up the sum of $134,102.90 under the heading of amortization or retirement reserve. By so doing, Prosecutor's books show a depreciated book value of all

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its property of $33,438.53 as against the depreciated value of $46,865.00 fixed by the Board.

But be that as it may, having found that the rate fixed by the Board was fair and just, it necessarily follows, and we so hold, that Prosecutor has failed satisfactorily to establish, as it was obliged to establish, that the rate fixed by the Board and affirmed by the Supreme Court, infringes constitutional immunities.

What the Court Should Do. Judgment is affirmed with costs.

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 57. October Term, 1938.

New Jersey Suburban Water Company, a Body Corporate,
Plaintiff-Respondent,
vs.
Town of Harrison, a Municipal Corporation,
Defendant-Appellant.

Argued October 21, 1938. Decided

On appeal from a judgment of the Supreme Court, whose opinion is reported in 120 N. J. L. 546.

For the appellant, *Michael J. Bruder* (*Anthony P. Kearns*, of Counsel).

For the respondent, *G. W. C. McCarter.*

For the Board of Public Utility Commissioners (by permission of the court), *Frank H. Sommer* and *John A. Bernhard.*

The opinion of the court was delivered by

HEHER, J.

In our view, there is serious question as to whether the Respondent Utility designed the "petition" filed by it with the Board of Public Utility Commissioners on April 29, 1936, as a schedule of increased rates fixed by the Utility under the authority conferred by section 17 (h) of chapter 195 of the laws of 1911, as amended by chapter 150 of the laws of 1926 (Pamph. L. 1911, pages 374, 380; Pamph. L. 1926, pages 239, 240; Revised Statutes 1937, 48:2–21d), and therefore effective, by the mere act of filing, until suspended, changed, or altered by the Board pending

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the determination of the ultimate question of whether the rates so promulgated were "just and reasonable."

The presentation of the companion petition for a specified surcharge, based upon its alleged "failure to earn a fair return upon the capital invested in the property devoted to the public use," considered in the light of the dismissal by the Board of a prior application by the Utility for an increase of rates, "without prejudice" to the filing of petitions for an increase of rates and a surcharge, would seem to indicate a purpose to invoke the procedure outlined in section 16 (c) of the cited statute, as amended by chapter 50 of the laws of 1935 (Pamph. L. 1911, pages 374, 377; Pamph. L. 1935, page 129; Revised Statutes 1937, 48:2–21b (1)), authorizing the Board "to fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof," and so forth, "after hearing, upon notice." In the prior proceedings, there were two orders suspending the operation of the rate increase *pendente lite*. The second (the statute permitted but two, each for a period not exceeding three months) expired of its own limitation on October 15, 1930. On September 24, 1930, it was stipulated by the attorney for the Utility that, "in the event that the present order of suspension expires and the hearings on the application of the Company for increased rates have not been concluded, the New Jersey Suburban Water Company will continue to bill the municipalities at the same rate as at present, until such times as the rates are fixed by the Board." Due to the non-action of the Utility, the matter was not again brought on for hearing until October 2, 1935; and the proceeding was not concluded until 1936, with the result hereinbefore stated.

But however this may be, the Utility subsequently pursued a course of action, that, if not to be deemed a clarification of the original purpose, certainly constituted an election to proceed under section 16 (c) of the statute, supra, and is thus precluded by its own conduct from the enforcement of the rate increase embodied in the petition as regards water delivered during the pendency of the proceedings before the Utility Commission. The proceedings terminated in an Order by the Commission, entered on October 4, 1937, adjudging the existing rate to be just and reasonable, and disapproving the proposed increase; and the Utility now seeks to enforce, for water sold to the municipality

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in the interim, a rate thus deemed by the Utility Commission to be unjust and unreasonable. We entertain the view that, for reasons to be presently stated, the doctrine of estoppel *in pais* is operative against the Utility.

On June 30, 1936, the Respondent Utility dispatched this communication to the Utility Board:

> "We beg to acknowledge receipt of your letter of the 24th instant, advising that every public utility will hereafter be required by the Board to give not less than sixty (60) days' written notice, in advance, of any change or variation in the rate of depreciation.
>
> "This Company, as you know, has filed with the Board, under date of April 29th, last, a new schedule of rates, effective June 1, 1936, as to the rate, and presumably until after action by the Board as to the surcharge.
>
> "By mutual consent we will continue to bill the towns at the old $99.00-rate until the new rate shall have been fixed by the Board. Likewise, we will make no entries on the books as to depreciation or amortization until action has been taken by the Board, in view of the imminence of the anticipated action by your Honorable body directing what amount shall be proper."

