

INDEX

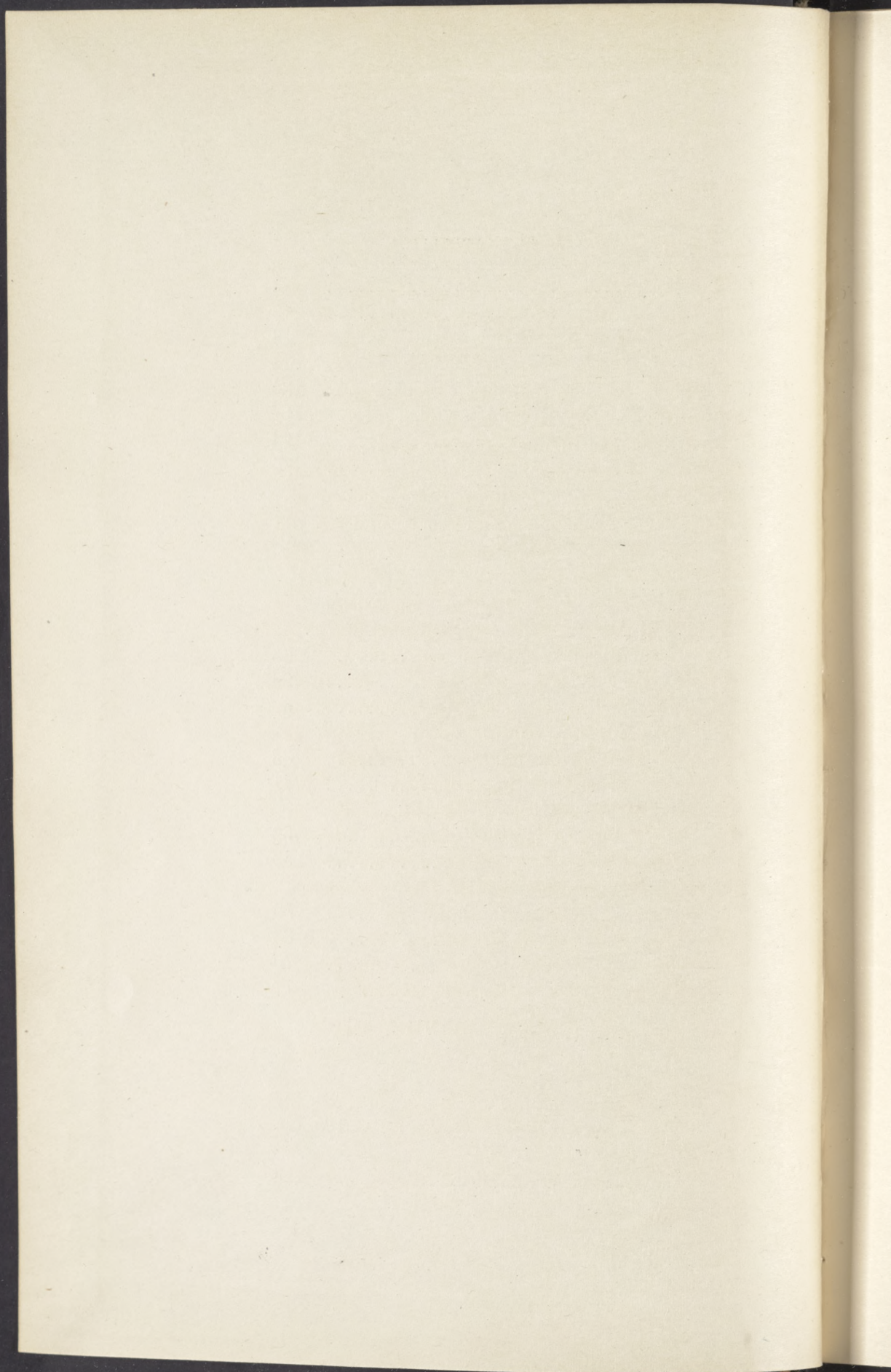
	PAGE
Writ of Certiorari	1
Return to Writ	2
Reasons	3
Complaint	12
Minutes of Hearing, October 18, 1928....	16
Minutes of Hearing, November 1, 1928	124
Minutes of Hearing, November 8, 1928	134
Minutes of Hearing, November 22, 1928 ...	157
Order	194
Decision	195
Opinion of Supreme Court	209
Rule for Judgment.....	217
Notice of Appeal and Grounds of Appeal..	218

Witnesses for Petitioner.

Phillip Lipschutz,	
direct examination.....	23
cross "	26
re-direct "	32
Leo Steiner,	
direct examination.....	33
cross "	41
Maxwell M. Chesler,	
direct examination.....	52
cross "	53
Sven Gafvert,	
direct examination.....	55
cross "	60, 83
re-direct "	70
re-cross "	77

Witnesses for Respondent.

Franklyn Heydecke,	
direct examination.....	84, 157
cross "	103, 135, 176
Percy S. Young,	
direct examination.....	118
cross "	120



Writ of Certiorari.

New Jersey, to wit: State of New
Jersey to Board of Public Utility
(SEAL) Commissioners of New Jersey, GREET-
ING.

We being willing for certain rea- 10
sons, to be certified of an order made by the
Board of Public Utility Commissioners of New
Jersey on December 11, 1928, in the matter before
said Board entitled, "The Sixty-seven South
Munn, Inc. v. Public Service Electric & Gas
Company in re refusal to install a master meter,"
wherein said Board did order "that the complaint
shall be and the same is hereby dismissed. This
order shall become effective December 13, 1928."

We do command you that the said order so 20
made by the Board of Public Utility Commission-
ers, together with all things touching and con-
cerning the same, including all testimony taken,
as fully and entirely as before you they remain,
to our Justices of our Supreme Court of Judica-
ture at Trenton on the 25th day of February
next, you certify and send, together with this
writ, that therein may be done what of right
and according to the laws of this State should
be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice 30
of our Supreme Court at Trenton, this 5th day
of February, nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

OSBORNE, CORNISH & SCHECK,
Attorneys.

C. J. 40

Return to Writ.

To the Honorable Justices of the Supreme Court
of Judicature of New Jersey:

10 In obedience to the command of the within
writ, we, the Board of Public Utility Commis-
sioners of New Jersey, do send under our hands
and seals to you, the Honorable Justices of the
Supreme Court of Judicature of New Jersey,
our order made on or about December 11, 1928,
in the matter before us entitled, "The Sixty-
seven South Munn, Inc. v. Public Service Electric
& Gas Company in re refusal to install a master
meter," wherein we did order "that the com-
plaint shall be and the same is hereby dismissed.
20 This order shall become effective December 13,
1928," together with all things touching and con-
cerning the same, including all testimony taken,
as fully and as entirely as they remain before
us, as appears in the schedule hereto annexed,
as we are commanded.

IN WITNESS WHEREOF, we have caused this re-
turn to be signed by our Clerk and attested to
by our seal this 19th day of February,
A. D. nineteen hundred and twenty-nine.

30

seal.

Alfred N. Barber
Secy.

40

Reasons.

NEW JERSEY SUPREME COURT.

THE SIXTY-SEVEN SOUTH MUNN, INC., a corporation, <i>Prosecutor,</i>	10
<i>vs.</i>	
BOARD OF PUBLIC UTILITY COM- MISSIONERS OF NEW JERSEY, a corporation, and PUBLIC SER- VICE ELECTRIC & GAS COMPANY, <i>Defendants.</i>	
	<i>On Certiorari.</i> <i>Reasons.</i>

The prosecutor writes down the following reasons why the order of the Board of Public Utility Commissioners brought before this Court upon the writ of certiorari made herein should be set aside, and why an order should not be made in accordance with the prayer of the prosecutor contained in the complaint of prosecutor filed with the Board of Public Utility Commissioners: 20

1. The order of the Board made herein and the refusal of the Board to grant the relief prayed for by prosecutor so interferes with and circumscribes the right of prosecutor to make contracts with its tenants and to deal with its own property and to receive compensation for electric wiring and electric fixtures which it has installed in its apartment house as that prosecutor is deprived of its property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States. 30 40

Reasons.

2. The order of the Board of Public Utility Commissioners and the refusal of the Public Utilities Commission to grant the relief prayed for by prosecutor so interferes with the use by prosecutor of its own property and of its right to contract as that, in view of the fact that
 10 landlords are permitted by the said Board to receive current from the Public Service Electric & Gas Company and sell said current to their tenants so long as they do not do so through a master meter, an unjust discrimination is created and prosecutor is denied the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States, the distinction attempted to be made by the Board of Public Utility Commissioners being
 20 illusory and without any substantial justification.

3. The effect of the order of the Board of Public Utility Commissioners and the refusal of the Board of Public Utility Commissioners to grant the relief prayed for by prosecutor in its complaint is to appropriate the private property of prosecutor to public use without compensation, and prosecutor is deprived of the rights secured to it by paragraph 16 of Article 1 of the Con-
 30 stitution of the State of New Jersey.

4. The order of the Board of Public Utility Commissioners and the refusal of the Public Utilities Commission to grant the relief prayed for by prosecutor in its complaint is not justifiable under the police power.

5. Under Chapter 271 of the Laws of 1912 of the State of New Jersey, regulating the use of electricity in cities for light, heat and power,
 40 governing standards, approving of wiring in-

Reasons.

spection, etc., and under the Public Utility Act, Chapter 195 of the Laws of 1911, as amended, prosecutor is entitled to be supplied by Public Service Electric & Gas Company with electricity at wholesale rates through a master meter. The refusal of the Public Service Electric & Gas Company to supply current to prosecutor at the rates as prayed for by prosecutor is unjust, discriminatory and unreasonable and its conduct is in violation of the provisions of the Public Utility Act of 1911 as amended, and the order of the Board sustaining it in its conduct is likewise in violation of the expressed provisions of the act. 10

6. The order of the Board brought up by the certiorari is beyond the power of the Board as defined in the Public Utility Act, and there is no basis in law for the order of the Board or for the refusal of the Board to grant the relief prayed for by prosecutor in its complaint. 20

7. The effect of the order of the Board brought up by the writ of certiorari and of the refusal of the Board to grant the relief prayed for by prosecutor in its complaint is that the Board has assumed jurisdiction to regulate the sale of electricity as a commodity, whereas the power of the Board under the Public Utility Act is limited to regulating its sale by public utilities, and the Board has exceeded the jurisdiction conferred upon it by the act. 30

8. The Board was without authority to approve the "policy" of the Public Service Electric & Gas Company which was approved by the Board in the order brought up by the writ or certiorari because the Board has no jurisdiction under the law to approve such "policy" and be- 40

Reasons.

cause such "policy" is unjust, unreasonable and discriminatory.

10 9. The evidence taken before the Board does not justify the making of the order by the Board or the refusal of the Board to grant the relief prayed for by prosecutor in its complaint.

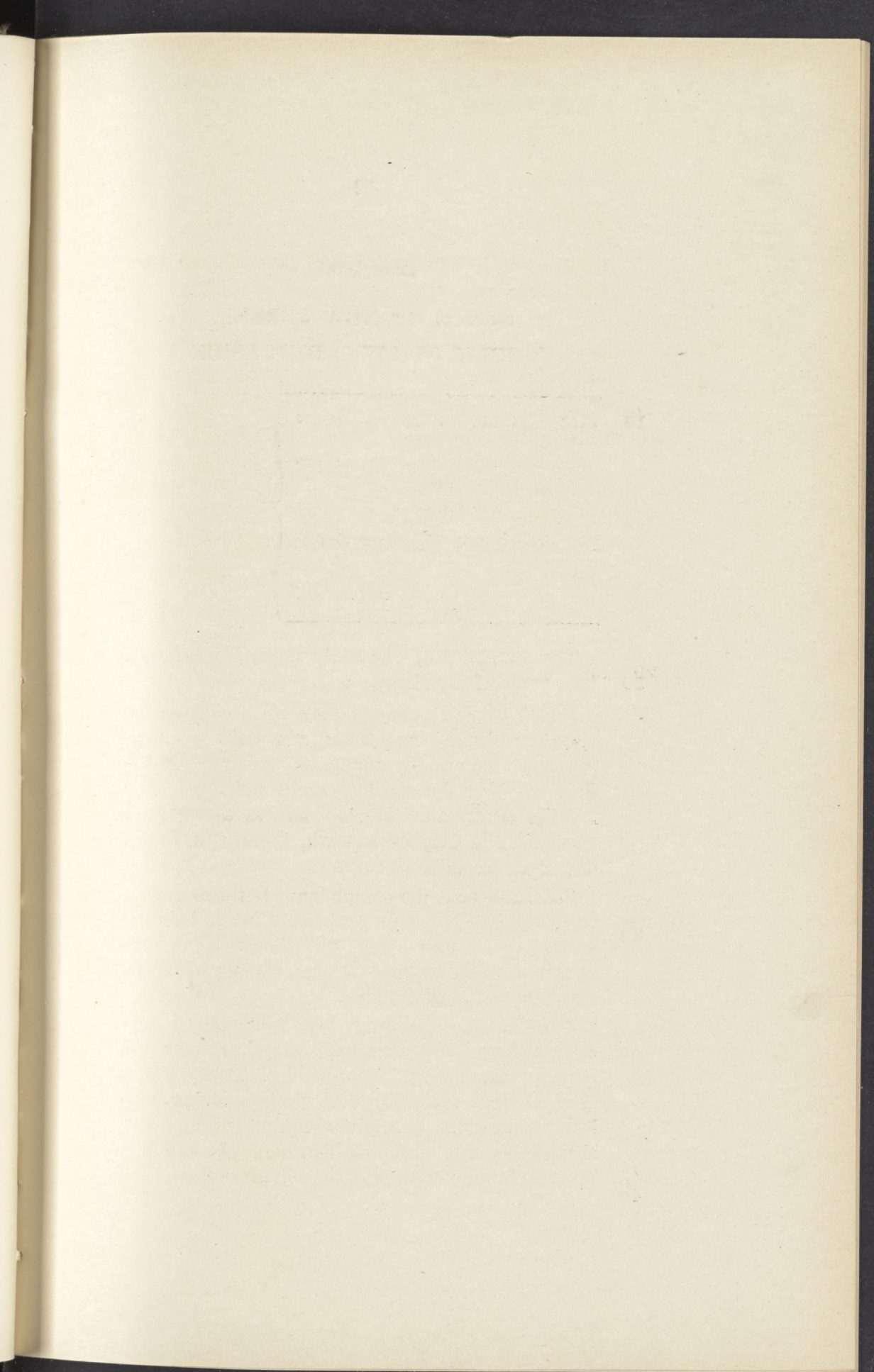
10 10. The order and the refusal of the Board to grant the relief prayed for by prosecutor in its complaint is otherwise illegal and without evidence to support it.

OSBORNE, CORNISH & SCHECK,
Attorneys for Prosecutor.

20

30

40



Complaint.

STATE OF NEW JERSEY,
PUBLIC UTILITY COMMISSION

10 THE SIXTY-SEVEN SOUTH MUNN,
INC.,

Plaintiff,

vs.

PUBLIC SERVICE ELECTRIC & GAS
Co.,

Defendant.

20 The complaint of The Sixty-seven South Munn,
Inc., respectfully shows:

First.—That the complainant is a corporation duly organized, incorporated and existing under, pursuant to, and by virtue of the laws of the State of New Jersey, having its principal office for the transaction of its business at 60 Park Place, in the City of Newark, County of Essex, and State of New Jersey.

30 *Second.*—That the complainant is the owner, in fee simple, of a certain apartment house building situate, lying and being #67 South Munn avenue, in the City of East Orange, County of Essex, and State of New Jersey.

Third.—Said building has been wired and equipped by the complainant at its own cost and expense amounting to upwards of Thirty Thousand Dollars (\$30,000) with electric wiring, outlets, connections and other equipment in order that the tenants of complainant could be supplied by complainant with electric current. Complain-

40

Complaint.

ant is also prepared to furnish proper electric meters through which to submeter the current to be used by its tenants, and to read, test, maintain and calibrate said meters, to bill the tenants for the electric current consumed and to collect the amount due upon such bills.

10

Fourth.—That the Public Service Electric & Gas Co. is a corporation doing business in the State of New Jersey, having its principal office in the said State of New Jersey at #80 Park Place, in the City of Newark, County of Essex, and being engaged in the business of supplying electric current for light, heat and power in pursuance of a franchise or franchises heretofore duly granted to it and now held and owned by it by the terms of which franchise or franchises the said Public Service Electric & Gas Co. is bound by law to supply electric current upon the application of the occupant or owner of any building or premises situated within one hundred (100) feet of any of its mains and/or supply lines. That the building above mentioned and referred to is now in course of construction and is intended to be occupied by this complainant and various tenants, and the same is within one hundred (100) feet of the mains and/or supply lines of said Public Service Electric & Gas Co.

20

30

Fifth.—That complainant has duly made application to said Public Service Electric & Gas Co. for electric current to be supplied to this complainant at the above mentioned premises, #67 South Munn Avenue, in the City of East Orange, County of Essex, and State of New Jersey, through one meter, generally known and designated as a "Master Meter", and duly offered to enter into an agreement with the said Public Service Electric & Gas Co. to pay for all electric cur-

40

Complaint.

rent thereafter consumed by the complainant and any and all of the complainant's tenants upon said premises at the regular wholesale rate of the said Public Service Electric & Gas Co. under the schedule of rates of the said defendant heretofore filed with and approved by the Public Utility Commission. At the time of making such application, the complainant was and now is ready and willing to comply with any and all just and reasonable requirements of the defendant which have been approved by this Commission.

Sixth.—That the said defendant, Public Service Electric & Gas Co., in violation of its obligations under its franchise or franchises and/or the statutes in such case made and provided, refused and does still continue to refuse to comply with the said request of the complainant and refuses and does still continue to refuse to supply electric current to the above mentioned building notwithstanding such request by this complainant and the complainant's compliance with and willingness to comply with any and all just and reasonable requirements of the defendant approved by this Commission, except as aforesaid.

WHEREFORE this complainant prays that the Public Utility Commission shall look into the facts herein set forth and make such order for the relief of the complainant, requiring the defendant, Public Service Electric & Gas Co. to make the necessary connections with its mains and to supply electric current in complainant's said building as set forth and requested in said application and to that end this complainant respectfully asks that a hearing may be had before the Commission or a Commissioner on notice to the said defendant, Public Service Electric & Gas Co., as to the matter hereinbefore set forth and that the

Complaint.

complainant have such other and further relief as may be necessary and proper in the premises.

WM. E. CLARK,
Attorney for Complainant,
Office & P. O. Address,
Suite 223, Military Park Bldg., 10
60 Park Place,
Newark, N. J.

STATE OF NEW JERSEY,)
COUNTY OF ESSEX, } ss.:

HERMAN HENRY GOLDSTEIN being duly sworn, deposes and says that he is an officer, to wit: The President of The Sixty-Seven South Munn, Inc.; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except the matters therein stated to have been alleged upon information and belief and as to those matters he believes it to be true. 20

Deponent further says that the reason that this verification is made by deponent and is not made by the complainant is that the complainant is a corporation; that all of the material allegations contained in this complaint are within the personal knowledge of this deponent; and that the source of the deponent's knowledge and the grounds for his belief as to the matter in said complaint alleged to have been made upon information and belief are as follows: 30

Correspondence and conversations had between officers, agents and/or employes of the defendant, Public Service Electric & Gas Co. and the complainant, The Sixty-Seven South Munn, Inc.

HERMAN HENRY GOLDSTEIN.

Sworn and subscribed to before me } 40
this 29th day of September, 1928. }

WILLIAM LUNSKY,
A Notary Public of N. J.

Minutes of Hearing, October 18, 1928.