The Utility continued to bill the municipality (its sole customer), and to receive payment, for water delivered, at the old rate. The bills thereafter submitted for the year 1936 contained this notation:

> "Pending the determination of the rate to be fixed by the Board of Public Utility Commissioners under the application of this Company, dated April 29, 1936, for an increase in rate, this bill is by mutual consent rendered at the old rate of $99.00 per million gallons, and is subject to correction after action thereon shall have been taken by the Board."

For the quarter ending March 31, 1937, a payment was demanded at the increased rate. The reason assigned therefor by the Utility was that its board of directors, on the advice of counsel, "took the ground that the rate had been made affirmative by negative action on the part of the Board of Public Utility Commissioners because their six-month power of suspension had expired."

And, when the petitions in question came on for hearing before the Utility Commission, it was plainly understood between the parties that the increase of rate should not become operative during the pendency of the proceedings, except as ultimately approved by the Utility Commission, and that, meanwhile, water delivered to the Appellant municipality was to be billed at the

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old rate. Again, at a hearing held on February 16, 1937, counsel for the Utility reiterated the common understanding that the old rate was to continue in effect until the Board determined the rate. In response to the sitting Commissioner's question as to the effect of the stipulation made in the prior proceeding for the maintenance of the old rate *pendente lite,* he acknowledged that it was effective for "what it purports to do, that until this Court makes an Order we cannot charge a cent more than $99. He continued: "Yes, we cannot bill them for the month of February (1937) at more than $99. We don't claim that we can. We claim that when the Board decides this case the Board will fix a rate—we don't care and still don't care whether it is all in the rate or divided between the rate and the surcharge—but the Board said the proper procedure is to segregate it in order that certain of the items will cease after a definite period of years and will not go on until * * *. Now, then, as I say, if the Board feels that the proper procedure requires segregation and separation of some of the money, the price to be paid by the Town of Harrison, into a rate and a surcharge, that is all right with us, because it is dollars and cents just the same, but we realize neither the rate nor the surcharge—if there is to be a rate and a surcharge—shall commence one day before the Board makes its Order, which may be March 1 or April 1, whenever you make your Order. Then the new deal begins, and meanwhile, no matter how long these delays have been—and they have been very long, since I was first here arguing with your Honor—we are stuck with the $99 rate. That is the situation. * * * I think we are stuck with it (the old rate of $99) in full until the Board makes its Order. Then this stipulation spends its force, and from and after the date of this Board's Order, this stipulation is of no effect."

We are of opinion that, by force of these circumstances, the Water Company is estopped from asserting that the document in question constituted a rate schedule automatically effective under section 17 (h) of the cited statute, and therefore enforceable as regards water supplied in the interim, notwithstanding the subsequent finding of the Utility Commission that the rate was unjust and unreasonable.

In modern usage, equitable estoppel and estoppel *in pais* are convertible terms, embracing also quasi-estoppel. They embody the doctrine, grounded in equity and justice, that one shall not be

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permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has relied thereon. An estoppel arises "where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth." *Termes de la Ley,* tit. Estoppel, cited in *Demarest* vs. *Hopper,* 22 N. J. L. 599, 619. It is operative where a person "has done some act which the policy of the law will not permit him to gainsay or deny." *Greenleaf on Evidence,* c. 4. See, also, *Blackstone's Com.* 308. While the creature of equity, and governed by equitable principles, it is a doctrine enforceable in courts of common law jurisdiction. *LaRosa* vs. *Nichols,* 92 N. J. L. 375; *Central R. R. Co.* vs. *McCartney,* 68 N. J. L. 165. It is of the essence of equitable estoppel that one is precluded from taking a position inconsistent with that previously assumed, and intended to influence the conduct of another, if such repudiation "would not be responsive to the demand of justice and good conscience," and would effect an unjust result as regards the latter. *Rothschild* vs. *Title Guarantee & Trust Co.,* 204 N. Y. 458, 97 N. E. 879, 41 L. R. A. (N. S.) 740.

But it is argued on behalf of the Utility that there is no proof of reliance upon its written consent "to bill * * * at the old rate until the new rate" should have been "fixed by the Board," or upon what counsel said at the hearings, termed "an informal exchange of views arguendo," and signifying, "at the worst," that counsel "was laboring under a mistaken view of the law, and of the legal effect of the old stipulation."