**BOARD OF PUBLIC UTILITY
COMMISSIONERS.**

Newark, N. J., Thursday, October 18th, 1928.

10	THE SIXTY-SEVEN SOUTH MUNN, INC., vs. PUBLIC SERVICE ELECTRIC & GAS COMPANY, <i>in re</i> Refusal to Sup- ply Service.
----	---

20 Before:

COMMISSIONER FREDERICK W. GNICHTEL, Esq.

For the Petitioner appears
HARRY V. OSBORNE, Esq.

For the Respondent appears
GEORGE H. BLAKE, Esq.

30 Mr. Osborne: This is a petition, the effect of which is to compel Public Service Electric & Gas Company to furnish service to a customer through a master meter. The issue in the case is whether an owner of an apartment house, hotel, factory or loft is entitled to receive current for distribution to its or his tenants.

The facts in this case are, that the owner customer is a corporation known as The Sixty-Seven South Munn, Inc.; the corporation owns an apart-
40 ment house in East Orange, a very large apartment house, ten stories high, containing 106 apart-

Minutes of Hearing.

ments, of which twenty-eight are now occupied; it has spent upwards of \$30,000 in electric wiring and equipment. Pending construction, the Public Service furnished a 50 ampere meter and consented to connection therewith of sub-meters through which various tenants of the house were supplied with electricity. Some of the facts which I am now stating will undoubtedly be controverted, but these are the facts which I intend to prove. The 50 ampere meter was subsequently replaced by a 75 ampere meter by the company. 10

I may say that there are separate meters for light and domestic use and that is the meter that is in controversy, and for power and refrigeration.

The owner's arrangement with his tenants involves furnishing them through sub-meters with electric current for lights and other domestic purposes and the charging therefor of a rate which is fixed by the Public Utility Commission, this Board, as the rate at which the Public Service Electric & Gas Company may sell its current to its customers. 20

Application was made to the Public Service Electric & Gas Company under the authority of the case of the Supervision Company against the Public Service, reported in 10 Public Utility Reports, page 163, which was a decision of this Board in another situation. 30

Commissioner Gnichtel: Are you arguing the case now?

Mr. Osborne: I am stating what I expect to prove, and if your Honor will permit, I would like to state it on the record as clearly and concisely as possible.

Commissioner Gnichtel: I think it would be more valuable after I had the facts.

Mr. Osborne: I am giving facts. 40

Minutes of Hearing.

Commissioner Gnichtel: Now you are going into a case.

Mr. Osborne: I am just referring to it in passing. I am very anxious to have this record in clean cut proper shape, because this is a very important case, and I have no doubt, whichever way it goes it will be carried up.

Mr. Blake: His opening is no part of the case, as I understand it.

Commissioner Gnichtel: No. If you tell us the facts, what the dispute is about, and prove the facts, then I can apply the law in a much better way than taking the law first.

Mr. Osborne: I will omit the reference to the case. But we applied to the Company, as I said, to install a master meter, to enable the owner—these are facts I am stating now—to enable the owner to furnish its tenants with electric current through individual meters supplied by it. The company refused to furnish a meter for that purpose and threatened to discontinue service on the ground that it was not its policy to furnish electric current under such circumstances and for such purpose.

Commissioner Gnichtel: They refused to have any electric current in that building?

Mr. Blake: For the purpose of reselling it.

Mr. Osborne: Through a master meter.

Commissioner Gnichtel: He wants the company to sell it to him and he sells it to the tenants?

Mr. Osborne: He distributes it to his tenants.

Mr. Blake: Do you include in distribution, sale, Judge?

Mr. Osborne: Yes.

Mr. Blake: He wants to sell it to his tenants?

Mr. Osborne: Yes, there is no question about that, we want to resell it; buy it at the wholesale

Minutes of Hearing.

rate through a master meter and distribute it to our tenants through sub-meters supplied by us.

Commissioner Gnichtel: Through separate meters?

Mr. Osborne: Surely. For which we charge them the retail rate.

Complaint was then filed, upon the Company's refusal, with the Utility Commission. 10

In aid of the Board's power, and pending this disposition, after requesting Colonel Betts to call up the company and ask them to desist from cutting off the current pending determination by the Board—I think I am a little ahead of my story.

Mr. Blake: Yes, you went into Chancery and got your restraint first.

(Discussion.)

Mr. Osborne: Now then, in aid of this Court, not having the injunctive power, the building company went into the Court of Chancery and got a temporary order from Vice-Chancellor Backes, which was dismissed by Vice-Chancellor Church. Then I went to Trenton and got an order from Chancellor Walker, got an order restraining them from cutting off the current, returnable before the Court of Errors and that was argued yesterday and the restraint continues. 20

Mr. Blake: With a condition that a bond be given. 30

Mr. Osborne: With a condition that a bond be given. We offered to give a bond before we even went to the Court.

Commissioner Gnichtel: Just tell the facts and put your witness on.

Mr. Osborne: I will, if they let me. This is going to take a long time. We have a number of witnesses; it is a very important case, and we will take the rest of the morning in any event. 40

Minutes of Hearing.

The question, as I said, before the Board, is whether or not it is proper for them to refuse this service.

10 Mr. Blake: Counsel in his opening said this matter was a question as to whether or not a meter should be set in this apartment house to permit the owner thereof to resell—or distribute, was the word he used,—the energy to his individual tenants. The question as I see it before the Board to decide is, as to whether or not the system of regulation of utilities which has been carefully built up in this State since 1911 is to be wrecked; that is, as I view it. The petitioner here it is true is the owner, but it will develop in the case that the owner has entered into an agreement with a company known as the Meter Service Com-
20 pany. That company installs meters on the general panel board that is set in the basement of this apartment house. His contract with them, as I am informed, and I suppose it will be produced, is that this intermediary will not be a utility, will connect a master meter which they ask us to set, to these individual meters, and they will then read the individual meters and bill the tenants at some rate. Of course, nobody has control over that rate, because they not being a utility, you have no control over that. They will contract with the
30 tenants for a certain specified rate and will collect that rate and the difference between the total amount of their collections and the bill as rendered on the reading of the Master Meter, will be divided between the Meter Service Company and the landlord, in some proportion.

We have refused to set a master meter for the resale of the energy and we have refused it because we know of no regulation by your Board requiring the setting of a master meter for resale
40 to tenants, and because it has been our policy and

Minutes of Hearing.

practice to refuse to set them. The only contract we would have in a case like that would be with the owner of the apartment house. The consumer, the man who pays for the energy, and that is the test that is set forth in this supervision company's case to which they have referred—if you will look at the inspector's report, your Commission, the judge then sitting at the head of it, put his finger right on it and said: who pays for this energy? The man who pays ultimately for this energy is the customer. The person who will pay ultimately for this energy will be the tenant in this building. He will have no contract with us, the Utility; he will have a contract with the Meter Service Company, not a utility. We will have a contract with the owner, not the ultimate user of the electricity. So that in the matter of dispute of bills the tenants cannot look to the Utility Board or to us for any adjustment of the dispute; in the matter of an error in registration of meters, he cannot complain to you as customers now do. He would have to complain to his contractor, the Meter Service Company, and they may or may not adjust to his satisfaction.

In other words, all the regulation that has been carefully built up to safeguard the utility on the one hand and the customer on the other hand is to be swept aside and a new company is to insinuate itself between our manufacture and distribution and the ultimate consumer. They are going in to take a small portion of our business, the distribution from the master meter to the panel set up in the apartment house, and for that they expect to collect the difference between the wholesale rate and the individual retail rate, and it is that which we are protesting against and which I assure you, sir, we will continue to protest against.

Minutes of Hearing.

Mr. Osborne: We may shorten this somewhat if we could perhaps have some admissions on the record.

10 Mr. Blake: Perhaps I ought to say, if we are going to have some admissions; the fact is, sir, that energy is now being supplied to these tenants; the fact is, sir, that since the filing of this application and even prior thereto we have held ourselves ready and willing to serve the individual tenants in this building from the meter board.

Mr. Osborne: May I interrupt and suggest what I would like you to admit?

Mr. Blake: These are facts I think should come to the Board's attention, because you said our threat was to discontinue the energy. We never had any threat to discontinue the tenants.

20 Mr. Osborne: The petitioner, or the complainant here, The Sixty-Seven South Munn Inc., is a corporation of New Jersey; will you admit it?

Mr. Blake: I will admit that, yes, sir.

Mr. Osborne: I have a certified copy of course, of their incorporation. They own the premises, are the landlord; the company is the owner and landlord of the premises at 67 South Munn Avenue; do you admit that?

30 Mr. Blake: No, I cannot admit that. We have had so many gentlemen in our office pretending to be the owners of this property and it subsequently turned out they have little or no interest in it, that I cannot admit it.

Mr. Osborne: On the assumption that this is the correct description; they admit we own this property in question?

Mr. Blake: Yes.

40 Mr. Osborne: Will it be admitted that this apartment house is within 250 feet of the company's main supply of electricity?

Mr. Blake: Oh, yes.

Philip Lipschutz, for Petitioner—Direct.

PHILLIP LIPSCHUTZ, sworn on behalf of petitioner.

Direct examination by Mr. Osborne:

Q. Where do you live, sir? A. 5 Eppirt Street, East Orange. 10

Q. Are you an officer of the corporation, the Sixty-Seven South Munn Inc.? A. I am.

Q. What office do you hold? A. Assistant Secretary.

Q. Did that company build this apartment house? Did you buy it or build it? A. Sublet it on contract.

Q. I do not mean, did you actually lay the bricks. A. No. Yes, we built it.

Q. You built the apartment house; how large an apartment house is it, just in a general way? 20

A. A ten story building with two bungalows on the roof, consisting of approximately 106 apartments.

Q. Are any of those apartments now occupied? A. About thirty of them.

Q. Is there electrical wiring and equipment in the building for lighting and other domestic use by tenants? A. There is.

Q. Was that put in at the cost of The Sixty-Seven South Munn Inc.? A. It was. 30

Q. Can you tell me at what cost? A. The wiring and fixtures, \$40,000.

Q. So that you have an investment there of over \$30,000 in any event, in electrical wiring and equipment? A. Yes, sir.

Q. Does that \$40,000 include all the wiring in the building? A. It does.

Q. Do you know what proportion of that is incidental to furnishing the tenants in the building, the occupants of the apartments with light, elec- 40

Philip Lipschutz, for Petitioner—Direct.

tricity for light and domestic purposes? A. I would not be able to arrive at that.

Q. Who would know that? A. No one but an electrical engineer can figure that proportion.

Q. Do you know whether the contract would show that or not? A. No, it would not.

10

Mr. Blake: I think I might suggest to the Court, I think it is a matter of no moment, because every apartment house owner has to install electric wiring. All the company does in any building is to take the lead into the panel board and meter. Whether he spent \$1,000 or \$10,000 in wiring the house, this company has nothing to do with it.

20

Commissioner Gnichtel: He spent \$40,000, including that and his own?

Mr. Osborne: Perhaps we can dispose of the matter by an admission that a considerable proportion of the amount is for the purpose of supplying the tenants with electricity.

Mr. Blake: I assume that to be true, yes.

30

Q. Did you make application to the defendant company, that is the respondent here, Public Service Electric & Gas Company, for electric current to be supplied to this building through a master meter? A. I did.

Q. Where and when? A. At the Public Service branch office in Orange, on August 31.

Q. Who was present with you? A. Mr. Leo Steiner.

40

Q. Will you state just what happened, who you saw at the office of the company in Orange and what took place? A. We spoke—I spoke to Mr. Van Giesen.

Philip Lipschutz, for Petitioner—Direct.

Commissioner Gnichtel: I should say you two could agree on the facts in this case in ten minutes. I understand it is not a fact case, is it?

Mr. Osborne: No, I do not think there is any real dispute as to the facts. I suggest perhaps Mr. Blake will agree to this: 10
That this witness together with Mr. Steiner made application for the master meter to the company for the purpose of obtaining current at wholesale rates, for resale to the tenants occupying the apartments in this building.

Commissioner Gnichtel: Isn't that all there is to the facts?

Mr. Blake: And we refused it. That is 20
correct.

Mr. Osborne: And that it was refused.

Mr. Blake: Yes, sir.

Commissioner Gnichtel: Is not that all the facts in the case? The only question is whether that refusal is justified. I understand they furnish now direct to each tenant.

Mr. Blake: No, sir. The Meter Service Company, the intermediary—

Commissioner Gnichtel: I mean now, you 30
furnish other apartment houses direct to each tenant.

Mr. Blake: Yes, sir, each tenant.

Commissioner Gnichtel: And this is a new way of furnishing.

Mr. Osborne: We propose to show they are furnishing this to other people.

Commissioner Gnichtel: I thought I could shorten it.

Philip Lipschutz, for Petitioner—Cross.

Mr. Osborne: We can shorten certain parts of it. We don't want, of course, the whole case to be made too short.

Cross-examination by Mr. Blake:

10 Q. Mr. Lipschutz, the electric wiring in this building, whether it cost \$30,000 or \$40,000, is wiring and fixtures that would be required whether Public Service Electric & Gas Company set a master meter and permitted you to resell the energy to the tenants or whether Public Service Electric & Gas Company itself serves directly the tenants in your building; isn't that correct? A. That is right.

20 Q. You would have that capital expense regardless of the method of service to the tenants; isn't that true, sir? A. Yes, sir.

Q. Have you any contract with any outside party or any other party to render any electric service in that building? A. With the Meter Service Corporation.

Q. Have you a copy of that contract? A. I haven't got it here, no sir.

30 Mr. Osborne: I have it here, yes. We will furnish counsel with a copy.

Commissioner Gnichtel: Do you want to offer it now?

Mr. Osborne: Do you want to mark it for identification?

Mr. Blake: I would like to have it in the case before we get through.

Mr. Osborne: Counsel desires to mark it for identification at this time. We have no objection.

40 (Contract between Motor Service Corporation and Sixty-Seven South Munn, Inc., marked R-1 for identification.)

Philip Lipschutz, for Petitioner—Cross.

Q. Do you know of your own knowledge whether the Meter Service Corporation, with which your company has a contract, has entered into contracts with individual tenants in the building? A. I do not.

Q. Have you entered into any individual contracts with the company for service in this building, as landlord? A. With the Meter Service Corporation? 10

Q. No, with the tenants; have you as The Sixty-Seven Munn Avenue, have you entered into any agreements with the tenants? A. No written contracts.

Q. You have no written contracts. What do your leases provide? A. That they be supplied with electricity. 20

Q. By whom? A. I don't know the exact wording of the lease.

Q. I do not want the exact wording. By whom are they to be supplied with electricity?

Mr. Osborne: We will furnish a copy of the leases.

A. The Meter Service Company furnish the electricity.

Mr. Osborne: The witness says there is a lease. The contents of the lease, of course, is the best evidence. He is now asked to rely upon his recollection as to an instrument. We offer to furnish a copy of the lease. I object to his being called upon to testify, particularly as he did not testify correctly as to the facts. 30

Mr. Blake: He is the assistant secretary. 40

Philip Lipschutz, for Petitioner—Cross.

Commissioner Gnichtel: You are asking about a lease. The lease will be the best evidence.

10 Q. As a matter of fact, sir, haven't you directed the tenants in your building to apply to the Meter Service Corporation for electric service in that building, and haven't you sent letters to that effect to them? A. We have.

Q. You have, have you not? A. Yes, sir.

Q. So that the contractual relations between the tenants and the Meter Service Corporation for electricity to be used in that building is direct between them and not between you and the tenants, isn't that correct? A. It is.

20 Q. Who is to collect the bills from the individual tenants? A. That is something I don't know.

Q. When did you enter into the agreement with the Meter Service Corporation, do you know? A. I do not remember the date.

Q. The contract is dated the 20th of July? A. That would be approximately that time.

Q. What was the condition; in what stage of completion had your apartment house arrived at that time?

30 Mr. Osborne: I object to this as not cross examination, and not material to this issue.

Commissioner Gnichtel: I will allow the question. If it is not cross-examination he makes him his own witness.

A. It is really hard for me to tell you this.

Mr. Osborne: If you don't know, say so then.

40

Philip Lipschutz, for Petitioner—Cross.

Q. Did work ever stop on the building? A. Construction?

Q. Yes, construction work? A. It did.

Q. For how long a period? A. About two weeks.

Q. When was that? A. I don't know.

Q. You don't know whether it was before or after the execution of this contract? A. I don't know. 10

Q. Have you any way of finding out as to what the state of the building construction work was on the 20th of July, 1928? A. Not to my knowledge.

Q. Wouldn't you have some records to show it? A. No.

Q. Wouldn't your payments to the contractor show how much work had been done up to that time? A. The payments would be there but would not show what work had been done. 20

Q. You would not make payments unless the work had been done in accordance with the contract, would you? A. I have no record as to what state of completion it was.

Q. Is there anybody in your company, The Sixty-Seven South Munn, Inc., that would have that knowledge and information? A. I don't know.

Q. Pardon me? A. I don't know. 30

Mr. Osborne: I object to this line of examination on the ground it is entirely immaterial and irrelevant, has nothing to do with the issue in this case and it is just encumbering the record with a lot of by-play.

Mr. Blake: They say they spent a large sum of money. I assume they expect the inference to be drawn that they spent this sum of money in anticipation of the situa- 40

Philip Lipschutz, for Petitioner—Cross.

tion which would later develop, that the intermediary company would enter the building and serve these tenants.

Commissioner Gnichtel: I will admit the question.

10 Q. You don't know what officer would be familiar with the construction work of your company? A. I do not, sir.

Q. Who is the president? A. Herman G. Goldstein.

Q. Is he here today? A. No.

Q. Where does he live? A. Seventy Palisade Avenue, Union City.

Q. Who are the other officers? A. Benjamin F. Appel.

20 Q. Where does Mr. Appel live? A. His business is in the Military Park Building.

Q. Where does Mr. Appel live? A. I don't know.

Q. Does he live in the city or in the State? A. Yes, sir.

Q. Does he live in Newark? A. Yes, sir, Newark.

Mr. Osborne: I would suggest this information can be obtained from either the contractor or the architect if material.

30

Q. Who are the other officers? A. That is all.

Q. No secretary? A. Mr. Appel is secretary.

Q. You are the assistant secretary? A. Yes, sir.

Q. Who is treasurer? A. Mr. Goldstein.

Q. President and treasurer? A. President and treasurer.

Q. The thirty tenants who are now occupying your building are being served by electricity? A.
40 They are.

Philip Lipschutz, for Petitioner—Cross.

Q. Through what meters? A. Through meters installed by the Meter Service Corporation.

Q. They obtain that energy from what meter?
A. From the Public Service meter.

Q. That meter was set when and for what purpose? A. The Public Service meter?

Q. Yes. A. I don't know the date when it was set. For the purpose of supplying energy. 10

Q. It was set for construction purposes, was it not? A. Yes, as a temporary meter.

Q. As a temporary meter, for the contractors who were building the building? A. Right.

Q. That is the Criterion Construction Company? A. That is right.

Q. That company went into the hands of a receiver, did it not? A. It did. 20

Q. Had a receiver appointed? A. It did.

Q. The meter was continued in his name, was it not? A. The receiver's name?

Q. Yes. A. I believe it is; I am not sure.

Q. It is that meter which is now connected to the sub-meters of the Meter Service Company now serving the tenants in your building? A. That is right.

Q. Has your company, The Sixty-Seven South Munn Avenue made application to the Public Service Electric & Gas Company for the service to what we will term the public parts of your building? A. I am not familiar with what you mean by the public parts. 30

Q. You are obligated by law to light certain portions of your building, are you not? A. We are.

Q. Have you applied to Public Service Electric & Gas Company for energy to light the parts of the building which by law you are required to light? A. It is. 40

Philip Lipschutz, for Petitioner—Re-direct.