We find this claim to be untenable. The municipality challenged the fairness of the increased rate at every stage of the proceedings. The Utility Commission twice exercised its suspensory power during the first proceeding; and, as pointed out, the Utility stipulated to continue the existing rate, after the second order of suspension had expired of its own limitation, "until such time as the rates" should be "fixed by the Board." The subsequent expression—in the second proceeding—both by written communication and by counsel's stipulation, of the Utility's "consent to bill at the old rate until the new rate" "should have been fixed by the Board," was plainly designed to obviate the need of action looking to a suspension of the increased rate; and that the position thus taken was relied upon by the munici-

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pality is indisputable under all the circumstances. It found—and justifiably so—no need to apply for a suspension of the operation of the petition as a rate schedule.

And the Utility Commission was likewise led to believe that there was no occasion to exercise, *ex mero motu,* the power of suspension *pendente lite* of such rate increases; and that in itself sufficed to create an estoppel. It had a statutory duty to perform in the premises; and public policy will not tolerate the repudiation of a stipulation thus given to stay the hand of the Board in the exercise of its statutory function, especially where, as here, the result will be the enforcement of a right *pendente lite* that was ultimately found to be unjust and unreasonable.

To work an estoppel it is not requisite that a fraudulent intent be shown. Actual fraud is not an essential ingredient. If the conduct works an unjust or inequitable result to the person it was designed to influence, the doctrine is applicable. *Rothschild* vs. *Title Guarantee & Trust Co.,* supra.

The point is also made that the Utility "received no consideration" for the stipulation adverted to, and the doctrine of estoppel is therefore not invokable. But equitable estoppel is not grounded in the principles of contract. It is designed to prevent fraud and injustice, and needs no consideration for its operation. "It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation." *Rothschild* vs. *Title Guarantee & Trust Co.,* supra.

Moreover, the evidence conclusively shows an intentional waiver by the Utility of such right as it might have, under section 17 (h) of the cited statute, to immediate enforcement of the rate increase, in the absence of a formal order of suspension.

And there is no merit in the contention that, in any event, the Utility Commission could not lawfully suspend the increased rates for a longer total period than six months, and therefore there is no estoppel against the enforcement of the claim in suit. If the stipulation adverted to had not been made, and the Board had exercised its power of suspension, the statutory limitation would furnish, as it was manifestly intended to, a cogent reason for action by the Board within the six months' period. In such circumstances, the Utility is precluded from so limiting the stipulation.

The judgment is accordingly reversed.

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NEW JERSEY SUPREME COURT

Middlesex County

R. & A. Realty Corporation, a Corporation of the State of New Jersey, and John Rotella, Trading as Bloomfield Scrap Iron and Metal Co.,

Plaintiffs,

vs.

The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Wilson & English Construction Company, a Corporation of the State of New York, the Board of Public Utility Commissioners of the State of New Jersey, J. P. Burns, Harry Bacharach, Thomas L. Hanson, and Frank J. Reardon,

Defendants.

On motions to strike the Complaint and dismiss the action.

Decided December 2, 1938.

1. It is settled in this State that the owner of land abutting on a street or highway has no vested right to recover damages for a change of grade of the street or highway in the absence of a statute giving that right, and this is so even though the general effect of the change of grade is to impair or substantially destroy access to the landowner's property. It is not a taking of property in the legal sense. It is damnum absque injuria.

2. Section 2 of the Fielder Grade Crossing Elimination Act did not nor was it intended to create a cause of action in abutting landowners for damages occasioned by the changed grade of a street or highway. The intent was not to impose a liability to pay damages where none existed, but merely to provide a method of ascertaining and paying damage for such taking of private property as under existing law entitled the owner to compensation.

3. The State cannot be sued in its own courts without its consent. The Board of Public Utility Commissioners of the State of New Jersey in the performance of its statutory powers and duties is an alter ego of the State and cannot be sued as a separate entity or body in the absence of a statute granting permission or giving consent so to do. Such consent is not granted by the language of Section 2 of the Fielder Grade Crossing Elimination Act.

4. Members of a public board, acting in the performance of a public duty and under a public statute, are not personally liable for damages in a civil action arising out of their acts, provided what they do is done in good faith.

5. The individual members comprising the Board of Public Utility Commissioners are not personally liable for damages in a civil action allegedly arising out of an order of the Board directing the elimination of a grade crossing in the absence of a showing that the Commissioners were actuated in the making of the order by motives of private gain, oppression or bad faith.