Q. Pardon me? A. It has been applied for.

Q. Has that been refused? A. No.

Q. The company uses power, does it not, also in the building? A. It does.

Q. For elevator service? A. Yes.

10 Q. It takes that directly from the Public Service Electric & Gas Company, does it not? A. It does.

Q. On the meter? A. Yes.

Q. That energy has not been interrupted, has it, at any time? A. It has not.

Mr. Osborne: What does he say, yes or no?

Witness: No.

20 Mr. Osborne: Do you know of your own knowledge?

Witness: So far as I know.

Mr. Blake: I understand I am to have a copy of the lease and a copy of this. Am I correct in that, Judge?

Mr. Osborne: Yes, we will furnish a copy of the lease.

30 Mr. Blake: A sample copy between the tenants and the owner of the building, and a copy of the contract between the Meter Service Corporation and the petitioner in this case.

Re-direct examination by Mr. Osborne:

40 Q. This contract between the owners, the Sixty-seven South Munn Avenue and the Meter Service Corporation, creating the Meter Service Corporation its agent for the purpose of furnishing this service mentioned in the contract, was that made before or after you had permission from the company to use the temporary meter to supply your tenants? A. I don't know.

Leo Steiner, for Petitioner—Direct.

Q. Did you personally have anything to do with the obtaining of permission to connect with the temporary meter for the purpose of supplying your tenants? A. I did not.

Q. Someone else handled that? A. Yes.

£

10

LEO STEINER, sworn on behalf of petitioner.

Direct examination by Mr. Osborne:

Mr. Blake: May I ask that last witness, before he leaves, if they have two forms of lease, I would like a copy of each form. They have one with energy and one without. Can I have a copy of each form of lease? 20

Mr. Osborne: Yes. I will have to inquire into what the leases are and get them.

Q. Mr. Steiner, where do you live? A. 694 Haxton Avenue, Orange.

Q. Are you an officer of the corporation, the Sixty-Seven South Munn, Inc.? A. No, sir. 30

Q. Are you an officer of the Meter Service Corporation? A. Yes, sir.

Q. Did the Meter Service Corporation enter into a contract with the Sixty-Seven South Munn Avenue, Inc., to act as its agent in connection with the supply of electricity to its tenants? A. Yes, sir.

Q. I show you Exhibit R-1 for identification and ask you whether that is the contract? A. Yes, sir. 40

Leo Steiner, for Petitioner—Direct.

Mr. Osborne: We will offer this at this time in evidence, your Honor, so it will be in the record.

(Copy of contract between Meter Service Corporation and Sixty-Seven South Munn, Inc., received and marked Ex. P-1.)

10

Q. Do you know Mr. Heydecke? A. Yes, sir.

Q. Who is Mr. Heydecke? A. Do you want me to point him out?

Q. No, just describe him. A. I understand he is the general auditor of the Electric & Gas Company.

Q. Did you make any application to Mr. Heydecke for leave to connect the house meters with the master meter that had been installed? A. No, sir.

Q. You did have some contracts with Mr. Heydecke? A. We called Mr. Van Giesan on the telephone in reference to that, I believe.

Q. Did you make application for permission to connect the meters with the master meter, the local apartment meters? A. Well, there was no such thing as application made.

Q. Just tell us the circumstances under which that connection was made. A. I believe it was—I just want to place this date in my mind—on the 27th day of September, I believe.

Mr. Blake: You have sworn many times, it was the 28th.

Witness: This was something different. The 28th is when the connection was made. But on the 27th day of September, we got in touch with the Orange office of the Public Service, respecting the right to hook up the tenants with the meter on the premises. An appointment was made with Mr. Bald-

40

Leo Steiner, for Petitioner—Direct.

win, I believe he was the inspector, to go on the premises the following morning. Mr. Baldwin was on the premises the following morning. Do you want the circumstances?

Q. Just tell us what took place, yes. A. Mr. Baldwin was asked as the Public Service inspector 10 whether we could hook these wires up to the meters on the property with some sort of connections—I don't know just what they call them. Mr. Baldwin gave permission to do certain things on the property, which were followed out very closely.

Q. Was the purpose of that to supply the tenants with electricity? A. The purpose of that was to supply the tenants with electricity until such time as the master meter was granted, or, as it 20 happened, refused.

Q. Had an application for a master meter been made at that time? A. Application was made on August 21st.

Q. Had there been any reply? A. There was no reply.

Q. No consent or refusal at the time you are now testifying about? A. No. There was a refusal on that same afternoon, on the 28th in the afternoon, when we received the refusal, some- 30 wheres around 3:30 or 4 o'clock in the afternoon.

Q. Who was present during this conversation with Mr. Baldwin, besides yourself? A. Mr. Clark was present and Mr. Diehl, several of the electrical men on the job.

Q. Were there tenants in the house?

Mr. Blake: You say we received refusal. Who was we, who was refused?

Witness: Mr. Van Giesan called me up 40 on the telephone.

Leo Steiner, for Petitioner—Direct.

Q. Who is Mr. Van Giesan? A. Mr. Van Giesan, I understand, is the assistant to the agent at Orange.

Mr. Blake: He refused you to do what?

10 Witness: He advised me he had been told by the authorities or by the people in Newark that they would refuse to grant the master meter for the resale of current.

Mr. Blake: That was September 28th.

Witness: That was the afternoon of September 28th.

Mr. Blake: By the authorities in Newark, who did you understand?

Witness: I don't know. I understand Mr. Heydecke handles that.

20

Q. What did you understand him to mean by the authorities, the principal office of the company? A. Naturally, the principal office of the company, whoever we done business with previously.

Q. Were there tenants in the building at that time? A. Yes, sir.

Q. Being supplied with electricity? A. Yes.

30

Mr. Blake: How many?

Witness: Off-hand, that is very difficult to tell. Tenants are liable to have moved in; whether they were using electricity or not, I don't know. I understand somewhere upwards of twenty tenants.

Mr. Blake: I mean on September 28th.

40

Witness: Yes, sir, upwards of twenty tenants either moved their furniture in or they were connected for electricity with the fuses in the submeters, in the boxes connected to the submeters.

Leo Steiner, for Petitioner—Direct.

Q. Was there later any effort made by the Public Service representatives to induce the tenants to rescind any contract which they made with you or with the landlord? A. After the time when the temporary injunction was refused and prior to the appeal,—I believe our appeal was made that very afternoon—Mr. Van Giesan with three or four other gentlemen—I don't know who they were—went around to the various tenants, started at the 10th floor of the building and began working down, seeing every one of the tenants. We later found out through questioning of some of the tenants, that they endeavored to have the tenants sign a contract with the Public Service for light. The tenants advised them, we are being supplied light from the owner.

10

Mr. Blake: I don't think he can tell what the tenants said. I have no objection to his testifying to what we did.

20

Q. Did you have any personal knowledge of efforts made by the company to induce the tenants to violate their contract with the landlord and enter into a contract with the Public Service? A. Yes. The owner made efforts to find out what the Public Service were doing in the building and found out from one of the tenants—

30

Mr. Blake: He is going right back.

Q. Do you know that of your own knowledge; were you present at the conversation and heard the tenant? A. No, sir.

Mr. Blake: I will state for the record—there is no dispute about it—that we assured the Vice Chancellor there would be no interruption in service; we would solicit from the tenants individual contracts from

40

Leo Steiner, for Petitioner—Direct.

them and we would set our meters. In accordance with our offer to the Vice Chancellor we immediately did so when he dismissed or discharged the restraint. There is no secret about that.

10 Q. Were you present when any threats were made to the tenants in the building, that unless they complied with the demands of the Public Service, that their current would be cut off? A. I was not present with the tenants. I know an affidavit was signed by one of the tenants.

Q. To that effect? A. Yes, sir.

Mr. Osborne: I think you have a copy of that, Mr. Blake.

20 Q. Do you know whether or not the current was actually cut off? A. Yes, sir.

Q. Do you know how it came to be cut off by the Public Service? A. I know Mr. Heydecke and Mr. Van Giesan and quite a few other gentlemen were up on the property with the intention of removing our meters and putting theirs in. That was on the afternoon of the 10th of October. We advised Mr. Heydecke that we would not allow any of the property of the owner to be interfered with. Mr. Heydecke or some of the subordinates of Mr. Heydecke made demands to enter the meter room. We refused. Finally they sent a meter reader and said; you are not going to refuse him entrance. We said, no. We allowed the meter reader to go into the room and read the meter. Subsequently, Mr. Baldwin sought permission. We asked what he wanted. He wanted to see if we were jumping his meter. Certainly you can go in and see whether we are jumping the meter. Mr.
30
40 Baldwin went in and I asked him whether we were

Leo Steiner, for Petitioner—Direct.

jumping the meter and he said no. Subsequently Mr. Heydecke made the remark that we will get into that meter room. Subsequent to that the chief of the fire department of East Orange came to the premises. The chief of the fire department investigated the various wires. Mr. Baldwin had mentioned it was a fire hazard. We maintained that it was not a fire hazard. The Chief made the remark; well, I know Mr. Baldwin for fifteen or eighteen years and if he tells me it is a fire hazard, I have to take his word for it; I don't know myself. We finally persuaded the chief to wait until such time as our electrical man could come up on the premises and satisfy him whether it was a fire hazard or not, and if it was determined it was a fire hazard we would immediately take such steps to protect the property so that it would not be a fire hazard. The chief agreed to wait until the following morning. In the meantime the inspector of the building department came to the premises.

Q. Do you know how the inspector of the building department happened to come? A. Well, I don't know why else——

Q. Or the fire chief? A. I don't know who else asked the fire chief to come except the Public Service people. Of course, I have no direct knowledge of it.

Mr. Blake: I would not testify to it then.

Mr. Osborne: Perhaps you will admit it.

Mr. Blake: No. But if we did, it is no crime. They went and took the wires out; they found it was such a hazardous thing.

Witness: The building inspector came upon the premises and finally I was advised of the situation that there was no certificate of occupancy of the premises. I asked the building inspector what was

Leo Steiner, for Petitioner—Direct.

10 necessary to have that done. He mentioned
there were certain things had to be done
by apartment houses to comply with the
code of the City of East Orange at the time
that a certificate would be given. I was un-
der the impression right along that the cer-
tificate of occupancy was obtained by the
owner. The fire chief, after hearing the
building inspector mention the fact that
there was no certificate of occupancy, men-
tioned in practically these words: Well, I
don't know positively whether it is a fire
hazard or not, but as long as nobody is sup-
posed to live here, I don't see what dif-
ference it makes. We will cut the wires.
20 Mr. Baldwin, the Public Service inspector,
as soon as he heard that, without authority
from the chief except for the fact that the
chief said: we will see the wires are cut;
pulled the wires off. In fact, was in such a
hurry to pull the wires off that he almost
burned his hands. They were live wires.
During the entire afternoon, while the chief
was there, Mr. Baldwin was right on the
chief's back every minute, asking can I pull
these wires; can I pull these wires; showing
30 great eagerness on his part to pull the
wires, for what reason I don't know.

Mr. Blake: There is no dispute about it.
The restraint under which we had been
laboring had been dismissed and we had a
perfect right to go in and take the wires
down as we had the landlord's consent to
go into the premises.

40 Commissioner Gnichtel: I do not see what
difference it makes. You seem to think it
has some bearing on the case. What dif-

Leo Steiner, for Petitioner—Cross.

ference does it make whether the fireman came there or not? If they are entitled to have electricity supplied, they are entitled to it whether the fireman said that or not.

Mr. Osborne: I have endeavored to keep all collateral matters out.

Witness: I can touch on the facts of the case as they happened that afternoon. 10

Q. Now then, the wires were pulled and they were without light, were they not? A. Yes, sir.

Q. Did you get a certificate of occupancy from the building department? A. I understand the owner got it the following day.

Q. You would not know that? A. I would not know that. It is up to the owner to get that.

Q. Do you know whether there was obtained an underwriter's electrical inspection certificate? A. Yes, sir, our electrical contractor received it, in fact it was turned over to me and I believe I turned it over to you, Judge Osborne. 20

Cross-examination by Mr. Blake:

Q. You do not want us to believe that you got a certificate, an underwriter's certificate for the wire as you found it before the fire chief came there and said it was hazardous, do you? A. The wires were changed subsequently. 30

Q. When you got the certificate is after the wire had been changed, when they were put in cables and had been properly fused; that is when you got the consent from the underwriters? A. That is true.

Q. You do not charge that Public Service interfered in any way with your getting the certificate of occupancy to the building? A. Do I charge what? 40

Leo Steiner, for Petitioner—Cross.

Commissioner Gnichtel: Never mind that.

Q. How long have you been an officer of the Meter Service Corporation? A. Sometime in May.

Q. Of this year? A. Yes, sir.

10 Q. Prior to the execution of this agreement?
A. Yes, sir, prior to the execution of this agreement.

Q. The Meter Service Corporation is a corporation of the State of New York? A. Not the Meter Service Corporation of which I am an officer.

Mr. Osborne: He is talking about the Meter Service Corporation that made this contract.

Witness: Yes, sir.

20

Q. That is a corporation of the State of New York, is it not? A. Yes, sir.

Q. That contract has been transferred to the Meter Service Corporation of New Jersey is that correct? A. Yes, sir.

Mr. Osborne: Assigned to the New Jersey Corporation.

Mr. Blake: It is attached right to the contract.

30

Q. The New Jersey Company of which you are an officer is organized under the general corporation laws of the State of New Jersey, is that correct? A. I believe so.

Q. You are an officer of it, aren't you? A. Yes, sir.

40 Q. Vice-President. It is organized not under any section of utilities, having to do with the organization of utilities, is it? A. I don't think I quite understand your question.

Leo Steiner, for Petitioner—Cross.

Mr. Osborne: I object.

Commissioner Gnichtel: He said it was under the general law.

Mr. Osborne: The certificate is the best evidence.

Mr. Blake: I assume you have a copy of that which you will let me have. 10

Mr. Osborne: I will get a copy for you. It is a matter of public record.

Mr. Blake: This gentleman was informing me where it is filed in various places. I assume if they go into Court and assert a right it is up to them to establish it.

Mr. Osborne: This company does not assert any rights. It is the landlord who is asserting the right.

Commissioner Gnichtel: Do you represent both companies? 20

Mr. Osborne: It is not a party to this proceeding at all.

Commissioner Gnichtel: The Sixty-Seven South Munn Avenue.

Mr. Osborne: That is the party. They may hire Bill Jones to do something for them, or any other corporation.

Q. Under this agreement which you have with The Sixty-Seven Munn Avenue, the owner of the property grants to your company the full, absolute and complete right and privilege and authority to purchase from Public Service Electric & Gas Company hereinafter called the central station, all electric current used in and about the above mentioned premises for light and power, is that right? A. I believe that is what you are reading there. 30

Leo Steiner, for Petitioner—Cross.

Mr. Osborne: I object. The contract speaks for itself. I don't think the witness should be called upon to interpret it.

Commissioner Gnichtel: He has answered.

10 Q. Under this contract you have the right to resell such current so purchased, to the owner and each and all of the tenants upon said premises through sub meters?

Mr. Osborne: I object.

Commissioner Gnichtel: The contract is in evidence.

Mr. Blake: Yes, but there are questions I want to ask based on the contract.

20 Commissioner Gnichtel: Why not say, you have a right under the contract.

Q. You have a right under the contract to purchase all the energy from the Public Service and sell it to the building?

Mr. Osborne: I object. The contract speaks for itself.

Commissioner Gnichtel: The contract says that.

30 Q. What do you do in the event that a tenant in the building does not pay his bill?

Mr. Osborne: I object. What business is it of this company what they do?

Commissioner Gnichtel: I think that is material.

A. We follow the same policy that Public Service follows.

40 Q. What do you do? You have never been operating in this territory, have you? A. No, sir,

Leo Steiner, for Petitioner—Cross.

but I happen to live in this territory. I know what the Public Service does.

Q. I am asking what you do. If you will answer my question we will get along faster. A. We send them a letter advising them that their bill is past due.

10

Mr. Osborne: I renew the objection.

Commissioner Gnichtel: I will allow the question.

Q. If they don't pay, what do you do? A. We wait until the second month; if they don't pay their bill at the end of the second month, we follow the same procedure as the Public Service and turn their current off.

Q. Cut them off? A. Yes, sir.

20

Q. What does the tenant do who has neglected to pay his bill or refused to pay his bill because of a dispute; what does he do? A. He does exactly as the Public Service does.

Q. Tell us what you do. What does the tenant do? A. He is undoubtedly without light.

Q. He is in the building as a tenant and has no light? A. Yes, sir.

Q. Public Service Electric & Gas Company is the company serving electric light in this territory, is it not? A. I believe they are.

30

Mr. Osborne: I object.

Q. If the tenant applies to Public Service Electric & Gas Company—

Commissioner Gnichtel: I think this is material. Do you know they are?

Witness: I assume they are.

Mr. Blake: The Commission knows it.

40

Leo Steiner, for Petitioner—Cross.

Commissioner Gnichtel: He knows it, too, because he said he knows the practice of the Public Service and he gets electric light from them. Isn't that what you said before?

Witness: Yes, sir.

10

Q. You are purchasing it from them now? A. You mean at my own home?

Q. No, at 67 Munn Avenue. You are getting current from the Public Service right in these premises at the present time? A. You say we are getting current from the Public Service?

Q. Yes. A. The owner is getting it from Public Service; we as agents are handling the proposition for him.

20

Q. Under this contract are you not given the sole right, privilege and authority to purchase from Public Service Electric & Gas Company, herein called the central station, all power and energy used; you are given that right, aren't you? A. I believe that is what the contract says.

Q. Isn't that what you are doing now? A. As their agent, yes.

Q. I don't care how you are doing that; you are given the sole right to do it, and you are doing it.

30

A. We are purchasing it as their agents.

Q. I don't care in what capacity you are purchasing. You are now purchasing current from Public Service Electric & Gas Company? A. I don't believe we are; no, sir.

Commissioner Gnichtel: Who do you mean by we?

Witness: The Meter Service Corporation. I believe counsel is referring to that. Am I right?

40

Leo Steiner, for Petitioner—Cross.

Q. I am referring to the Meter Service Corporation; you are an officer of that company. From whom are you getting your enegry? A. We are naturally getting it from the owner.

Commissioner Gnichtel: That is who?

Witness: Sixty-Seven South Munn, Inc. 10

Q. You are getting it from the owner? A. Yes, sir.

Q. Do you know from whom he is getting it?

A. I believe he is getting it from the receiver on the premises.

Q. Do you know from whom the receiver is getting it? A. I believe the receiver is getting it from the Public Service Electric & Gas Company.

Q. You will admit that the energy being used by that apartment is generated by the Public Service Electric & Gas Company? A. It is generated by them, yes. 20

Q. And distributed as far as the temporary or construction meter by them? A. Distributed until——

Q. Yes, up to the temporary meter? A. Yes, sir.

Q. You take it from the temporary meter and take it where? A. Through sub-meters. 30

Q. On the panel board? A. Yes, sir.

Q. What do you own on that panel board other than the sub-meters? A. Nothing.

Q. If one of the tenants are in the building refused to pay his bill for a period of two months, you shut him off? A. Yes, sir.

Q. If that tenant applies to Public Service Electric & Gas Company, who is serving the owner as you say, and serving other residences and apartments in that vicinity, will you take your meter out and permit Public Service Electric & Gas 40

Leo Steiner, for Petitioner—Cross.

Company to set a meter in place and serve that particular tenant? A. I never had experience in that direction.

Q. Never had any experience? A. Not in that direction.

10 Q. You are not subject to any regulations by the Utility Board requiring you to give service, are you?

Mr. Osborne: I object. That is for the Utility Board to determine.

A. That I don't know.

Q. Do you require a deposit from all the customers, do you know? A. Not from all of them.

20 Q. You have in your contract the right to require deposits from customers? A. We have the right to. That does not say we get it.

Q. You have the right to? A. We have the right to, yes, sir.

Q. Who reads the meters? A. One of our men reads the meters.

Q. An employee of your company? A. An employee of our company, yes, sir.

30 Q. Are any of your meters tested or inspected by the New Jersey Board of Public Utility Commissioners? A. Are any of our meters tested by the New Jersey Board of Public Utility Commissioners?

Q. That is the question. A. Inspectors of the Board do you say?

Commissioner Gnichtel: Yes.

Q. Are any of your meters inspected by the inspectors of the Board of Public Utility Commissioners? A. They have not been so far.

40 Q. In the event of a dispute of a bill, a disputed bill, who settles the dispute between the tenant

Leo Steiner, for Petitioner—Cross.

and yourself? A. It is settled between the meter service and the tenant.

Q. Has the tenant as against you, any recourse to the Board of Public Utility Commissioners, a Commission set up under the statutes of this State to handle such an emergency? A. That I don't know. 10

Mr. Osborne: I object. That is a question of law.

Commissioner Gnichtel: He has answered.

Mr. Osborne: He answers after my objection.

Commissioner Gnichtel: His opinion would not have much weight. He says: I don't know. That is an answer. 20

Q. You also have the right under your contract to sell to the owner? A. Yes, sir.

Q. All the energy he uses; is that correct? A. I believe that is what the contract reads.

Q. To whom is the bill for the energy consumed at the master meter rendered? A. It has not been rendered as yet in this State.

Q. Pardon me? A. It has not been rendered as yet in this State.

Q. Rendered in other States to whom? A. To the owner. 30

Q. To the owner of the building? A. Yes, sir, and sent to us in other States.

Q. What practice do you propose to follow in this State? A. All I know is the Public Service have refused to deal with us. They want to deal with the owner. We said we are perfectly satisfied.

Q. What practice will you follow in this State; take the bill from the owner? A. We will take it from him? 40

Leo Steiner, for Petitioner—Cross.

Q. Yes. A. Either that or the owner will instruct the Public Service to mail the bill at a certain place. I don't know just what their policy will be. I imagine we will ask them to have the bill mailed to the Meter Service Corporation.

10 Q. Assuming the tenant has paid his bill to you and assuming that you or the landlord neglect to pay their bills to the Company, the Public Service Electric & Gas Company, and your service is shut off for non-payment of bills; what happens to the tenant who has paid his bill to you, what happens to his service? A. Naturally if the Public Service shut off the light, it naturally is out.

20 Q. So if you neglect to pay your bills, the company having a contract with you or the owner, of whom you are the agent, discontinues service, the tenants in the building, although they have paid their bills will be without light, is that correct?

Mr. Osborne: I object. That is a pure supposition, because they never pay in advance in any event.

By Commissioner Gnichtel:

Q. In the other states where you are operating, are you the agent of the owner too? A. Yes, sir.

30 Q. The same plan as you have here, the same kind of contract? A. As far as I understand. Yes, the same kind of contract.

Q. What states do you operate in? A. New York State. I believe the president of the company is here and he is in a position to give you the information about that.

Q. You spoke of another state. I wondered what you had in mind. New York State? A. Yes, sir.

Leo Steiner, for Petitioner—Cross.

By Mr. Blake:

Q. For the service you render, you divide fifty percent of the profit, is that correct, half to the owner and half to yourself? A. The contract is very clear.

Q. This contract says fifty-fifty; is that the way it is divided? A. It depends upon certain installation of electrical refrigeration. 10

Q. I am speaking of the contract. Is that the only one in existence? A. No. That particular contract refers to two different percentages, depending upon whether there are individual units of electric refrigeration installed or whether there is a multiple or central system.

Q. If individual units of electrical refrigeration are installed then it is divided on the basis of fifty to the owner and fifty to you? A. Yes, of the gross profits. 20

Q. Of the gross profits arising from this transaction? A. Yes, sir.

Q. If the individual units are not used and you have a central system of refrigeration then it is divided thirty-seven and one-half percent to the owner? A. That is correct.

Q. And sixty-two and a half percent to your company? A. I believe the contract is self explanatory. 30

By Commissioner Gnichtel:

Q. What is the advantage of your service? A. Well, our service, from what I understand, gives the owner an opportunity of making additional profit out of his equipment that he otherwise would not be able to do, and furnishing a satisfactory and proper service.

Q. You make a profit out of it too? A. We naturally make a profit for the service we give. 40

Maxwell M. Chesler, for Petitioner—Direct.

Q. And the owner makes a profit? A. Yes, sir.

Q. The tenant has got to pay for all that? A. I beg your pardon.

Q. The tenant pays for it? A. The tenant pays exactly the same rate which he would to the Public Service.

10 Q. Does he get anything in addition to what he would get if he was connected directly to the utility? A. That I don't know. I don't believe so.

Mr. Osborne: We have the president of the company here who will testify to that. This witness apparently does not know.

By Mr. Blake:

20 Q. Now at the time you were refused you say by Mr. Van Giesan, who in turn had been instructed by the central office not to set the master meter, there were twenty tenants in the building at that time, occupants of that building? A. I told you they may have put their furniture in and just used it part of the time. How much they used it I don't know.

Q. What was your business prior to your connection with this company in March of this year? A. I was in the knit goods business.

30 Mr. Osborne: I would like to call a witness a little out of his turn.

MAXWELL M. CHESLER, sworn on behalf of petitioner.

Direct examination by Mr. Osborne:

40 Q. Where do you live? A. I am a resident of New York State, I live in Brooklyn.

Maxwell M. Chesler, for Petitioner—Cross.

Q. What is your business? A. I am manager of the Industrial Office Building.

Q. This building that we are in? A. Yes, sir.

Q. Do you receive current in this building, electric current, for the use of tenants of the building? A. Yes, sir.

Q. Who do you receive it from? A. Public Service Electric. 10

Q. This is part of their territory? A. Yes, sir.

Q. You get it through a master meter? A. Yes, sir.

Q. Do you redistribute it to tenants? A. Yes, sir; not to all tenants.

Q. Do you redistribute it to some of your tenants? A. Just the tenants located in the concession space, the lobbies and stores.

Q. The offices, you include the cost of electric light in your rent? A. Yes, sir. 20

Q. But to the other tenants in the building, in the lobbies and stores, you resell it to them? A. Yes, sir.

Q. Do you do that through other meters than the master meter? A. Yes, sir.

Q. They have individual meters? A. They have individual meters for each store.

Q. Do you get your current from Public Service at the wholesale rate? A. Yes, sir. 30

Q. Through a master meter? A. Yes, sir.

Q. And then distribute it at a rate agreed upon between yourselves and the tenants through your sub-meters? A. Yes, sir.

Cross-examination by Mr. Blake:

Q. Is this an apartment house, sir? A. No, sir, it is an office building.

Q. The building and the stores that you speak of, all have access to the public halls in this building, do they not? A. Yes, sir. 40

Maxwell M. Chesler, for Petitioner—Cross.

Q. They have; the stores have entrances on the public streets, do they not? A. Yes, sir.

Q. The booths you speak of in the interior of the building are the cigar booths that are located in the main corridor? A. Not cigar. The beauty parlor and barber shop and bootblack and print shop and so on.

10

Q. All have access to the main corridor which is a public place in the first floor of this building? A. Yes, sir.

Q. All the others are facing the outside of the building and have access to use the streets? A. Yes, sir.

Q. Above the first floor, is anybody served on meters? A. No, sir.

20

Q. That is all included in your rent, is it not? A. Yes, sir.

Q. The business you are conducting here is the business of running an office building? A. Yes, sir.

Q. And you supply all your tenants above the first floor, where they have no access to a common floor level or the outer streets, you include the light the same as the heat in your rent, do you not? A. Yes, sir.

30

By Commissioner Gnichtel:

Q. What do you do with the cigar store? A. The cigar store, they pay for their current through a meter. We have a meter installed.

Q. Pay you or pay the Public Service? A. They pay us. We bill them each month for the current consumed.

Q. All the stores in the front of the building do that? A. Yes, sir.

40

Sven Gafvert, for Petitioner—Direct.

By Mr. Osborne:

Q. Do you bill at the same rate that you pay the Public Service? A. No, sir. We figure our overhead and expense involved in taking the reading and billings and everything in connection with it. It is very little more.

10

Q. And the investment on the equipment? A. That is it.

By Mr. Blake:

Q. What do you bill them at, what rate? A. I don't know what the rate is now. The bookkeeping department handles that.

By Mr. Osborne:

Q. The Public Utility do not have anything to do with your contract between yourself and the tenants, so far as you know? A. So far as I know, no, sir.

20

By Mr. Blake:

Q. May I ask what rate you charge? A. I don't know whether it is five cents or six cents; somewhere in that neighborhood.

30

SVEN GAFVERT, sworn on behalf of petitioner.

Direct examination by Mr. Osborne:

Q. Mr. Gafvert, are you president of the Meter Service Corporation of New Jersey? A. I am.

Q. Did you have a conference with Mr. Thomas N. McCarter, president of the Public Service, regarding this matter? A. I did.

40

Sven Gafvert, for Petitioner—Direct.

10 Q. Will you state the subject matter of the conference? A. Mr. McCarter claimed that he was opposed to anything that would take money out of the Public Service Corporation's pocket, and when I showed the decision of the Supervision Com-
pany he said: 'Well, if it is a matter of law, natu-
rally we will have to abide by it.'

Q. Who was with you? A. Mr. Gough.

Q. Have you been in this sub-metering business for any length of time? Are you familiar with it? A. I started the sub-metering line in 1913; that is, in the metering line, not the sub-metering line in 1913; the sub-metering line in 1916.

20 Q. Just tell us how many years you have been in it, in order to judge whether you have had any experience or not. A. Twelve years.

Q. Are you connected with the New York Com-
pany as well? A. Yes, sir, I am.

30 Q. What is the advantage, if you can tell us, if any, to the tenants or to the landlord or to both, in such an arrangement as is indicated here? A. The landlord uses the main part of the electrical supply for the building and, therefore, receives his rate slightly cheaper because of the whole-
sale rate than he would if he purchased the power only for his own use.

Q. In other words, in addition to the quantity that the landlord uses he can furnish an additional quantity? A. Yes, sir.

Q. He will be able to secure a lower rate; is that what I understand?

Mr. Blake: I think he better answer.

(Answer read.)

Witness: May I put it a little more ex-
plicit?

40 Commissioner Gnichtel: Yes; I think I understand what you mean.

Sven Gafvert, for Petitioner—Direct.

Witness: If the landlord purchases only for his own use for the power supplied in the building and for his public light, he uses only a certain number of kilowatt hours. If he purchases the supply for the entire building he adds on the tenants the kilowatt hours used by the tenants and therefore receives a lower rate on the entire supply. 10

Q. Does the landlord on his resale to the tenant thereby obtain any earnings on his investment in electrical equipment? A. He does, yes.

Q. Is that one of the advantages? A. That is of course an advantage.

Q. What advantage is there to the tenant, if any, in this kind of service? A. Only that in most cases they can receive quick service whenever there is an emergency, because they do not need to call the Public Service. The superintendent can immediately put in a fuse, which they cannot do on the Public Service meters. 20

Q. Then the advantage to the tenants is, for the same rate, they have immediate and quick service on the premises? A. Yes, sir.

Q. In connection with their electrical supply, is that right? A. Yes, sir.

Commissioner Gnichtel: You say he gets the same rate? 30

Mr. Osborne: Yes, because that is what the contract provides; the lease provides for that.

Commissioner Gnichtel: The same rate that the Public Service gets?

Mr. Osborne: The tenant is charged the same rate he would have to pay the Public Service.

Commissioner Gnichtel: He gets the retail rate? 40

Sven Gafvert, for Petitioner—Direct.

Mr. Osborne: That is what he would have to pay the Public Service, the retail rate.

Commissioner Gnichtel: The landlord gets it at the wholesale rate.

Mr. Osborne: He gets it at the wholesale rate.

10

Commissioner Gnichtel: So there is a profit divided between the landlord and you?

Witness: Really it is not a wholesale rate, it is a sliding scale rate, starts at nine cents and goes down.

Commissioner Gnichtel: Where do you get the rate from?

Witness: From the Public Service Corporation.

20

Commissioner Gnichtel: You base it on the same rate.

Witness: Exactly the same rates charged by Public Service Corporation for a like amount of electricity consumed; there is no difference.

By Mr. Osborne:

Q. Assume, Mr. Gafvert, an apartment containing more than 100 families supplied with electric current through one meter at the request of the owner where the owner pays for all of the current consumed through that meter and furnishes it to his tenants, which is included in the rent, such as for instance an office building or loft building or apartment where the light is included in the rent (such a situation for instance, your Honor, as the Chief Justice referred to yesterday in his own hotel; he said while it is true he does not get a separate bill for it, he imagines he pays for his light in his rent); assume such a situation, and

30

40

Sven Gafvert, for Petitioner—Direct.

then assume the same apartment house with a similar number of tenants supplied with electric current through one meter and the owner paying for all the current passing through to the tenants in the building through sub-meters and charging each tenant according to the number of kilowatt hours of electrical energy consumed; assuming the same number of tenants exist in each case and the same consumption, what would be the use in each case; would there be any difference in the amount chargeable to the owner by the central station? Do you understand that question? A. I understand your question. There would be and would not be, because where the tenant pays for the electricity, the amount of electricity used by him is smaller than it would be if he did not pay for it. 10

Q. In other words, if it is not metered to him he wastes it? A. That is correct. 20

Q. Assuming that they use the same amount of current in either event. A. Then the rates would of course be the same.

Q. To the landlord; so the landlord, whichever system is used, has to pay the company the same? A. That is correct.

Mr. Blake: The witness specifically injected in there an element.

Mr. Osborne: With that qualification. 30

Mr. Blake: That is the whole qualification. If two and two are four are two and two four; that is what the Judge thought he was asking, but the witness specifically says this—it all goes through a meter, a master meter and is then remetered to the tenants and the same amount of electricity is consumed, whether or not the landlord who is responsible for the bills on the master meter would not pay just the same 40

Sven Gafvert, for Petitioner—Cross.

10 amount of money. Of course, the answer to that is yes, he would. But the witness said, and put his finger on the sore spot in the case, that if there is no check upon the use of energy by the tenant he uses more electricity and therefore more electricity will be registered going through the master meter and therefore the company gets more revenue out of that apartment than it would by having a check on the place at each individual house. Then the Judge ends up the question; it would be just the same. The witness has put his finger on the meat of it.

20 Q. Assuming an office building having many tenants and consuming a given quantity of electrical energy per month, in each case the energy is supplied to the tenants by the owner and charged for at a flat rate and the rate added to the rent, also assuming an apartment under similar conditions, is there any difference in the cost to the central station? A. The cost to the central station?

Q. The cost to the central station, being the company manufacturing, generating and supplying electricity? A. There should not be.

30 *Cross-examination by Mr. Blake:*

Q. You have been in the business since 1913; first you told us the metering business and then you said the sub-metering business. A. Yes, sir.

Q. What is the distinction between the two? A. I was with the New York Edison Company for three years.

40 Q. You were with the New York Edison Company in what department? A. In the meter department.

Sven Gafvert, for Petitioner—Cross.

Q. Then did you start this sub-metering company? A. I did not.

Q. Was that already in existence when you went with them? A. You mean the company itself?

Q. Yes. A. The company was not in existence, no.

Q. Were there any concerns in New York at that time conducting that business? A. There were several. 10

Q. Were there any in 1913? A. Yes, sir.

Q. Do you know how long prior thereto there had been? A. That I could not say.

Q. But over a long period of years this practice has obtained in New York, has it not? A. It has, yes, sir.

Q. Whether it was prior to or subsequent to public utility regulation, this practice grew up, do you know? A. From my understanding, sub-metering has been going on in many cities since about 1902. 20

Q. About 1902 is when it first started. As a meter man you know that the presence or non-presence of a meter in either an office or in a home has a great deal to do with the amount of energy that is consumed in that office and in that home, isn't that true. A. That is true.

Q. If there is no meter, the use tends to be an extravagant use? A. Right. 30

Q. For instance, right in this building, with the bright sun shining, we would not have the lights burning if we were being metered for them? A. No.

Q. There is an advantage to the utility to encourage the use of its product, is there not? A. Yes.

Q. Of course, the more of a product that is used, the better rate the consumer will eventually get, won't he? A. I doubt it. 40

Sven Gafvert, for Petitioner—Cross.

Q. Well, under regulations, the cheaper it can be distributed to him, ultimately the consumer would get the benefit? A. Yes, but the landlord pays in cases like this.

10 Q. I am not talking about the landlord. I am dealing with principles now. With an increase in consumption, it reacts to the advantage of the consumer, does it not? A. That is right, yes.

Mr. Osborne: Did you say it does?

Mr. Blake: It does.

20 Q. In an apartment house, if a master meter is set and the use of electricity is included in the rent and there is no individual meter or check, would not the use of electrical energy in that apartment be greater than if there was an individual meter set in each apartment? A. It would, yes, sir.

Q. If the consumption is greater the company supplying the energy would get additional revenue, would it not? A. It would, yes, sir.

Q. And to the extent that that consumption is curtailed or checked, to that extent the company supplying the energy in the territory is injured, isn't that true? A. That is right.

30 Q. The system which you are interested in does set individual meters in each apartment, does it not, or in some place in the building, so it is measured to each apartment? A. Wherever the meter rooms are provided.

Q. Your contract provides that you may sell to the owner himself? A. Naturally we will have to have some way of proportioning the charges to the landlord.

40 Q. Under your contract do you take all the energy consumed in that building and then bill it to A, B and C who are the tenants, and D, who

Sven Gafvert, for Petitioner—Cross.

happens to be the landlord; is that the way you do it? A. We do, yes.

Q. And you take the net amount between the sum total of the individual bills and the reading of the master meter, and then divide what is left between yourself and the landlord in a proportion agreed upon? A. May I explain it? We take all 10
of the meters in the building for the tenants, plus the public light meter and the public power meter, and check them, the kilowatt hours, to the amount what is used by the Public Service meter or central station meter, so that if the central station meter is out or our meters are out, we are bound to detect it, because they must check.

Q. After you have done all that, don't you divide, in the method I have said, the difference between the two, in accordance with the terms of 20
your agreement? A. Yes, sir. The maintenance expense is borne by our share of the profits.

Q. You have to take out the maintenance expense? A. No, we don't take out the maintenance expense.

Q. That comes out of your profit? A. That comes out of our profit.

Q. The only apparatus you have in this building would be the meter, would it not? A. In this 30
particular case, yes.

Q. If you were not serving the customer, the tenants in that building, the Public Service Electric & Gas Company would set its meters without any additional charge to the landlord, would it not? A. That is correct.

Q. So the only investment you have is the meters and the landlord in no event would have to pay your investment or the Public Service investment as to meters, is that correct? A. Yes, he 40
does pay part of the Public Service investment there.

Sven Gafvert, for Petitioner—Cross.

Q. How? A. He supplies all the service boxes as well as the meter boxes himself.

Q. That is done in every installation by the owner, is it not? A. That is true. Therefore, on the meter part of it we are no different than the Public Service.

10 Q. Whether you are in there or whether we are in there, there is no difference in expense to the owner, is there, in the installation charges? A. That is correct.

Q. Whether he spends \$10,000 in equipment in the building or \$100,000, it would make no difference whether you served him or we served him? A. That is correct. We supply the meter mountings wherever the owner has not supplied them, as our contract states. Public Service does
20 not do that.

Q. Your company is now operating in New York City? A. New York City and Syracuse, New York, Chicago, Illinois.

Q. Are the meters of your company subjected to tests or calibration by any public authority in any place where you operate? A. They are in Chicago.