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For the Pennsylvania Railroad Company, *John A. Hartpence* and *Thorn Lord.*

For Wilson & English Construction Company, *William G. Hart.*

For the Board of Public Utility Commissioners and Harry Bacharach, *Thomas L. Hanson* and *Frank J. Reardon,* individually, *John A. Bernhard.*

For J. P. Burns, *Winne & Banta.*

For the plaintiffs, R. & A. Realty Corporation and John Rotella, *Marion Turtur.*

Prior to the time hereinafter mentioned, Leesville Avenue in the Township of Woodbridge, Middlesex County, crossed the Pennsylvania Railroad at grade. A proceeding was instituted by the Township of Woodbridge and after notice and hearing the Board of Public Utility Commissioners of the State of New Jersey determined that the crossing was dangerous to the public safety and public travel was impeded thereby. Accordingly, the Board made an order dated September 6, 1934, directing the Pennsylvania Railroad to eliminate the crossing by means of an underpass entirely within the street lines. December 1, 1934, was the date fixed for the commencement and September 1, 1935, for the completion of the work. The Railroad Company vainly sought delay; *Pennsylvania Railroad Company* vs. *Board of Public Utility Commissioners,* 13 N. J. Misc. R. 768, affirmed 116 N. J. L. 415. The power and authority of the Board of Public Utility Commissioners to make the determination and order is found in the Fielder Grade Crossing Act, P. L. 1913, chapter 57, page 91; Compt. Stat. Supp. 1924, section 167-30 et seq.; Rev. Stat. 48:12–61 et seq.

Upon the making of the order the Pennsylvania Railroad Company had no choice in the matter. It was compelled to proceed with the elimination. *Erie Railroad Company* vs. *Board of Public Utility Commissioners,* 89 N. J. L. 57, affirmed 90 N. J. L. 672, affirmed 254 U. S. 394, 65 L. Ed. 322. It entered into a contract, the Board of Public Utility Commissioners approving, with the Defendant, Wilson & English Construction Company for the performance of the work of lowering the grade of Leesville Avenue and the construction of the underpass. Wilson & English Construction Company in turn sublet part of the work to the Defendant, J. P. Burns.

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The Plaintiff R. & A. Realty Corporation is the owner of real property abutting Leesville Avenue and adjacent to the Pennsylvania Railroad right-of-way, and the Plaintiff John Rotella, trading as Bloomfield Scrap Iron & Metal Company, is the tenant in possession of the land and the owner of the business located thereon.

The Complaint consists of 49 pages and is divided into 20 counts, ten in behalf of the Plaintiff R. & A. Realty Corporation and ten in behalf of John Rotella. By it they seek to recover damages allegedly sustained by them to their respective interests by reason of the construction by the Defendant Railroad within the roadway on Leesville Avenue of the underpass and approaches thereto. It is alleged that the construction has caused the Plaintiff's property and business to become permanently depreciated in value and has caused other damages as set forth in the complaint. The first ten counts correspond somewhat to the second ten, for example, counts 1 and 11 seek recovery of damages from the Defendant, Pennsylvania Railroad Company, upon what is alleged to be common law principles of liability. Counts 2 and 12 seek the recovery of damages against the Pennsylvania Railroad Company by reason of the violation of the plaintiff's constitutional rights. Counts 3 and 13 seek the recovery of damages from the Defendant, Pennsylvania Railroad Company, upon the theory that such recovery is authorized by the Fielder Act.

Counts 4 and 14 seek the recovery of 50 per cent of the damages from the Defendant, Pennsylvania Railroad Company, upon the theory that such a recovery is authorized by the said statute. Counts 5 and 15 seek the recovery of damages from the Defendant, Board of Public Utility Commissioners, upon the theory that the recovery is authorized by the said statute. Counts 6 and 16 seek the recovery of damages from the Defendants, Harry Bacharach, Thomas L. Hanson and Frank J. Reardon, individually, on the ground that their action as members of the Board of Public Utility Commissioners was ultra vires and illegal. Counts 7 and 17 seek the recovery of damages against the Pennsylvania Railroad Company on the theory of a common law trespass. Counts 8 and 18 seek the recovery of damages against the Defendant, Wilson & English Construction Company, upon the same theory, and likewise counts 9 and 19 seek the recovery of damages against the Defendant, J. P. Burns, and counts 10 and 20 seek damages against the Defendant, Wilson & English

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Construction Company, upon alleged common law principles of liability.

The Defendants move to strike the counts of the complaint relating to them respectively. The motion in behalf of the Pennsylvania Railroad Company is made upon the following grounds:

1. That the several respective counts of the complaint do not set forth or state a legal cause of action against the Pennsylvania Railroad Company.
2. That the complaint is sham.
3. Is frivolous.
4. Is vague and uncertain.
5. Is so framed as to embarrass a fair trial.
6. It appears from the complaint itself that the Defendant was acting as an arm of the State and not liable to suit.

The Defendant, the Board of Public Utility Commissioners, and the individual Commissioners move to dismiss the complaint upon the following grounds:

1. That it does not set forth a legal cause of action against either the Board or the individual members of the Commission.
2. That the Board of Public Utility Commissioners is an agency of the State and its representative for the purpose and within the limitations expressed within the act of 1911 and the supplements and amendments thereto, and as such agency is not a proper Defendant.
3. The State without its consent cannot be sued, and since there is no allegation of such consent, the suit cannot be maintained.
4. The Public Utility Commissioners as individuals constituted the Board of Public Utility Commissioners on the date of the order directing the elimination and are therefore not personally liable in a civil action for damages arising out of their acts as such Commissioners.
5. That the order of the Board directing the elimination was an order issued in the performance of a duty of a public character.

The Defendant, Wilson & English Construction Company, moves to dismiss upon the ground:

1. That it on the dates alleged acted in a contractual relationship with the Pennsylvania Railroad Company in compliance with a mandatory order made by the Board of Public Utility Commissioners, an agency of the State, which order required the

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Pennsylvania Railroad Company to eliminate the crossing, and that it was acting for an agency of the State under the authority of a lawful court order.

2. That it is an improper party and under no liability to the plaintiffs because the legislature provided an exclusive remedy for damages sustained by directing that such damages should be paid by the railroad company involved and the Board of Public Utility Commissioners.

3. That the 8th count of the complaint is duplicitous in that it alleges in one count two causes of action, i.e., trespass quare clausam fregit and trespass on the case.

4. That the eighteenth count fails to comply with the requirements of certainty and the defendant is not reasonably apprised of that which is complained of.

The Defendant, J. P. Burns, moves to dismiss upon substantially the same grounds as those urged in behalf of the Wilson & English Construction Company.

In passing, it might not be amiss to observe that no part of the Plaintiffs' property has been actually taken and the change in grade of Leesville Avenue is wholly within the highway lines; that the location and level of the railroad has not been changed; that nothing has been added to the railroad's structure nor done for a railroad purpose. The highway has been changed. Its grade, wholly within its lines, has been depressed for a certain distance in order to carry it underneath the railroad tracks, leaving a portion of the Plaintiff's property on an elevation. All that the Pennsylvania Railroad did was to enter into an agreement with an independent contractor, to wit, Wilson & English Construction Company in obedience to the State's mandatory order for the performance of the work of changing the grade of the highway for the benefit of its users and for the safety of the public. There is no allegation of negligence in the performance of the work.

The gravamen of the complaint is that the construction of the underpass and the consequent depression of the grade of Leesville Avenue left a portion of the Plaintiffs' property on an elevation and deprived it of the ingress and egress from Leesville Avenue it formerly enjoyed; took away its valuable frontage and as a result has permanently rendered the property less valuable for the purposes for which it is best adapted.

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It is appropriate to note at this point that as a result of a proceeding brought by the present Plaintiffs in the Court of Chancery against the Pennsylvania Railroad Company and the Board of Public Utility Commissioners, the Defendants conveyed or caused to be conveyed to the Plaintiff, the R. & A. Realty Corporation, a triangular tract of land adjacent to the westerly side of its property to serve as a means of access, practically at grade, and to and from Leesville Avenue. The conveyance was made without cost to the Plaintiff and it accepted it and is using the property so conveyed, without prejudice, however, to any action at law which it might desire to bring.

There is no allegation in the complaint that the grade of Leesville Avenue was legally established before the work of elimination was undertaken.

It is settled that the owner of land abutting on a highway has no vested right to recover damages for a change of grade of the highway in the absence of a statute giving that right, and this is so even though the general effect of the change of grade is to impair or substantially destroy access to the landowner's property. It is not a taking of property in the legal sense. It is damnum absque injuria; *Clark* vs. *Elizabeth,* 61 N. J. L. 565; *Willets Manufacturing Co.* vs. *Freeholders,* 62 N. J. L. 95; *Sommer* vs. *State Highway Commission,* 106 N. J. L. 26; *Burns Holding Corporation* vs. *State Highway Commission,* 8 N. J. Misc. R. 452, affirmed 108 N. J. L. 401; *Cooper* vs. *State Highway Commission,* 6 N. J. Misc. R. 723; *Hulett* vs. *Sea Girt,* 108 N. J. Eq. 309. But the Plaintiffs insist section 2 of the Fielder Act as amended, supra, give them the right of action pleaded.