Q. Are they in New York City? A. They are not.

30 Q. Occasionally disputes do arise, do they not, between tenants in the building and yourself as to the amount that is charged on the meter? A. They do.

Q. Or as to the accuracy of the meter? A. They do.

Q. Are those disputes referred to and are they decided by any public authority? A. We test the meters and if the tenant is not satisfied we tell him to get anyone whom he desires, to investigate the matter; we would be glad to have a represen-
40

Sven Gafvert, for Petitioner—Cross.

tative there and check it up the same as the Public Utility Commission.

Q. Of course, you have the right to insist upon the payment of your bill as you render it, if you see fit, do you not? A. Our policy is to ask for payment, depending upon the consumer; some of them having deposits we let go until the deposit runs out, for a certain reasonable time after that. 10

Q. You have the power to refuse accommodation if you wish? A. Naturally we have the power to shut the service off.

Q. In the event of a dispute in which the tenant refuses to pay, and the deposit which has been put up—I understand you require a deposit of the tenants if you see fit, the same as a regular utility? A. Yes.

Q. What do you do then? A. I did not get your question. 20

Q. In the event of a disputed bill and refusal to pay and the exhaustion of the deposit money, what do you do then? A. We do our best to adjust the complaint and tell the tenant to get an outsider to decide it.

Q. Suppose the tenant refuses to do it, what do you do then? A. We have to insist upon payment of the bill.

Q. If he does not pay the bill what do you do? A. Disconnect the service. 30

Q. When service is disconnected, do you permit the tenant to apply to the utility serving electrical energy in that field, and allow that utility to go in and sell that tenant? A. That all depends. We have to abide by what the landlord wants in the matter. If he wants to turn it over to the Utility, we seldom object to it.

Q. Then as I understand it, if the landlord refuses to permit the tenant in the building to take 40

Sven Gafvert, for Petitioner—Cross.

from the utility serving in the field, he is completely without service?

10 Mr. Osborne: That is a pure conclusion of law. Mr. Blake knows that the Court of Chancery is always open to any litigants, to remedy the condition he is describing.

Mr. Blake: We thought it was open. These people refused to let us go into the building and give service although we had applications from tenants.

Commissioner Gnichtel: I will admit the question.

Mr. Osborne: I object, that is a conclusion.

20 Commissioner Gnichtel: I have overruled the objection and will allow the answer. Answer the question.

A. I would not say he would be prevented from it in all cases, as we have many cases where the tenants have a separate Public Service meter in, I mean in New York City, New York Edison meters.

(Recess from one to two p. m.)

30

—
AFTER RECESS.

SVEN GAFVERT, resumes the stand on behalf of Petitioner.

Cross-examination by Mr. Blake (continued):

40 Q. Do you keep an employee of your company, the meter company, on the premises? A. That I could not answer you at the present time. I have been away for several days.

Sven Gafvert, for Petitioner—Cross.

Q. Is it your practice—I am not speaking at the present moment—is it your practice to keep an employee of your company all the time in the apartment house where you are serving? A. No.

Q. You rely on the superintendent of the apartment house, I suppose? A. No, we do not.

Q. Well, suppose a fuse blows out in a meter, 10
what happens? A. If the superintendent does not fix it, we send a man to fix it.

Q. You send a man to fix it? A. Yes.

Q. Where is your office located in Jersey? A.
In the Military Park Building.

Q. Do you keep a man there twenty-four hours a day? A. We do not, no.

Q. How long is a man there on duty? A. Only
regular working hours, eight to five.

Q. From what time to what time? A. Eight to 20
five.

Q. Eight to five in the day time. So if a fuse blew out after five o'clock at night, thus depriving the apartment of light, they would wait until eight o'clock the next morning and telephone your office to send a service man out? A. They would not, because the superintendent would put in the fuse.

Q. What superintendent? A. The building
superintendent. 30

Q. If a fuse blew out in the building, the superintendent of the building would put it in? A.
Right.

Q. The superintendent of the building is not your employee; he is employed by the owner, isn't that correct? A. Yes.

Q. Assuming that Public Service Electric & Gas Company had no emergency operations whatsoever, why couldn't the superintendent of the building put in a fuse if one blew out in the Public 40

Sven Gafvert, for Petitioner—Crass.

Service meter box? A. Because your meters are sealed.

Q. Pardon me? A. Your meters are sealed.

Q. Aren't your meters sealed? A. They are sealed, but the superintendent has our permission to break the seal whenever there is any emergency.

Q. Wouldn't therer be an emergency if the tenant was without light? A. Yes, of course.

Q. Is that sufficient emergency to break the seal and open the meter? A. Yes.

Q. How many fuses are in the meter? A. That all depends on what type meter it is.

Q. Take the ordinary type meter for a five-room apartment. A. Two fuses.

20 Q. Where does the trouble ordinarily occur in the circuits, in the meter or in the fuse box outside the meter? A. It should not occur in the meter. It should occur on the house side of the meter.

Q. About what proportion of failures occur in the meter? A. Very few.

Q. Very few; it is very remote and very rare that you ever have to break the seal on the meter to reset a fuse, isn't that correct? A. Yes.

30 Q. The failures come on the house side of the meter? A. Yes.

Q. And there is an open meter box or fuse box that anyone with average intelligence could screw in a new fuse? A. That is right.

Q. The building superintendent can screw that in? A. Yes.

Q. He can screw it in whether your meter is in that building or whether the Public Service meter is in that building? A. Yes, sir.

40 Q. There would be no more delay incident to the restoration of service whether your meter was

Sven Gafvert, for Petitioner—Cross.

in or the Public Service meter was in, is that correct? A. Not on the house side of the meter.

Q. You say the failures in the meter itself are very rare? A. That is true, they are very rare.

Q. Now assuming that the occupant of the building had a failure and telephoned down to the janitor or superintendent that he had a failure, would the superintendent get in touch with you or would he just go and repair it? A. He would just go and repair it. 10

Q. If it was on the house side of the meter, on our meter they could do the same thing? A. Yes, sir, that is right.

Q. Do you know what trouble service is maintained by Public Service Electric & Gas Company? Is it not a twenty-four hour service we maintain seven days a week? A. We do that in New York City. 20

Q. I am asking about this territory. A. We would do that.

Q. Public Service? A. We would not at the present time, because we only have two or three buildings.

Q. Can't you answer my question, whether or not Public Service Electric & Gas Company does not maintain a twenty-four hour trouble service, seven days a week, every week in the year? A. Yes, sir, I suppose they do. 30

Mr. Osborne: I did not hear the answer.

Witness: I suppose they do.

Mr. Osborne: Do you know anything about it?

Witness: I don't know anything about it.

Mr. Osborne: Why do you assume to suppose then?

Witness: A public utility should do that. 40

Sven Gafvert, for Petitioner—Re-direct.

Commissioner Gnichtel: As far as you personally are concerned, you don't know?

Witness: I don't know.

10 Mr. Blake: He has testified it would be an advantage to the tenants because of the high class of his service. I am attempting to show the character of his service.

Commissioner Gnichtel: He says he personally don't know anything about it but he supposes they do.

Q. You are under contract with the owner of the building to supply meters. Are you under contract with the owner of the building to directly pay Public Service Electric & Gas Company the bills rendered by it? A. Yes.

20 Mr. Osborne: I object. The contract speaks for itself.

Commissioner Gnichtel: He has answered it.

Q. If you should not pay your bills or pay the bill when rendered by the Public Service Electric & Gas Company and the tenants of the building had paid their bills which you have rendered to them, and the service was disconnected, discontinued, the tenants would be in a position of having paid for their energy and still be deprived of service, would they not? A. That is right, yes.

30

Re-direct examination by Mr. Osborne:

Q. Mr. Gafvert, about these fuses; you say the fuse boxes were sealed? A. The fuses on the house side of the meter are open; the service side of the meter they are sealed.

40

Sven Gafvert, for Petitioner—Re-direct.

Q. That is the fuses on the Public Service meter are sealed? A. On the service, before the service enters the meter.

Commissioner Gnichtel: His meters too; he says they were sealed; sealed on the Public Service and also on his meter.

10

Witness: That is correct.

Q. Are the meters which the tenant measures his electricity through, or through which the electricity furnished to the tenant is measured, are they sealed? A. They are.

Q. But in your case you give the superintendent of the building, who as I understand it, is also an employee and servant of the landlord, permission to break the seal? A. Yes.

20

By Commissioner Gnichtel:

Q. What advantage does a tenant get under your system that he does not have under the other system? A. Only he can get minute service, the moment the superintendent breaks the fuses open, if the service side of the meter blows out.

Q. That is the only advantage? A. That is the only advantage.

30

Q. In regard to rates, suppose you increase rates to a higher figure; what remedy would he have? A. Our contract covers that; under the same rates as the Public Service, for the same amount of electricity consumed.

Q. Your contract with whom? A. With the landlord.

Q. Suppose you and the landlord agree to raise it? A. We don't do those things.

Q. Suppose you did? A. It would be subject to our contract.

40

Sven Gafvert, for Petitioner—Re-direct.

Q. Suppose you sold out to somebody who was not quite as fair minded as you, and he and the landlord got together and raised the rate; what remedy would the tenant have? A. None that I know of, except his lease.

10 Q. He would have to pay or get out? A. Except his lease.

Q. Do you state in the lease the rate? A. Usually the landlord covers that in the leases.

Q. You have no control of that? A. Our contract specifies that the lease must be made so that our contract can be carried out. I do not remember the exact wording.

By Mr. Osborne:

20 Q. I suppose if the landlord broke the lease the tenant could move, couldn't he? A. He could move, yes.

Q. If he was overcharged or charged more than he wanted to pay, he could move, couldn't he? A. That is, of course, a question for the attorneys. I don't know that.

Q. Whether he could move or not?

30 Commissioner Gnichtel: He says that is a question for the attorneys. I guess that is right.

Q. You were examined at some length by Mr. Blake in regard to the consumption by the tenant or tenants in cases where the current is metered and where it is not metered, is that right; do you remember that? A. Yes.

40 Q. I think you said on cross-examination, or admitted at least in response to Mr. Blake's question, that where the current was not metered there was a very much greater use by the tenants, is that right? A. That is correct.

Sven Gafvert, for Petitioner—Re-direct.

Q. Now, then, what would the effect of that be on the landlord, where would the burden of that wasted current rest? A. The landlord, of course, would be paying for the waste of electricity to the electric company.

Q. So that, although this excessive use of current might enure to the benefit of the electric company, because it would naturally sell more to the landlord and get paid for it, the burden would be placed upon the shoulders of the landlord to pay for that waste; would it not? A. Yes. 10

Q. You were asked about the difference in metered and unmetered current, but in this case, under the contention of the Public Service, if their meters supplant our meters there would be no question of waste because of unmetered service, would there? A. No, of course not. 20

Q. Because it would not make any difference then; the waste would be more or less the same, regardless of who supplied the meter, would it not? A. It would; it would be the same consumption.

Q. If the company is permitted to deny this current to the landlord and furnish the current directly to the tenant, over whose wires and appliances, whose equipment is the current furnished to the tenant? A. On the landlord's own equipment. 30

Q. The landlord then would be deprived of the right to earn on his investment in equipment in that situation? A. He would.

Mr. Blake: Just a moment. I think that is objectionable. The testimony is that regardless of who serves, the landlord must provide facilities over which our energy goes. We are only required to bring it in 40

Sven Gafvert, for Petitioner—Re-direct.

the basement and attach it to the panel board.

Commissioner Gnichtel: I think that is admissible.

Mr. Blake: He has the investment, whether we serve it or not.

10 Commissioner Gnichtel: I think the question is admissible.

(Question read.)

Witness: Yes.

By Commissioner Gnichtel:

Q. Couldn't he arrange that in the rent? A. I understand that there would be no objection if the landlord bought the current and sold it to the
20 tenants and included it in the rent.

Q. But even in this question here, you say under certain circumstances stated, he would be deprived of the income on the amount spent for putting in the wires? A. Yes, sir.

Q. Isn't that included in the rent?? A. But there is nothing to prevent the landlord from raising the rent five dollars a month and charging it in the rent.

Q. There is nothing to prevent it under your
30 system, is there? A. I mean on the flat basis. I do not mean on the meter charge.

Q. There is nothing to prevent him raising the rent when he makes the contract with the tenant under any system? A. No, of course not.

Q. But it is usual to fix the rent on the cost of the building, isn't it? A. That is right.

Q. So the wiring goes into that cost? A. Yes, sir.

Q. He gets an income on that? A. Yes, sir. Of
40 course it would be possible for the landlord to

Sven Gafvert, for Petitioner—Re-direct.

more economically operate his building, if he gets——

Commissioner Gnichtel: That is another question.

By Mr. Osborne:

10

Q. In cases where the landlord furnishes light, we will say, along with the heat and other facilities, he buys the current at wholesale of course through the master meter? A. Yes.

Q. And furnishes the tenant with whatever the tenant uses, no sub-meter intervening, is that right? A. That is right.

Q. In such a case that cost is included in the rent, isn't it, that is to say, his rent covers the cost of light, heat and similar service? A. Yes, 20
sir, right.

Q. That is the case in the case of apartment hotels, is it not? A. That is right.

Q. The result of that then, as I understood your responses to Mr. Blake's questions, was that there was an excessive and wasteful use of electricity? A. That is right.

Q. Which the landlord of course had to pay for? A. That is right.

Q. And had to get out of the tenant by way of 30
rent in order to pay for it? A. That is right.

Q. Therefore, in order to protect himself it is advantageous to the landlord to meter the service to the tenants, is it not, to prevent that excessive waste? A. It is.

Q. In the situation as presented here, of course the company does not have to bill to a multiplicity of small users, does it? A. They do not, no.

Q. Is that an advantage or a disadvantage? A. 40
I should think it would be an advantage.

Sven Gafvert, for Petitioner—Re-direct.

Q. That is a saving, isn't it? A. It is a saving.

Q. It does not have to install meters? A. No.

Q. Or furnish the meters for that purpose? A. It does not.

Q. It does not have to read the meters? A. It does not.

10 Q. Is that an advantage? A. Yes, sir.

Q. Are you sufficiently familiar with the manufacture and sale of electricity to tell us what the relative difference is between the actual cost of manufacturing electricity and delivering it at the bus bar, and what the relative cost is for the distribution and service and reading meters and billing.

20 Mr. Blake: I object to it. It seems to me it is immaterial.

Commissioner Gnichtel: I do not see how it is material, except the latter part of it, the cost of passing it around.

Mr. Osborne: That is the big end of it. They make it for less than a cent and charge I think nine cents.

Commissioner Gnichtel: How does that affect this question?

30 Mr. Osborne: It affects this question, your Honor, because it shows there is really a great saving to the company; we are taking a burden off their shoulders and assuming it ourselves in this situation.

Commissioner Gnichtel: You may show that.

40 Q. Then the company, by reason of being able to make personal contact—do you know whether the company sells appliances of various kinds? A. They do.

Sven Gafvert, for Petitioner—Re-cross.

Q. Of course, you don't know whether they have, under their charter, any right to do that or not? A. I do not.

Q. But their personal contacts with their customers enable them, of course, to sell a great many appliances using electricity? A. It does, yes.

Q. And that is an advantage, too, isn't it? A. 10
Of course it is.

Commissioner Gnichtel: Let us get on with the real facts.

Mr. Osborne: I want to show they are getting something; it is not such a deprivation as they make out.

Commissioner Gnichtel: I do not see how the question of selling fixtures and gas stoves has anything to do with the question 20
of the advisability of doing this. It is too remote.

Re-cross examination by Mr. Blake:

Q. You have spoken generally of this master meter as furnishing a wholesale rate? As the rates are filed in this territory, it is so much for the first group, so much for the second group, so much for the third group, in steps, isn't that correct? A. That is right. 30

Q. As your consumption exceeds a certain amount you drop down to the next step; as it exceeds that, you drop down to the third step; isn't that correct? A. That is correct.

Q. Why do you say the company would receive no benefit if there was an excessive consumption, or, as the Judge terms it, a wasteful consumption in apartments, because of the fact there were no individual meters to check it? Would not the com- 40

Sven Gafvert, for Petitioner—Re-cross.

pany receive more in gross revenue; wouldn't they get more dollars? A. Of course they would.

Q. And the stimulation of use of that electricity results in a larger sale and a larger revenue to the company, doesn't it? A. That is correct.

10 Q. You have testified that it is an advantage to the customer to have your company in there, on the theory that you can immediately break a seal in the meter, if a failure should occur in the meter. In an apartment house of 100 families, how many meter failures would occur ordinarily in a year? A. That all depends how the services are arranged and if the fuses are of proper capacity.

Q. You put in the meters, don't you? A. Yes.

20 Q. And the installation has to have the underwriter's certificate, does it not? A. Yes, sir.

Q. Assume it is all done according to specifications, what is the average? A. If done according to specifications there should not be any burn-out on either the house side or the service side. But you will find where the fuses are put through the building, they put in larger fuses instead of the proper capacity fuses after the building is once in operation, over which we or the Public Service have no control.

30 Q. Won't you answer the question as to how often? A. It is impossible to tell.

By Commissioner Gnichtel:

Q. You have already testified it was not frequently. A. It is not very frequently.

Q. That a fuse blows out. A. It is not possible to take it for one building; you have to take the average of a number of buildings.

40 Q. You said there are very few? A. There are very few, yes, sir.

Sven Gafvert, for Petitioner—Re-cross.

By Mr. Blake:

Q. Among the other advantages that were listed, was the fact—I don't know whether you counted it as an advantage—was the fact that if the landlord and yourself should agree to change the rate, that the redress the tenant would have would be to move out of the building, is that correct? A. I said that was a matter of lease for the attorneys. 10

Q. Don't you know, and this morning your counsel stated, that if current were deprived or taken away from a tenant who paid his bills to you, he could go into the Court of Chancery? Your company and your associates have had enough experience in the last week to know you cannot go into the Court of Chancery without employing counsel, isn't that correct? A. That is correct. 20

Q. You do know, do you not, that this Board boasts, all it requires to start action on it is a post card sent to the secretary at Trenton and they will take immediate action in this case; you know that?

Mr. Osborne: What case?

Mr. Blake: In the case of a shut-off of electricity and the deprivation of service; charging an extortionate rate; all you have to do is send a post card to Mr. Barber and something happens. 30

Mr. Osborne: You mean to say this Board would compel you to furnish service?

Mr. Blake: You have charged the simple remedy of a tenant in the building, if the light was cut off, was simply to go into the Court of Chancery. This witness has testified from his experience in the past week it 40

Sven Gafvert, for Petitioner—Re-cross.

requires counsel; I am told as many as six or eight on one side, in Chancery.

10 Q. Do you think that is comparable in the matter of relief as writing a postal card to Mr. Barber? He has enumerated this as one of the great advantages to the tenants.

Mr. Osborne: We tried that. That did not work.

Mr. Blake: I think that is all.

Mr. Osborne: I think Mr. Blake will admit he refused to continue the service on Colonel Betts' request. Didn't you?

Mr. Blake: Pardon me?

20 Mr. Osborne: You refused to continue the service when asked to by the Board's representative?

Mr. Blake: You already thrust yourself into the Court of Chancery and I felt powerless to act under the injunction you secured.

30 Mr. Osborne: Now, then, I desire certain information from the other side with relation to other apartment houses, loft buildings, office buildings, or any in that group or class where there is a common landlord and the resale of electricity by the landlord, where they are furnishing current for that purpose. They made the statement that there were none. I thought perhaps Judge Speer was misinformed when he told that to the Court, because I had evidence to the contrary. I called one witness, your Honor, this morning.

40 Mr. Blake: I told the Judge if he would give me a list of them I would be glad to have them investigated.

Sven Gafvert, for Petitioner—Re-cross.

Mr. Osborne: I would ask the circumstances under which current is being furnished for Fulton Towers, 106 Harrison Street, East Orange. I thought perhaps they would have somebody here they could put on the stand.

Mr. Blake: We will check it up for you 10
and furnish it.

Mr. Osborne: And the Hampton apartments, 157 Harrison Street; the Peoples Trust & Guarantee Building, 210 Main Street, Hackensack; the Church Construction Company, 150 Harrison Street, East Orange; of course the Industrial Office Building we have just covered; the Kinney Building, corner of Market and Broad Streets; the stores owned by the Prudential Insurance Company on the northwest corner of Broad and Market Streets. 20

Mr. Blake: I can tell you about those. I am familiar with those.

Mr. Osborne: Where there is a common bill to the landlord. I think Jim Seymour also gets current for resale.

Mr. Blake: He gets energy from something. I don't know whether it is from current or not. 30

Mr. Osborne: Or any other cases where current is furnished through a master meter and resold by a landlord to his tenants, in office buildings, lofts, apartment houses or factories.

Mr. Blake: Of course, the last has an odor similar to that of the Gloucester Fish Company; it is a fishing expedition; anything else you may have.

Mr. Osborne: Your Honor will realize 40
they have this information.

Sven Gafvert, for Petitioner—Re-cross.

Commissioner Gnichtel: They said they will furnish it.

Mr. Osborne: They have denied any such condition as that.

10 Then I want to call the Board's attention and offer in evidence, if necessary, the regulations; proposed rules and regulations to be adopted by water companies, in which the Board describes under subdivision D and E a customer, and refer the Board to its decision in the case of the supervision company against the Public Service, in which it adopts that description of a customer and says in express words that it is applicable to electric companies, other companies.

20 And then to the Board's rules, regulations and recommendations for electric supply utilities and for all other utilities owning or using poles or wires, promulgated in 1927, and for this I am therefore not responsible. The other I will have to admit. Rule 11 enumerates the circumstances under which the utility is justified in refusing to connect, the rule saying: when it is not in accordance with the provisions of the electrical code, or the certificate of the underwriters or the local inspection bureau has not been issued, or when the wiring is not in accordance with the rules of the utility. It then refers to Chapter 271 of the Laws of 1912, which says: It shall be unlawful for any persons real or artificial, and so on, to refuse to supply electric current upon the conditions therein named, that is, upon a written certificate of the inspector of electrical wires and appliances approving the construction thereof

30 in any building.

40

Sven Gafvert, for Petitioner—Cross.

My point being that nowhere does the Board by anything it has said or done justify this refusal and the company's so-called policy—contrary to Judge Speer's assertion to the Court—has never been approved by the Board. I want to put this in as part of this Board's rules and part of my case. 10

Commissioner Gnichtel: Is that all? Do you rest?

Mr. Osborne: Can I reserve the right, if one of my witnesses come in, on this question of discrimination, I will put him on.

20

SVEN GAFVERT, recalled on behalf of petitioner.

Further cross-examination by Mr. Blake:

Q. Mr. Gafvert, in order to read the meters and in order to bill the customers and to collect the money, you have to have an office of some kind to do that, do you not? A. We do.

Q. Do you maintain such an office force? A. We do.

Q. Public Service Electric & Gas Company of course now have in existence an office force and field force reading meters and billing and collecting, does it not? A. Yes, sir. 30

Q. To that extent your efforts and their efforts will be duplicated, will they not? A. In what respect?

Q. You will each be maintaining in the field and maintaining in your office a corps of people to do the work that either of you could do alone? A. I would not say it would be duplicated. 40

Franklyn Heydecke, for Respondent—Direct.

Q. Under your theory if you were permitted to retail this current, why should not a water company be required to install a master meter in the premises and permit the landlord to resell the water at a higher price?

10 Mr. Osborne: I object. It is purely a matter of opinion.

Commissioner Gnichtel: That would become a matter of argument. You may argue that.

20 Mr. Blake: I am going to ask him his opinion and I want to continue it further and show that we would then have a separate electric utility, water utility, gas utility and telephone utility, and have a sewerage disposal plant, a sewerage disposal utility, all operating in a little building.

Commissioner Gnichtel: The point is whether he is a competent witness on that. I see the force of the argument on that. All he can say is what you or I would say to answer that. You may answer his question.

A. Purely a matter of law and I am no attorney.

30 Commissioner Gnichtel: Do you rest?
Mr. Osborne: Yes.

FRANKLYN HEYDECKE, sworn on behalf of Public Service.

Direct examination by Mr. Blake:

40 Q. Mr. Heydecke, you are general auditor of the electric department of Public Service Electric & Gas Company? A. I am.

Franklyn Heydecke, for Respondent—Direct.

Q. That company distributes electricity for domestic and public use to how many municipalities? A. Approximately 212.

Q. Approximately how many people do you serve? A. Approximately two and a half million.

Q. About how many customers have you? A. Approximately 750,000. 10

Q. Customers or meters is that? A. Meters.

Q. About 700,000 customers? A. Approximately 700,000 customers.

Q. Some have more than one meter? A. Some do.

Mr. Osborne: Some have master meters?

Mr. Blake: Not for the purpose of resale. 20

Q. How many apartment buildings would you say were being furnished? A. Upwards of 1,000.

Q. About how many families are being served? A. I would say upwards of 40,000.

Q. Do you maintain any field force, meter readers and collectors? A. We do.

Q. Do you have facilities for billing of tenants of apartments along with other customers? A. We do.

Q. Do you find it onerous or burdensome to set meters in apartment houses for individual customers? A. Not at all. 30

Q. Is the matter of reading a bank of meters easier in an apartment house, than making separate calls on the same number of families? A. The cost per meter reading of course would be less, because you can go in the room and obtain a great number very quickly.

Q. Your company has been doing that for how many years? A. All the time. 40

Franklyn Heydecke, for Respondent—Direct.

Q. Ever since its inception, has it not? A. Yes, sir.

Q. Setting individual meters for apartment house dwellers? A. Yes, sir.

10 Q. What is the policy of the company with respect to setting master meters for the purpose of resale by the landlord of an apartment house to his tenants? A. The policy is that we do not permit it.

Q. And have you so instructed the representatives of the applicants here? A. We have.

Q. And have refused to date to set a meter for that purpose? A. For that purpose, we have refused to set a meter.

20 Q. Have you offered to set individual meters for the various tenants of the apartments? A. We have. We tried to comply with the requests of tenants to set the meters and were ready and willing at all times to do so, but have been prevented from doing it.

Q. How many applications did you have from individuals prior to the application of the meter service company for meters? A. Prior to the application? That I could not say offhand.

30 Q. Prior to the refusal, because the application was made in August sometime; prior to your refusal in September, do you know? If you don't know, all right; it is not important. A. I don't know offhand.

40 Q. Eliminating the details of the Chancery proceedings, but following the action of Vice Chancellor Church in dismissing the restraint, in accordance with our offer to him, did you seek, you or through you, were applications for service sought and were meters taken to the apartment house at 67 Munn Avenue for the purpose of being set? A. Yes, our representatives went to this apartment house.

Franklyn Heydecke, for Respondent—Direct.

Mr. Osborne: Your Honor, is this material to this issue?

Commissioner Gnichtel: Some testimony was brought in regarding that.

Mr. Blake: The Judge brought it in this morning. I want to briefly go over it this afternoon. 10

Commissioner Gnichtel: Proceed.

Mr. Osborne: This witness has no personal knowledge of this fact.

Witness: Yes.

Mr. Osborne: Were you up there?

Witness: I was up there, not at the time the applications were solicited, but the next day.

Q. Did you receive the applications? A. The applications were solicited at my instructions. 20

Q. And were received? A. And were received.

Q. You were not able to put the meters in, were you? A. The next day we tried to set the meters.

Q. You tried to but were not able to put them in? A. And we were refused.

Q. The agent of the meter service Company—

A. The agent of the owner.

Q. —refused to permit you. Are you willing now and do you offer now to set individual meters of the Public Service Electric & Gas Company in the apartment house? A. We do. 30

Q. Why do you not desire to put in this system of sub-metering; what is the reason for it? A. Well, we desire that the system of sub-metering and resale be not introduced into our territory. We believe it is our right and duty to have direct personal relations and responsibilities with all persons who use our service and pay for it. We do not desire that others sell this current at unregulated rates and with the intervention of un- 40

Franklyn Heydecke, for Respondent—Direct.

regulated vendors and the retention of any revenue by such vendors. Our rates do not contemplate sub-metering and resale by others.

Q. So far as you know, is this intermediary, the meter service company, a public utility? A. As far as I know, it is not.

10 Q. Who do you consider your customer to be in dealing with the situation? A. The user of the service.

Q. The user or the man who pays for it? A. The user and, as I said before, the user and the man who pays for the service.

Q. In this connection who is the man who pays for the service? A. The tenant of the apartment house.

20 Q. Will the money be paid to you by the tenant? A. No.

Q. Will the money be paid to the owner in whose name the contract for the meter stands, so far as you know, by the tenants? A. So far as I know, no.

Q. Will your company have any contractual relations with the meter service corporation, the intermediary? A. We will not.

30 Q. Will you have any contractual relations with the consumer, the man who is going to use the energy and pay the bill? A. We will not.

Q. In the event of non-payment of the bill by the Meter Service Company or by the landlord, under the rules approved by this Board, what would you be permitted to do? A. Shut them off for non-payment, shut off the service for non-payment if they refuse to pay the bill.

40 Q. Assuming the tenants had paid the bill, however, to the persons with whom they had the contract? A. That would be the unfortunate part of it; the tenant who paid the bill would be without

Franklyn Heydecke, for Respondent—Direct.

recourse to regulative authority and he would be without service that he paid for.

Q. Are bills frequently disputed? A. Well, not so frequently in proportion to the total. There are disputes.

Q. Bills are disputed? A. There are disputes, of course. 10

Q. Do errors occur in meter readings and in registration of meters? A. Occasionally the man reads the meter wrong, occasionally a meter will register improperly.

Q. Has any system been set up by the Board of Public Utility Commissioners in those cases, to examine and calibrate meters? A. Oh, yes.

Q. What is done? A. Under the Board's rules and regulations there is a fluctuating period—the average residence meter—I am not sure whether it is thirty-six or forty months, but it provides for a regular periodic inspection and check of the customer's meter. 20

Q. And in the event of a complaint by a customer that the meter is not recording properly, what is the procedure now under the rules and regulations of the Board?

Mr. Osborne: Isn't that a matter of record?

Mr. Blake: You say you are going to take this to so many courts; other courts might not understand it. I think it ought to be in the testimony. 30

Commissioner Gnichtel: State it briefly.

Mr. Osborne: I should think rather than have this witness state it the introduction of the regulation itself would be proper and then we would know.

(Question read.)

40

Franklyn Heydecke, for Respondent—Direct.

Commissioner Gnichtel: Do you mean by this Board?

Mr. Blake: Yes, sir.

Commissioner Gnichtel: Suppose you introduce that.

10 Mr. Blake: I haven't it with me.

Mr. Osborne: I have it.

Commissioner Gnichtel: You can pick out the parts later. Why not agree to that; complaint is made to the Board and we have an inspector inspect and the matter is remedied.

Mr. Blake: The meter is taken off and tested; if correct, somebody pays a dollar; if not correct, they don't pay it.

20 Mr. Osborne: You state it, Mr. Blake.

Commissioner Gnichtel: He does not know as much about it.

Mr. Osborne: I object to the witness interpreting it. I have heard too much of his testimony already.

Mr. Blake: Then we will offer rule No. 18, entitled Testing of Watt-Hour Meters. Rule 19, equipment for testing.

Commissioner Gnichtel: You can copy those rules in the record.

30 Mr. Blake: Rule 20, Rule 21, Rule 22, Rule 23, Rule 24, Rule 25, Rule 26, Rule 27 and Rule 28.

"Rule XVIII. Testing of Watt-Hour Meters.

(a) All utilities supplying electricity within the State of New Jersey shall provide and properly maintain suitable apparatus and facilities for testing and proving
40 of watt-hour meters.

Franklyn Heydecke, for Respondent—Direct.

(b) All portable standards shall be tested and proved as to their accuracy as often as is necessary to insure their maintenance in proper condition for testing of watt-hour meters. Portable standards, if not tested and calibrated in the laboratory of the electrical utility owning the same, shall be tested and calibrated in any properly equipped laboratory of recognized standing. Each standard shall at all times be accompanied by a certificate giving the date it was last checked, the correction to be applied at various loads, and signed by the proper authority. These certificates, when superseded, shall be kept on file in the utility's office for at least one year. 10

(c) All direct current meters installed upon customer's premises shall be periodically tested according to the following schedule: 20

(1) Meters up to and including 25 amperes capacity shall be tested at least once in every 13 months.

(2) Meters exceeding 25 amperes, up to and including 500 amperes rated capacity, shall be tested at least once in every 12 months. 30

(3) Meters exceeding 500 amperes rated capacity shall be tested at least once in every 6 months.

(d) All types of alternating current watt-hour meters shall be periodically tested as follows:

Franklyn Heydecke, for Respondent—Direct.

- (1) Single phase meters, up to and including 50 amperes rated capacity, shall be tested at least once in every 48 months.
- 10 (2) Single phase meters exceeding 50 amperes rated capacity shall be tested at least once in every 24 months.
- (3) Polyphase meters, up to and including 150 amperes rated capacity, shall be tested at least once in every 24 months.
- (4) Polyphase meters exceeding 150 amperes rated capacity shall be tested at least once in every 12 months.
- 20 (c) A complete record shall be kept of all complaint tests, office and periodic test of watt-hour meters installed on customer's premises. Such record shall include:
 - (1) Owning utility's number.
 - (2) Manufacturer's name and number.
 - (3) Type, rated volts, amperes and wire.
 - 30 (4) Date of each installation, removal and test.
 - (5) The, as found, accuracy at full load, light load and normal load.
 - (6) A record of tests of each meter shall be continuous for a period of not less than five years, and in any event of sufficient length to cover two consecutive periodic tests.

40 Rule XIX. Equipment for Testing:

- (a) Each utility furnishing electric service shall, unless specifically relieved by the

Franklyn Heydecke, for Respondent—Direct.

Board, provide and have available such laboratory meter testing shop, standard meters and instruments and such other equipment and facilities as may be necessary to make the tests required by these rules, or by other orders of the Board. Such equipment and facilities shall be satisfactory to and approved by the Board and shall be available at all reasonable times for the inspection and use of any authorized representative of the Board. 10

(b) Each utility furnishing electric service shall provide and have available such portable indicating electrical testing instruments and portable watt-hour meters of suitable range and type for testing service watt-hour meters, switchboard instruments, recording voltmeters and other electrical instruments in use, as may be deemed necessary and approved by the Board. 20

(c) For testing the accuracy of portable watt-hour meters commonly called "Rotating Standard" and the portable instruments used for testing customer's service meters, every utility not specifically relieved by the Board, shall provide for and have available as reference or check standards suitable indicating electrical instruments, watt-meters, watt-hour meters, or any or all of them hereafter called "Reference Standards." Such standards may be of the service type of watt-hour meters, but, if so, such watt-hour meters shall be permanently mounted in the laboratory or meter shop of the utility and shall be used for no other purpose than for checking standards. All reference standards may be 30 40

Franklyn Heydecke, for Respondent—Direct.

tested, adjusted and sealed by the Board at its discretion.

10 (d) All portable watt-hour meters (rotating standards) of the commutator type shall be compared with reference standards at least once each week. Every portable watt-hour meter (rotating standard) shall at all times be accompanied by a certificate giving the date when it was certified, the corrections to be applied at various loads, and signed by the proper authority. These certificates, when superseded, shall be kept on file in the office of the utility at least one year.

20 (e) All portable indicating electrical testing instruments, such as voltmeters, ammeters and watt-meters, when in regular use for testing purposes, shall be checked against reference standards at least once a week when continuing in use.

Instruments and standards may be tested and certified by any standardizing laboratory whose instruments and methods are approved by the Board.

30 Rule XX. Determination of Meter Accuracy—Complaint Tests:

Any electric meter may be considered correct when it does not show an error greater than 4 per cent in comparison with standards approved by the Board as determined by the Two or Three Point Method of Testing.

40 Two-Point Method.—The accuracy of the meter is the average of the accuracies at light and full load.

Franklyn Heydecke, for Respondent—Direct.

Three-Point Method.—The accuracy of the meter is the resultant accuracy obtained by multiplying the accuracy at normal load by 3 and adding the accuracies at light and full load and dividing the total by 5.

Light load tests shall be made at or between 5 per cent and 10 per cent of rated capacity of the meter for an induction type, and at or between 10 per cent and 15 per cent of rated capacity for a commutator type.

Full load tests shall be made at a point approximately equal to the following percentage of the full connected load of installation.

(a) Residence and apartment lighting, 25 per cent.

(b) Elevator service, 40 per cent.

(c) Factories (individual drive), churches and offices, 45 per cent.

(d) Factories (shaft drive), theatres, clubs, entrances, hallways and general store lighting, 60 per cent.

(e) Restaurants, pumps, air compressors, ice machines and moving picture theatres, 70 per cent.

(f) Sign and window lighting and blowers, 100 per cent.

Rule XXI. Determination of Meter Accuracy—Periodic Tests:

For periodic testing the average accuracy shall be determined by the Two-Point Method.

10*

20

30

40

Franklyn Heydecke, for Respondent—Direct.

For complaint testing the average accuracy shall be determined by the Three-Point Method.

10 In period testing where the average accuracy shows the meter in error more than 4 per cent. the Three-Point Method shall be used to determine the final average accuracy of the meter.

No meter which registers upon "no load" shall be placed in service or allowed to remain in service. To determine that a meter is registering upon "no load", all load side wires shall be removed, and if the meter disk then rotates at the rate of one revolution in five minutes or less it shall be considered as registering on "no load".

20 Rule XXII. Basis for Refunds:

Whenever a meter is found to be incorrect and the test result shows it to be more than 4 per cent. fast, as above defined, a refund shall be made by the utility to the customer in accordance with the following:

30 (1) If the date when the meter had first become incorrect can be definitely ascertained then the refund shall be such percentage as the meter is found to be in error at the time of test on the amount of the bills covering the entire period that the meter had registered incorrectly.

(2) In all other cases the refund shall be such percentage as the meter is found to be in error at the time of test on the amount of the bills covering a period equal to one-half of the time elapsed since the previous test.

40 No customer shall, however, be given a refund for a period greater than the time

Franklyn Heydecke, for Respondent—Direct.

during which such customer has received service through that meter. The Board reserves the right to set aside the provisions of this rule in any particular case where the facts appear to warrant such action.

Rule XXIII. Readjustment of Meters: 10

Each meter after being tested shall be adjusted to record within one per cent. of correct at both light and heavy loads. These adjustments are to be made by comparing the meter while connected in its place of service, with an approved standard at light and heavy load. Meters removed from service are to be tested and adjusted in the meter room before being put in service again. Each electric meter shall be tested for accuracy before installation or within thirty days after being set. 20

Rule XXIV. Meter Test Records:

Complete records shall be kept in the office of all tests. These records shall be available for examination at any time by inspectors of the Board. A report shall be made to the Board at stated intervals giving a summary of the periodic, complaint and removal tests. Each utility having more than 500 meters shall report monthly. Utilities having less than 500 meters shall report quarterly. Blank forms will be furnished by the Board on which reports are to be made. 30

Rule XXV. Tests by Company on Request:

Each utility shall, without charge, make a test of the accuracy of a meter upon re- 40

Franklyn Heydecke, for Respondent—Direct.