Section 1 thereof gave the Board power to order any company operating a railroad in this State to eliminate grade crossings by either reconstructing the railroad over or under the highway or by vacating, relocating or changing the lines, width, direction or location of the highway, or the opening of a new highway. Sections 2, 3 and 4 of the original act related to the manner in which the expense of such changes was to be borne.

Section 5 created a procedure by which the municipalities of the State, the railroads or the Board of Public Utility Commissioners might set in operation an application for the alteration of a grade crossing, and section 6 related to the powers previously granted to the Board.

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Section 2 provides as follows: "The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event the Board may order not exceeding 10 per centum of such expense directly chargeable to the crossing used by the street railway company, to be paid by the company operating such street railway, and the balance to be paid by the company operating such railroad."

Section 2 was amended in 1930, P. L. 1930, chapter 101, page 348, to read: "The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property and the cost of removing, relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits, or subways, shall be paid 50 per centum by such railroad company, or companies involved, and 50 per centum by said Board (Board of Public Utility Commissioners) out of funds to be provided for that purpose."

Section 2 of the act was again amended in 1933, P. L. 1933, chapter 390, page 1092; Revised Statutes 48:12–62, so that in its present form as set forth in the Revised Statutes it provides: "The railroad company or companies involved, and the Board out of funds to be provided for that purpose, shall each pay 50 per cent of the entire expense of such alterations, changes, relocation or opening, including damages to adjacent property and the cost of removing, relaying or relocating any municipal pipes, conduits or subways; *provided,* that if funds are granted or allotted by the United States Government or any of its agencies, the Board may, with the consent and approval of the Governor, allot and credit any or all of the funds so received toward the part of the expense to be borne by such railroad company or companies."

Reliance is placed upon the phrase "including damages to adjacent property" in that section.

At the time of the passage of the Fielder Act in 1913 there was a statute in force authorizing the recovery of damages arising from the alterations of the grade of any street or highway. It provided: "An action doth and shall lie in behalf of any person or corporation owning any house or other building standing and erected upon any street or highway, the grade whereof shall be or shall have been altered by virtue of the ordinance, resolution, or other proceeding of the legislative authority of any city,

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borough, town corporate, village, or other municipality in this State, to recover from such city, borough, town corporate, village, or other municipality all damages which such owner or owners shall suffer by reason of altering any such grade; *provided,* that no such action shall be brought after the expiration of twelve months from the working of any such grade." Pamph. L. 1858, page 415; section 70 of the Road Act; 4 Comp. Stat., page 4461. Hence the phrase "including damages to adjacent property" was incorporated in section 2 of the Fielder Act. However, this statute permitting the recovery of damages in such cases was repealed in 1918 (P. L. 1918, page 659), so that when section 2 of the Fielder Act was amended in 1930 (chapter 101), and 1933 (chapter 390), no right of action existed at the common law or by statute for damages arising out of the change of the grade of a street or highway; *Sommer* vs. *State Highway Commission,* supra. The Fielder Act, as amended, did not, nor was it intended to create a cause of action in adjacent landowners for damages occasioned by the changed grade of a street or highway. Such an object was not expressed in its original title: "A supplement to an act entitled 'An act concerning Public Utilities; to create a Board of Public Utility Commissioners, and to prescribe its duties and powers'; approved April 21, 1911."

The intent was not to impose a liability to pay damages where none existed, but merely to provide a method of ascertaining and paying damages for such taking of private property as under existing law entitled the owner to compensation; *Willie* vs. *Winona,* 60 N. W. 814; 26 L. R. A. 142. There was no necessity upon the part of the Legislature to create such a cause of action, for the statute of 1858 as amended, supra, granting that right, was then in full force and effect. Such a right, in derogation of the common law, must be created by an express statute to that effect. It will not be inferred or implied by judicial construction. The sole purpose of section 2 was to apportion the cost of the grade crossing elimination among the various parties concerned therein.

What has been said with relation to the claim against the Pennsylvania Railroad applies with equal force to that against the Board of Public Utility Commissioners. Consent or permission to sue the State will not be spelled out by mere inference or legal construction.

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In the performance of its statutory powers and duties the Board of Public Utility Commissioners of the State of New Jersey is an alter ego of the State and as such cannot be sued as a separate entity or body. The State cannot be sued in its own courts without its consent, and if the Legislature had intended that the State should be subject to suit it would have said so in plain and explicit language. *Strobel Steel &c., Co.* vs. *State Highway Comm.,* 120 N. J. L. 298; *DeSantis, et als.* vs. *Delaware, Lackawanna & Western Railroad Company, et als.,* 11 N. J. Misc. R. 22, 165 Atl. Rep. 119.

By their complaint the Plaintiffs would place the burden of determining the constitutionality of an act of the Legislature upon the individual members constituting the Board of Public Utility Commissioners at their peril. It is urged that the action of the Board in making an application to the United States Government for a grant to aid in the cost of the construction of the elimination was illegal and ultra vires, and that the 1933 amendment to section 2 of the Fielder Act is unconstitutional, in violation of Article 4, section 6, paragraphs 1, 2 and 3 of the New Jersey Constitution providing that all bills for raising revenue shall originate in the House of Assembly; that no money shall be drawn from the Treasury but for appropriations made by law, and the credit of the State shall not be directly or indirectly loaned in any case; and, therefore, the Defendants, Harry Bacharach, Thomas L. Hanson and Frank J. Reardon, individually, acted without sufficient authority in law and subjected themselves to individual liability.

There is no merit in this contention. The individual Commissioners acted in concert in the performance of a public statutory duty. There is no allegation in the complaint that the Commissioners were actuated by motives of private gain, oppression or bad faith. Members of a public board, acting in the performance of a public duty and under a public statute, are not personally liable in a civil action for damages arising out of their acts, provided what they do is done in good faith; *Valentine* vs *City of Englewood Board of Health,* 76 N. J. L. 509; *Johnson* vs. *Marsh,* 82 N. J. L. 4. The determination of the constitutionality of an act is purely judicial function residing in the Courts. The making of the Order by the Board was a matter which was at least colorably within its jurisdiction; *Grove* vs.

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Van Duyn, 44 N. J. L. 654. If the rule were otherwise, the public business of the State would be shackled, for public officers would be loath to perform their duties.

The 7th, 8th, 9th, 17th, 18th and 19th counts of the complaint are similar. The 7th count is typical of the others. The allegations thereof are substantially that beginning on or about the first day of March, 1937, and on divers other days and times to the commencement of the action, the Defendant, Pennsylvania Railroad Company, by its servants, agents and employes, with force and arms, broke and entered the particularly described close of the Plaintiff, R. & A. Realty Corporation, and then and there put, placed and erected divers structures, barriers, fences and walls in and upon said close and kept and continued such structures, barriers, fences and walls without the leaves and against the will of the Plaintiff for a long space of time, thereby hindering and preventing the Plaintiff from having the full use, benefit and enjoyment thereof. The allegation of resulting damage is that the Plaintiff has thus been deprived of valuable frontage and access to and from the premises by way of Leesville Avenue, whereby the land has been greatly depreciated in value. If the allegations are true, there has been a direct physical invasion of the land of the Plaintiff and the count sets forth a good cause of action for trespass quare clausam fregit. The question of damages can and undoubtedly will be controlled by the Court at the trial.

The result is that the motions to strike counts 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16 and 20 will be granted, and the motions to strike counts 7, 8, 9, 17, 18 and 19 will be denied.

Appropriate orders may be submitted accordingly.

Decided December 2, 1938.

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NEW JERSEY SUPREME COURT

No. 225. May Term, 1939.

The County of Hudson,
Prosecutor,

vs.

Board of Public Utility Commissioners, Emmett T. Drew, Secretary, Board of Public Utility Commissioners, Erie Railroad Company, et als.,
Respondents.

Submitted May, 1939. Decided October 2, 1939.

On certiorari.

For prosecutor, *J. Emil Walscheid.*

For Erie Railroad (Charles E. Denny and John A. Haddon, trustees), and New York and Greenwood Lake Railway Company, *Edward A. Markley, Charles W. Broadhurst, Collins & Corbin.*

For Board of Public Utility Commissioners, *John A. Bernhard.*

Before *Justices Parker, Bodine* and *Perskie.*

BODINE, J.

This writ of certiorari brings up for review a decision by the Board of Public Utility Commissioners holding that a highway as diverted by the Erie Railroad Company and the New York & Greenwood Lake Railway Company, under State direction, was not such an underpass as the railroads were obligated to keep in repair within the meaning of section 26 of the Railroad Act. (R. S. 48:12–49.)

The County of Hudson has under its control in the town of Kearny a county road designated as Passaic Avenue, which road is crossed by the Erie Railroad at or near the West Arlington station by means of an overhead bridge. The right of way is owned by the New York & Greenwood Lake Railroad Company. The bridge was constructed for the purpose of carrying the railroad over Passaic Avenue, which was depressed in order to carry the avenue under the bridge. Passaic Avenue, was, in part, relocated to effect this change.