10 quest of a customer, provided such customer does not make a request for test more frequently than once in six months. A report giving results of such tests shall be made to the customer, and a complete record of such tests shall be kept on file at the office of the utility.

Rule XXVI. Tests by Commission on Request:

20 Upon formal application by any customer to the Board of Public Utility Commissioners a test shall be made of the customer's meter by an inspector employed by the Board. Such test to be made as soon as practicable after receipt of the application. For such test a fee of \$1 shall be paid by the customer at the time application is made for the test; this fee to be retained if the meter is found to be slow or correct within the allowable limits. If the meter is found to be fast beyond the allowable limits, the amount of \$1 will be refunded to the customer, and collected from the utility owning the meter. The utility owning the meter will be notified that such test is to be made, and should have a representative present to open the meter and seal it after the test.

30

Rule XXVII. Basis for Billing:

40 Meter dials should read directly in kilowatt hours. If not, the dial constant must be clearly indicated where it can be seen without disturbing the case of the meter or the connections. Bills rendered periodically by the utility shall give the dates on which the readings were taken and designate the readings of the meter at the be-

Franklyn Heydecke, for Respondent—Direct.

ginning and end of the time for which the bill is rendered unless the company is specially relieved by the Board in any particular case. Bills shall also show the gross amount charged, and the net amount after deducting the rebate, if any, allowed for prompt payment. Where prepayment meters are in use, the meter reader at the time of reading same shall leave with the customer a slip showing the readings as well as the amount of money collected from the meter. 10

Rule XXVIII. Meter Replacement:

No utility shall make any charge for replacing a meter where such replacement is requested by a customer, unless the meter first referred to has been in use less than one year, in which case a charge, which in no case shall exceed the cost for making the change, may be made to cover the actual expense.” 20

Q. Those are a few of the safeguards that are placed around the customer by the Board of Public Utility Commissioners in respect to meter testing, is that right, Mr. Heydecke? A. Just a few of them, yes, sir. 30

Mr. Blake: I offer all those in evidence.

Q. Mr. Heydecke, when your rates are established you have certain conditions in mind, I assume, in fixing your steps and so forth? A. Referring particularly to the lighting rate which is the one in question.

Q. Yes. Does that lighting rate contemplate such a situation as this sub-metering of energy? 40

Franklyn Heydecke, for Respondent—Direct.

A. None of our rates contemplate such metering and resale.

Q. You are familiar with the so-called Supervision Company case, are you, and the report of the chief inspector in that case? A. Yes, sir, I am.

10 Q. What was the definition of a customer, what was his test that he applied? A. The Chief Inspector?

Q. Yes.

Mr. Osborne: Is this another attempt to get the witness to tell the Court what its own decisions are?

Mr. Blake: I am just asking him what test the Chief Inspector applied as to a customer.

20 Mr. Osborne: In what case?

Mr. Blake: In the Supervision case to which you have referred and offered the decision. Unfortunately you did not offer the inspector's report, merely the decision.

Mr. Osborne: The inspector's report is not the decision of the Board. I object.

Commissioner Gnichtel: I do not think that is admissible.

30 Mr. Blake: May I offer the inspector's report then. Here is your own Board has set that up. They are complaining now we are not following out the rules and regulations of the Board.

Commissioner Gnichtel: You may offer the whole record in that case.

Mr. Blake: All right, sir.

40 Mr. Osborne: I want to be heard on that, because it is contrary to the policy of the Board to permit its inspector's reports to be put in evidence.

Franklyn Heydecke, for Respondent—Direct.

Commissioner Gnichtel: This report was sent to the parties.

Mr. Blake: Yes, sir.

Commissioner Gnichtel: It was a public report.

Mr. Osborne: I thought these reports were communications for the Board. 10

Commissioner Gnichtel: Some are and some are not. That is the decision of the Board.

Mr. Osborne: The inspector's report?

Commissioner Gnichtel: That is the result of the investigation the Board ordered made and that is sent to them. I will allow the report to go in.

Mr. Blake: All right, sir.

Mr. Osborne: Of course, the decision I assume is in because that is a matter of public record. 20

Commissioner Gnichtel: The decision is the decision of the Board, I take it. This is the report of the inspector that investigated it.

Mr. Osborne: I object to it.

Commissioner Gnichtel: Your objection is noted. Proceed.

Q. Mr. Heydecke, with the introduction of a service such as this, which picks up our service at the master meter and conducts it for a short distance across some room or rooms to the meter board, thus interposing into our system of distribution a small unit, which unit would see that the energy passes through its meters, and that the meters were read and bills were rendered and collected from them, would that introduce a duplication of those services in our territory? 30
40

Franklyn Heydecke, for Respondent—Direct.

10 Mr. Osborne: I object to that question because it does not accurately state the facts. This situation does not introduce a new system into theirs, or engraft another system upon theirs. When they sell electricity to the owner of that building at that master meter, then they are through with it.

Mr. Blake: That is where we differ.

20 Mr. Osborne: It is a commodity, just as much as a bushel of potatoes or anything else is a commodity, and to say as they have, after it passes that master meter and it is the property of the owner, that we are injecting something into their system it is, I respectfully submit, injecting into the question an element that is not based upon facts.

Commissioner Gnichtel: Objection overruled. I will allow him to answer.

A. I would say there would be a duplication of both facilities and organization, and incidentally the added cost is eventually passed on to the customers.

30 Mr. Osborne: Your customers?

Witness: The users of electric light.

Mr. Blake: I assume sir, that this company—I imagine counsel will admit on the record—is not a utility, the meter service company.

Mr. Osborne: That is merely an agent of the landlord and not a utility.

40 Mr. Blake: If a utility would not be permitted to invade the territory which an existing utility is adequately serving at adequate rates, certainly a company not a

Franklyn Heydecke, for Respondent—Cross.

utility would not be permitted to enter the field and interpose itself.

Commissioner Gnichtel: That is argument.

Mr. Osborne: I need not answer that at this time.

10

Cross-examination by Mr. Osborne:

Q. You have two and a half million customers?

A. Approximately.

Q. And you want them all, don't you? A. In our territory.

Q. You the not willing that the tenants of apartment houses should make their own contracts with their own landlords to get their service as they choose, are you? A. We are not only trying to protect the company but we are trying to protect the user too.

20

Q. You are philanthropists as well as a public utility, as I understand it? A. Well, we try to be, yes. We don't want the customers or users of light to be subject to conditions of unregulated rates and service.

Q. You like them all to be regulated? A. We like them all to be treated fairly.

Q. This policy, as you have termed it, not to permit anybody to buy electricity from you and then distribute it or sell it, is something of your own concoction and invention, isn't it? A. My personal?

30

Q. Your company. You are speaking for the company. A. Our company, yes.

Q. That so-called policy you think enures to your interest, that is the interest of the company, don't you? A. Yes, sir.

Q. And that is the reason you are for it, isn't it? A. Yes, sir.

40

Franklyn Heydecke, for Respondent—Cross.

Q. That policy so-called, has never been approved by the Board of Public Utility Commissioners, has it? A. There is nothing in the rules and regulations of the Commission to deny it.

10 Q. You just assume to make that rule and the people can subscribe to it or not.

Mr. Blake: In the absence of regulations and rules by the Board, the company has the right to inaugurate reasonable rules.

Commissioner Gnichtel: It is not necessary to argue. Just ask the question.

20 Q. When this matter came up you tried to comply, you say, with the tenants' request. Did the tenants make application to you for current or did you send up to the tenants and solicit them? A. Before we sent up, a great many of them came to us.

Q. You had not turned it off yet, had you? Did they come to you before you turned off the current? That was not the night you left them in darkness, was it?

30 Mr. Blake: Don't say we did, when you had a policeman up there and would not let us go in with the meters when we had them on the truck to put in.

A. You see, it is customary, Judge, for a person moving in an apartment house, or moving any place, to apply, sufficiently in advance for service, and many of these customers moving in, say October 1st, applied much earlier than that for the service on October 1st.

40 Q. You are quite sure that your recollection is correct, the testimony is based on the facts, facts of your own knowledge? A. Absolutely on facts.

Franklyn Heydecke, for Respondent—Cross.

Q. Don't you know the tenants had a contract with the landlord to furnish them with electricity?

A. I know this—

Q. Don't you know that? That is what I want to know? A. Partly.

Q. Don't you know that as a matter of fact he was furnishing them with electricity? A. No. As a matter of fact—oh, yes, after a certain date. 10

Q. Don't you know that you sent somebody up there and told them if they did not sign up with your company, that their service would be shut off? A. I understand that is not so.

Commissioner Gnichtel: Did you send someone up?

Witness: I did not send any one up to say that, no. 20

Q. You did not tell them to say that? A. Absolutely not.

Q. You don't know whether they did say it or not? A. To my knowledge—I was not there—but the man reported to me that he did not.

Q. That is after the accusations had been made that he reported that? A. Yes.

Q. Was it or wasn't it, or did he come right back and tell you? A. The man is here who told me. 30

Q. How did he come to tell you; why did he tell you anything like that? A. As part of the business; he discussed the business with me.

Q. So after you sent up there and told him to get these customers, he came back and said, I have been up there and I did not threaten to turn off their current.

Mr. Blake: You charged it in your affidavits. 40

Franklyn Heydecke, for Respondent—Cross.

Mr. Osborne: I am asking him when it was and why it was the man came back and said anything like that.

Commissioner Gnichtel: Is it material whether he did or did not?

10 Mr. Osborne: No, but this is cross-examination.

Commissioner Gnichtel: What is the materiality, whether he did threaten to turn it off or not?

Mr. Osborne: That just shows the method.

Mr. Blake: If we are going to try out methods in this case, we are going to be a long time.

20 Commissioner Gnichtel: I allowed him to open the door very wide, because he seemed to want to get in a lot of material, that I do not quite understand the relevancy of. Aren't you going too far now, when you are trying the methods this company pursued when they went up there. I don't think it is cross-examination.

Mr. Osborne: I think in view of their claim that they are acting in a philanthropic way and in the interest of these people—

30 Commissioner Gnichtel: I do not think that has any bearing. They are in business and they are acting under their business ideals. Whether it is philanthropic or business, I don't think matters anything about this case. So ask another question.

Mr. Osborne: This is cross-examination, your Honor.

40 Commissioner Gnichtel: I know, but you cannot cross-examine on something that is absolutely irrelevant here.

Franklyn Heydecke, for Respondent—Cross.

Mr. Osborne: I objected to it and you let it in.

Commissioner Gnichtel: There wasn't anything said about whether a threat was made or not.

Mr. Osborne: He said he sent up there and solicited this business.

10

(Discussion.)

Q. Do you claim that the company still owns and controls this current after it is sold to the purchaser? A. After we deliver and sell the current to the purchaser, do we own and control it?

Q. Yes. A. I should say not.

Q. And after a customer has purchased current from you then it is his current, isn't it? A. Under certain conditions.

20

Q. Electric current is recognized as a commodity, isn't it? A. I don't feel so. It is a service.

Q. Hasn't it been held by courts and boards that current is a commodity subject to barter and sale and delivery?

Mr. Blake: In the language of the other witness you can say you are not a lawyer.

Mr. Osborne: If he don't want to answer—he is your electrical expert.

Commissioner Gnichtel: He has answered. He says it is a service, not a commodity.

30

Q. You don't think it is a commodity then? A. I will leave that for the lawyers to answer.

Q. You say your rates do not contemplate a resale. What is there about your rates that is not consistent with the situation that is presented here? A. The promotional feature of the rate, for example—

40

Franklyn Heydecke, for Respondent—Cross.

Q. I don't know what you mean by that. A. I will tell you; the first step of our rate is 20 kilowatt hours at nine cents, the next 30 kilowatt hours at eight cents, encouraging the customer to a greater use of the current at lower steps and consequently at lower rates. That is the trend and has been the trend for some time in rate-making and under such conditions it never contemplated that the rate was for sub-metering and resale, but rather the application of the rate to the conditions as found in the individual family.

10 Q. Then your theory of stepping down the rates is that it encourages the use of electricity by a customer? A. Yes, sir.

Q. And that is the purpose of it? A. Yes, sir.

20 Q. And your theory is not that the stepping down of the rate is because you can manufacture and sell electricity cheaper in volume than you can in small quantities? A. That plays a part in it of course.

Q. Does it make any difference, so far as your revenue is concerned, whether the tenant pays for the electricity which he uses by way of rent or in his rent charge, or whether he pays for it separately through the landlord billing him for current furnished by a master meter? A. Of course there is a vast difference between the two.

30 Q. What is the difference? A. There are two that I would say; one is, aside from the monetary part of it, a company's right and duty to deal directly, personally, and have personal relations and responsibilities with the user of the service, and the Board's regulation and supervision of such installations and customers. From the monetary standpoint, of course, a customer whose service is metered is going to have a more or less
40 restricted use of service. If he gets the service

Franklyn Heydecke, for Respondent—Cross.

in with his rent—for instance as was pointed out this morning, the current in an office building is used very much more freely, and that would be so with the residents of an apartment house.

Q. Then in other words, you agree it is an encouragement to wasteful use of electricity, if you can furnish it directly at a charge through the rent rather than through a meter? A. I would say yes— 10

Q. Unmetered as against metered. A. —except for the use of the word wasteful. I do not consider it wasteful.

Q. You do not consider any unnecessary use of electricity wasteful? A. No, I do not.

Q. Are your facilities ample now for supplying this territory at all times and under all conditions? A. Oh, yes. 20

Q. You do not need any more enlargement of your plant? A. What I mean by this Judge; if I want to have four or five rooms in my house lighted tonight, although I am only using one, I do not say that is an extravagant use of service.

By Commissioner Gnichtel:

Q. Why not? A. I may not want to walk from one room to another and throw a switch; I may want to have my whole house lighted. 30

Q. What do you call wasteful? What would you say was wasteful? Mr. Blake referred to this room. If the lights were turned off it would be rather dim in here, wouldn't it? A. Right now, probably so.

Q. You would not call that wasteful, would you? A. No, I would not.

Q. What would you call wasteful? A. Well, if I left the light in the garage burning all night or down in the cellar, or up in the attic, I would call 40

Franklyn Heydecke, for Respondent—Cross.

that waste of energy, but in the average living rooms of a house or in the average living conditions in apartment houses——

10 Q. It makes the rooms more cheerful? A. Absolutely, makes it more homey, more so than only a light in the room they occupy and you go in another room and throw the switch. I don't call that an extravagant use of service.

By Mr. Osborne:

Q. When it is not metered, the people are a little careless about turning off the lights in a room and they are apt to leave the lights burn? A. What did you say?

20 Q. People are apt to be a little careless about saving it if it is not metered, more so than if they knew they were paying for it in K. W.'s. A. There might be little carelessness to it too.

Q. The burden as the result of that would fall on the landlord, wouldn't it? A. Yes, immediately; ultimately, not.

Q. The benefit would enure to the company? A. Yes.

30 Q. Now then, you do not agree with the Board's conclusion that a customer is not necessarily the individual who actually is turning on the light, the user, as you say, but a customer may be a building or combination of buildings or one side of a double house or a building owned by one party with more than one apartment and using in common one hall and entrance, or a building owned by one party having a number of apartments or offices and using in common one hall and one or more means of entrance, or each apartment of a multi-family dwelling or apartment
40 house where service to individual families is de-

Franklyn Heydecke, for Respondent—Cross.

sired; you do not agree with those definitions of the Board, of a customer?

Mr. Blake: I suppose it is subject to objection. They would have to stand by themselves.

Commissioner Gnichtel: He said; you do not agree with the Board in the definition of a customer. That is admissible. 10

A. I do agree with the Board in its definition of a customer but I do not believe that the Board ever contemplated in that definition sub-metering and reselling and breaking down regulation that has taken years to establish.

Q. In this district, in this territory? A. The Public Service territory. 20

Q. You know it is the custom in other territories to resell; meter to a single customer.

Commissioner Gnichtel: That is immaterial. Let us get on.

Mr. Osborne: I think it would be material, as a precedent.

Commissioner Gnichtel: We have nothing to do with others. It would be quicker to answer. Go on and answer it.

A. Yes, sir, I do know it is being done in New York City. 30

Q. You know it is being done in other places too, don't you? A. Not to my knowledge.

Q. In your opinion is a building owned by one party, of more than one apartment, and using one hall and one entrance not properly designated as a customer to whom electric current should be furnished? A. It is properly designated as a customer provided they do not sub-meter and resell. 40

Q. I understood that you made an affidavit in

Franklyn Heydecke, for Respondent—Cross.

the Chancery proceedings; that is right, isn't it?

A. Yes, sir, that is so.

Q. Do you remember testifying there that you are familiar with the installations throughout the various office buildings and apartment houses? A. Yes, sir.

10 Q. You limited that to the City of Newark, however, didn't you?

Mr. Blake: I think we are entitled to have it all. They charged in their complaint, this Meter Service Company was serving a large number of apartment houses and stores, or whatever it was in the City of Newark, and they are not serving anybody in the City of Newark and we specifically denied it and they admitted on the stand themselves that is the only installation they had.

20

Q. You testified of your familiarity. Are you familiar with the conditions under which the company is serving apartment houses? A. Yes, sir.

Q. Are there none other in the City of Newark that are being served through a master meter and reselling to their tenants? A. Not to my knowledge?

30

Q. Are you familiar with the conditions under which this building is being served? A. I said apartment houses.

Q. Enlarge the question to include apartment houses, office buildings, loft buildings and factories where it is a question of resale to the tenant. A. Yes, I am.

Q. You are familiar? A. Yes.

Q. Not only in Newark but in East Orange and other places within your territory. Are you familiar with the Fulton Towers situation? Fulton

40

Franklyn Heydecke, for Respondent—Cross.

Towers you know is in East Orange, 106 Harrison Street, East Orange? A. Yes, sir, I am.

Q. What is the situation there? A. That is an apartment house.

Q. You furnish current there? A. We have one meter in place.

Q. A master meter? A. That is a situation that— 10

Q. Will you answer my question. You can make your explanation. A. I have already said it was metered.

Q. A master meter? A. Yes.

Q. Through which current is furnished and delivered to the tenants in the building? A. Yes, sir.

Q. Does the landlord pay the bill? A. As to who pays the bill—

Q. Who is it billed to? A.—I could not say offhand. 20

Q. Do you own the individual meters? A. No.

Q. Then the Fulton Towers is such a case as this, isn't it? A. Yes.

Q. Are there any more? A. There is the other one you mentioned. I do not recall the name of it.

Q. I will refresh your recollection. How long has the Fulton Towers condition been existing? A. I heard of it less than a year ago.

Q. So that you have known it— A. My recollection is about four years ago it was put in, and it was one of the mistakes in carrying out the policy of the company. Had it been brought to me, it never would have gone in. 30

Q. When did this policy originate? A. I have been general auditor for four years and it was before that.

Q. I don't quite get the significance. A. I say I have been general auditor for four years and the policy existed before that time. 40

Franklyn Heydecke, for Respondent—Cross.

Q. You found it? A. This Fulton Towers is a mistake and should have never gone in under the company's policy. In a big organization such as ours mistakes do happen once in a while.

10 Commissioner Gnichtel: Who has charge of that; this same company?

Witness: I could not say positively. I don't know.

Q. Are there any more mistakes of that character? A. Yes, there are two or three probably.

Q. How about the Hampton apartment, 157 Harrison Street, East Orange; are you familiar with that condition? A. Yes, that is a similar situation to the Fulton Towers.

20 Q. And it is parallel to this present case, is it not? A. Yes. That is another mistake, too.

Q. Of course, under your present theory, I assume they are all mistakes. A. They are just a few out of the vast number that we serve.

Q. When did the Hampton apartments mistake occur? A. My recollection is it was less than a year after the Fulton Towers.

Q. What about this People's Trust & Guarantee Building, 210 Main Street, Hackensack, New Jersey? A. I could not answer as to that.