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The petition filed by the county with the Board alleged that it was the duty of the railroad to keep the highway underpass in good and sufficient repair. It further alleged that the underpass had not been constructed in the proper manner and had not been kept in repair, specifying that the fill from the embankment had been carried down into the traveled portion of the highway. The embankment is eroded and washed out. Drainage facilities are inadequate, so that the ramp leading up to the highway on the other side of the railroad known as Midland Avenue is being undermined.

In 1930, proceedings were instituted under the Fielder Grade Crossing law (P. L. 1930, Chapt, 101, p. 347) R. S. 48:12–61, whereby it was ordered that the Erie Railroad Company alter its Passaic Avenue crossing by changing the lines of the street and by carrying so much of the highway so changed under the railroad, according to plan submitted, and by relocating the railroad and highway so as to conform with plans adopted. Fifty per cent of the cost of the elimination of the grade crossing was borne by the State and the balance by the railroad company. An underpass for the highway was built in a descending curve at a depth of approximately 15 feet and an upward curve to rejoin the highway on grade on the other side. The railroad right of way was carried over the underpass by means of a bridge. By 1937, the underpass became out of repair and unsafe for travel. Hence, the institution of the proceedings under review.

The testimony and exhibits offered before the commissioners indicated that the underpass was very much out of repair. The commissioners found that there was no duty as a matter of law imposed upon the railroad to make the required repairs. A rehearing was granted at which time the Respondent noted upon their answer that Messrs. Denny and Haddon had been appointed trustees for the railroad company in proceedings in bankruptcy under section 77-b of the United States statutes and the record was so amended.

The same decision was, however, reached at the re-hearing. There was error in this because while the railroad was under no duty to repair county roads, however, relocated for its convenience or that of the traveling public it was under a duty to repair the underpass under its right of way. *Metuchen* vs. *P. R. R.*, 73 N. J. E. 359.

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Section 26 of the General Railroad Law (P. L. 1903, C. 207, par. 26, now R. S. 1937, sec. 48:12–49), provides that: "Every railroad company owning, leasing or controlling any right of way over a railroad within this state *shall* construct and *keep in repair,* good and sufficient bridges and *passages,* over, *under* and across the *railroad or right of way* * * *, *so that public travel on the road is not impeded thereby* * * *." This statute imposes a duty to keep in good and sufficient repair passages under the railroad right of way to the end that public travel on the highway may not be impeded.

The Fielder Grade Crossing Law is a supplement to the Public Utility Act. As this statute reads in 1930 (P. L. 1930, Ch. 101, p. 347), it provided that: "Whenever a public highway * * * and the tracks of a railroad * * * cross each other at the same level and it shall appear to the Board that such crossing is * * * dangerous to public safety or that the public travel on such highway is impeded thereby, the Board * * * may order the company * * * operating such railroad * * * to alter such crossing * * * according to plans to be approved by such Board, by substituting therefor a crossing not at the grade of such public highway * * *; by carrying such public highway under * * * such railroad; or by vacating, relocating or changing the lines, width, direction, or location of such highway and the opening of a new highway in the place of the one ordered vacated." Under this statute the Utility Board acted in eliminating the grade crossing in question.

There is an evident legislative policy to protect public travel. *State* vs. *Biggs,* 117 N. J. L. 240; *Bronstein & Co.* vs. *Hoffman,* 117 Id. 500; *Jersey City* vs. *State Water Policy,* 118 Id. 72; *Public Service Elec. & Gas Co.* vs. *City of Camden,* 118 Id. 245; *Group No. 23 of Assn., of the Sons of Poland,* 121, N. J. E. 102.

The Board has the power under the statutes cited to require the repair of an underpass when necessary for the safety of the traveling public. *Erie R. R.* vs. *Board of Public Utility Comm'rs,* 107 N. J. L. 409.

In the present case the county road was relocated for a distance of at least 1,100 feet. Such relocation was not an underpass in fact or as contemplated by the legislative enactment. The railroad obligation, we think, was confined to the repair of the passage under its right of way.

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The decision of the Board must be set aside to the extent that it must require the repair of the underpass within the bounds of the railroad right of way.

Filed October 2, 1939.

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 19 (with 20). February Term. 1940.

The County of Hudson, et als.,
Appellants,

vs.

Board of Public Utility Commissioners, et als.,
Respondents.

Appeal from Supreme Court.

PER CURIAM:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court, reported in 123 *N. J. L.* 204.

Endorsed:

"Filed, April 25, 1940,

THOMAS A. MATHIS,
Clerk."

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