30 Q. You will find out? A. Yes, sir, we will be very glad to find out for you, but I do not have all these details of installations in my mind, of 750,000 meters. I could not do it.

Q. I am only asking you about the mistakes, however. A. There may be some mistakes that I know nothing of.

Q. What about the Church Construction Company? A. I know nothing about that.

40 Q. What about the Kinney Building here in Newark? That is a big familiar building. A. My

Franklyn Heydecke, for Respondent—Cross.

recollection is that the Kinney Building is the same as this Industrial Building.

Q. A master meter and resale to tenants?

Mr. Blake: The first floor.

A. Exactly as was covered this morning.

10

Q. Another mistake? A. Well, an office building is in a different class than an apartment house.

Q. Even though they resell to their tenants?

A. I will say this: That the type of the Kinney Building and Industrial Building are exceptions to the rule. The vast, vast number are not billed and metered in this way.

Q. I am not quarreling with you, my dear sir, about the exceptions. My objection is we are not one of them. The question is whether you can distinguish in principle between a situation of resale to a tenant by a landlord in an office building, a loft building, an apartment building or apartment hotel, in some cases where the light is included in the rent and in some cases where it is not. A. Was that a question you asked?

20

Q. It was intended to be.

Commissioner Gnichtel: It was not a question. It was a statement. It is just a statement. You better put a question.

30

Q. Would you consider in this large building, if we chose to put in our own plant and furnish our electricity to our tenants, that we had a right to do so? A. Of course, you have.

Q. We have a right to sell to the tenants electricity which we furnish, although we have not a right to buy electricity and sell to the tenants; we can manufacture and sell to them but cannot buy and sell to them? A. We maintain that.

40

Franklyn Heydecke, for Respondent—Cross.

Q. That is your position? A. Yes, sir.

Q. In such a situation, a tenant would not have any more protection than he has now, would he?

A. No, he would not.

10 Q. His remedy, if he had any, would be just the same as he has now? A. Of course, in the use of our service we try to take means to bring it under regulation. I say, where our service is introduced we try to take means to bring it under regulation.

Q. You mean under the regulation of the Utility Board? A. Regulation of the Utility Board and the company's rules and regulations which are in conformity therewith.

20 Q. There is nothing in conformity with anything of the Utility Board in this regulation that it is your policy, adopted by yourselves, not to furnish for resale, is there? A. It is the policy of the company, not contrary to any issued rules and regulations of the Utility Commission.

Q. Is there anything, so far as you can see from your experience, any reason why, if the landlord wishes to comply with the rules and regulations of the Utility Board, he should not do so in his dealings with his tenants?

30 Commissioner Gnichtel: That has absolutely no value in the decision of this case.

Mr. Osborne: Except this, your Honor—

Commissioner Gnichtel: I do not care what he thinks of that. Neither do you.

Mr. Osborne: I know I do not.

Commissioner Gnichtel: I do not either. I will overrule that.

40 Mr. Osborne: They say the tenant hasn't this protection. I say he can have it.

Commissioner Gnichtel: It is objected to. I will overrule the question.

Franklyn Heydecke, for Respondent—Cross.

By Mr. Blake:

Q. Mr. Heydecke, you said in establishing your rate schedule for furnishing electricity you had in mind—in these various steps you had in mind family use, individual family use. A. Individual family use.

Q. In devising the rate schedule, did you have in mind the furnishing of 106 families' demands on one meter and predicated a rate on that? A. Absolutely not.

10

Mr. Blake: Testimony has been introduced, sir, by the Judge, over objection, but nevertheless it was permitted, as to operations of similar companies in New York City. I have here a copy of a letter from the acting chairman of the New York State Department of Public Service wherein he states the attitude of the Commission as disapproving this sub-metering and suggesting there be incorporated in the new gas rates to be filed by the Brooklyn Union and Citizens Union Gas Company a prohibition against it. If they are showing the trend of things in New York City I think we ought to know the attitude of their Commission and what they are intending to do. I would like to offer a copy of that letter.

20

30

Commissioner Gnichtel: Any objection?

Mr. Osborne: My only objection to it is we are bound by the Court's decision and not by private correspondence between two people.

Commissioner Gnichtel: I think that objection is well taken. That is merely a letter.

40

Percy S. Young, for Respondent—Direct.

Mr. Osborne: We have a decision of that Board.

Commissioner Gnichtel: As I see it, the letter is in typewriting. I suppose if that is their decision, they have decided that and their decision would be public.

10

Mr. Blake: They are about to incorporate it in a rate schedule about to be filed. This is dated September 20th.

Commissioner Gnichtel: I do not think that is admissible.

20

Mr. Blake: I have Mr. Young as another witness. While counsel laughingly referred to these things as mistakes, I want to show through Mr. Young it has been his policy and the policy of the company, but two or three of the laughingly referred to mistakes did occur and will be rectified, and were not discovered until very lately.

PERCY S. YOUNG, sworn on behalf of Public Service.

30 *Direct examination by Mr. Blake:*

Q. Mr. Young, you are vice-president in charge of finance of Public Service Electric & Gas Company? A. I am.

Q. And have been for how many years? A. I could not tell you. For a number of years.

40

Q. Long before the formation of that company. How long has it been the policy of the company, and I understand you are in charge of directing the policy of the company in these matters, to refuse to set master meters for the purpose of

Percy S. Young, for Respondent—Direct.

resale of your energy? A. It has always been our policy.

Q. Several instances have been referred to, that Mr. Heydecke has referred to as mistakes. Will you explain to the Board, please, exactly how those occurrences came about and the company's position then and the company's position now in the matter? A. I am not familiar how they occurred, but they were mistakes. As a matter of fact, I knew nothing about these master meters and resale in apartment houses until very recently. They have evidently crept in in some way through misunderstanding of instructions. The rate structures of our company, as we have fixed them from time to time and adjusted them, have always had in contemplation the direct dealings with customers. Our policy has always been, as I have said, to deal directly with customers, for various reasons. We wanted to see the customers ourselves; we want to give them the widest opportunity to utilize our service, and we wanted to see that there was no discrimination as far as we could arrange it.

By Commissioner Gnichtel:

Q. When you found out your custom had been broken, why didn't you stop it? A. As I say, this case came up——

Mr. Blake: This is what brought it up. We just found out about it.

Q. You never heard it before that? Do you mean to say nobody in your office knew of this? A. I say I did not know it, and it was never brought to my attention. I might say this, too, in the arrangement of rate structures the matter was not so all-important as it is today. For in-

Percy S. Young, for Respondent—Cross.

stance, on a flat rate, if a rate structure was only fixed as a flat rate there would be no opportunity or no inducement for outsiders to go in and reap this profit, but under the system that we have developed, where there has been a step rate introduced in order to promote the use of electricity and introduce appliances to the greatest possible extent and utilize the facilities of the company, we find these things are likely to creep in, this kind of thing is likely to creep in, and we object very strenuously against the practice which would naturally grow.

10 Q. What is your position, Mr. Young, as to these instances which you have found that have been retailed, at the two apartment houses in East Orange; how soon do you propose to correct that situation? A. We propose to deal with the cus-
20 tomers and not allow the resale of the energy, electrical energy; for the benefit of our customers at large as well as the company.

Cross-examination by Mr. Osborne:

Q. Do I understand that you will disconnect then in an endeavor to enforce the policy, you will disconnect the service? A. We have not deter-
30 mined what we will do in that connection. There are two or three cases, and we have got to determine how we will arrange it. It may be by the formulation of a new rate which would discourage this kind of thing. I don't know.

Q. When you formulated this rate structure of course you had the views of the Board in mind, did you not? A. Absolutely.

Q. And its rules, regulations, definitions and what not? A. Absolutely.

40 Q. You knew the Board had defined a customer, at least had defined various conditions which con-

Percy S. Young, for Respondent—Cross.

stitute a customer? A. In general we knew the Board's attitude in these matters, which was that they wished all customers to come under their regulations.

Q. You accepted the Board's definition of a customer various definitions, let me say, of a customer, because they made, as you know, several? 10

A. We had that in mind and we had also in mind that the Board would follow the trend of the business and would vary their definitions from time to time for the best interests of the customers.

Q. Having it in mind you formulated your rate structure accordingly? A. That is true.

Q. When, therefore, you say that the rate structure was formulated with relation to your dealings with your customers, you mean with your customers as defined by the Board of Public Utility Commissioners. A. We had in mind absolutely there would be no resale. 20

Q. Just a minute. You are not answering my question.

(Previous question read.)

Witness: Absolutely.

Q. Therefore, when the Board defined a customer as a building owned by one party of more than one apartment and using in common one hall and one entrance or a building owned by one party having a number of apartments or offices and using in common one hall and one or more means of entrance— A. It says nothing about resale in that definition. 30

Q. —you understood that situation and your rate schedule was based accordingly? A. Absolutely. But as I say, there is nothing about resale in that regulation.

Q. You understood the use of English and know what these things mean? A. I hope so. 40

Percy S. Young, for Respondent—Cross.

Q. Isn't it true that the landlord who collects and furnishes light and adds it to the rent; isn't he reselling electricity? A. No.

Q. You do not consider that a resale? A. I do not.

10 Q. You would distinguish between a case of that kind and one where it was passed through another meter? A. Yes.

Q. You will concede of course that it is to the landlord's advantage to have it pass through a meter so as to reduce the cost? A. Certainly.

Q. Otherwise the burden would be on him? A. Certain. He reaps a tariff from that plan, under that plan.

20 Q. Otherwise he would have to pay for the wastefulness of the tenant, wouldn't he? A. Yes.

Q. When you say that you did not know about that— A. I want to say there, that is the guard against that method, that is the thing which prevents the adoption of that method.

30 Q. I don't quite understand you, but I won't press it. A. I mean this, Judge; that we believe it is to the best advantage of the company and our customers to have the company deal directly with the customer. We believe that the fact that the tenant will perhaps use more current where the owner rents the building with light, will retard the owner from adopting that plan and will, therefore, induce him to assist the customer in dealing with the company direct. That is what I mean.

Q. You say you did not know this until recently? A. That is correct.

Q. You knew that Mr. Heydecke knew of it? A. No, I did not.

40 Q. Over a year ago? A. I did not know that.

Q. Do you sell appliances? A. As I said to

Percy S. Young, for Respondent—Cross.

our people, when the matter came to my knowledge, I said—I repeated over and over again what our policy was, and I could not understand how these two or three cases crept in.

Q. Do you sell appliances? A. We do.

Q. And your contacts with each user are of value for that purpose? A. Very great. 10

Q. It would be a detriment— A. To them and to us.

Q. To you at least (if you will, to them, not to be able to buy from you) if you could not make contacts which would result in the sale of appliances? A. We think so.

Q. And that is one of the reasons why you want to retain this contact, isn't it? A. That is correct.

Q. To stimulate your sales of appliances? A. 20
That is correct.

Mr. Osborne: That is all.

Mr. Blake: What have we to exchange with each other? I am to get copies of your contracts and leases and I am to give you the information that you have asked for in those cases.

(Matter taken into conference.)

(Briefs to be filed.)

30

40

Minutes of Hearing, November 1, 1928.

**BOARD OF PUBLIC UTILITY
COMMISSIONERS,**

Newark, N. J., Thursday, November 1, 1928.

10 Motion on behalf of Sixty-Seven
South Munn, Inc., for an order
of the Board directing re-
spondents to install meter
pending decision by the Board.

Before

20 COMMISSIONER FREDERICK W. GNICHTEL, Esq.

For the Petitioner appears HARRY V. OS-
BORNE, Esq.

For Public Service Electric & Gas Company
appears GEORGE H. BLAKE, Esq.

Commissioner Gnichtel: Is the entire case in?

30 Mr. Osborne: No. Public Service were to fur-
nish us with some information as to whether they
were affording similar service to others. Whether
they are ready to do that or not, I don't know.

Mr. Blake hands me a paper, which I assume
covers that.

40 Mr. Blake: In addition thereto, you were to
furnish a copy of the contract existing between
the Meter Service Company and the landlord, to-
gether with copies of two forms of leases, which
they have. And I have signed a stipulation and
I wonder if you would present that to the Board.

Minutes of Hearing.

Mr. Osborne: Yes, that has been filed and the secretary asked to make it part of the record.

Mr. Blake: I have to offer in the case, sir, applications from tenants in the building to Public Service Electric & Gas Company for electric service. The application covers both gas and electric, but the gas I suppose can be disregarded. 10
Nevertheless, it is a copy of the application and I would like to offer those in evidence, giving a copy to the other side.

(Copies of applications from tenants, received and marked Ex. R-1.)

Mr. Blake: I ask leave to offer the inspector's report in the Supervision Company case, which was according to the Board's practice at that time submitted to each party in advance of the hearing. 20
I have copies of it. Your Honor said you would refer to it anyway as it was a matter of record before the Board, and I have copies so it would be in more convenient form to use it that way.

(Copy of inspector's report in Supervision Company case, received and marked Ex. R-2.)

Mr. Osborne: May I address myself first to these offers which have just been made. 30

Commissioner Gnichtel: Only so far as they relate to your motion. It is not necessary to refer to them.

Mr. Osborne: It will be necessary to.

Commissioner Gnichtel: So far as necessary to your motion, but I would not go outside of that.

Mr. Osborne: Then I would have to make a new motion with regard to this new matter that came in. 40

Minutes of Hearing.

Mr. Blake: It is not new matter. I reserved that right.

Commissioner Gnichtel: That is part of your main case, I take it?

Mr. Blake: Yes, sir.

10 Commissioner Gnichtel: So far as necessary to your motion I should say it is perfectly proper. I do not think we understand each other.

Mr. Osborne: I do not think your Honor understands me. Let me say this (if it is improper you can strike it out): These matters have just been handed to me. I can see on their face they will require cross-examination, and I was going to ask the Board if it would designate a day when I could examine on the list of places which has been furnished.

20 Commissioner Gnichtel: I understand the case is not closed yet and we will keep the case open for you to do that.

Mr. Osborne: Will your Honor fix a day at this time?

Commissioner Gnichtel: How about next Thursday?

Mr. Blake: That is agreeable, sir.

Mr. Osborne: Will you have Mr. Heydecke here?

30 Mr. Blake: Yes.

Mr. Osborne: Now, to the motion.

There is, as your Honor knows, a meter now installed, and this motion is to require the respondent to furnish safe, adequate and proper service pending the determination of this case. The motion is made under the provision of the statute which expressly gives this Board the authority to require a utility to furnish safe, adequate and proper service. I can refer particularly to it, if
40 your Honor hasn't it in mind. There is no question about it. The matter, as your Honor knows,

Minutes of Hearing.

took the form of an application to the Court of Chancery and that went to the Court of Errors. It might just as well have in the first instance taken the form of this application, after filing the petition, the original petition; the complainant might have come here and asked for this relief, but they did not do it. They went into the Court of Chancery and asked for certain relief. They obtained a temporary restraining order. That temporary restraining order was set aside and an appeal taken from that to the Court of Errors and Appeals. That was argued before the Court of Errors and Appeals on its merits, on the legal aspects of the case, and of course the burden was upon us in that argument at that time to convince the Court of Errors and Appeals that we had a *prima facie* case upon which to issue their discretionary order of injunction or temporary restraint. So that as far as the Court of Errors and Appeals is concerned, it has been determined *prima facie* on the argument, on the merits that we were entitled to protection pending the decision on the appeal and to this Board. The Court of Errors and Appeals made an order that the motion to continue the injunction dissolved by the Court of Chancery is granted upon terms. I say they made an order. This was an order made in open Court and it has not yet been entered formally on the records because Judge Speer has been busy and has not had time to take up the form which I submitted to him. But this is what the Chancellor announced as furnished me by the Sergeant at Arms and I am reading from his communication and it conforms with my recollection. I was present.

“The motion to continue the injunction dissolved by the order of the Court of Chancery is granted upon terms; that the appellant shall give

Minutes of Hearing.

bond to the Public Service Corporation to make good any financial loss it may sustain by reason of the granting of the injunction. The penal sum in which the bond shall be written, the terms whereof and the sufficiency of the security of the same to be determined and approved by Hugh B. Reed, Esq., Special Master in Chancery of New Jersey''. So the Court of Errors has continued that restraint which prohibits the company from interfering with the service now being rendered to the customer at 67 Munn Avenue, the customer being the corporation known by that name.

It has been alleged in the course of the proceedings by the company that that equipment is not adequate for the demand made upon it, and we are here asking that pending the determination of this matter which is now before your Board, and final adjudication, in view of all the circumstances, that this Board exercise its authority and direct the company to furnish safe, adequate and sufficient service and installation for service at 67 Munn Avenue, the premises of the applicant.

Mr. Blake: The applicant here is the owner of an apartment house on Munn Avenue. In that apartment house during the period of construction a meter was installed for construction purposes. When the building was completed—or rather, prior to its completion, the owner of that building entered into an agreement with the Meter Service Corporation, a corporation of New York, which assigned that contract to a corporation of New Jersey, which provided that the owner of the apartment house would take the current or energy through a master meter and would give it to this meter service company for registration. They entered into possession of the property and installed some of their meters, the Meter Service Company.

Minutes of Hearing.

Application had been made by various tenants about to move in, to Public Service Electric & Gas Company, to render that service.

Without our knowledge and consent the employees of the Meter Service Corporation connected the construction meter with some meters which had been installed in the cellar by the Meter Service people to give service to the tenants. They allege that consent was given by our employees, the local men, to make such connection. Our contention is that the consent, if any, given by the local employees was a consent to attach the service to our master meter directly to the tenants line but not through the medium of the meter of the Meter Service Company. In other words, it would by-pass the Meter Service Company. 10

Upon our finding that they had connected some six or seven of their meters to our master meter it is alleged we said we would discontinue the service. Thereupon they went into the Court of Chancery for an order restraining us from discontinuing service. At that time there were about seven families connected from our master meter to their meters. During the time of the period of the rule to show cause, which was returnable a week later, it developed they connected up some eighteen or fifteen more families. It was our understanding that the Vice Chancellor had issued this preliminary restraining order in the first instance to preserve the *status quo* of the parties so there would be no change in their position, between the interval of the granting of the rule to show cause and the return day. During that time the number of customers drawing energy through the master meter and being measured by the individual meters jumped from seven to thirty-four or thirty-five. Upon the return day the Vice Chancellor discharged the restraint on the theory, as 20 30 40

Minutes of Hearing.

he stated that we were asking him to decide a matter which was for the Board of Public Utilities to decide, and that we were giving a preference to these people that we were not giving to other customers in our territory.

10 That matter was appealed to the Court of Errors and Appeals. A preliminary stay was granted there pending the opening day of the term. This was argued—whether the merits were argued or not, I don't know—in any event, the result was the stay previously granted was resurrected and we understood it stood as a barrier against any change in the conditions, in the position of the parties as they then existed. Our master meter is set and some thirty-four or thirty-five tenants
20 being served.

Now their application is that we install a meter in the premises sufficient to take care of the entire building. The entire building, if your Honor recalls, accommodates some 106 parties. If they are granted the relief here, you are determining in advance of your final decision and giving all the relief they can hope for, you are going to order us to set a meter capable of supplying the entire apartment house, and that is all they are asking for. They are asking you to give them
30 something which is against correct practice and which is against the practice of the company. You have never ordered it in any other case. I do not think in this case you should order us to install a meter that is going to take care of more families than were in the building at the time the Court of Errors issued their citation. We will take care of the thirty-two or thirty-three families in there and will provide sufficient apparatus to do it so as not to violate terms of the restraint. I do not
40 think we should be asked that we should install

Minutes of Hearing.

apparatus to take care of 106 families not in the building yet, although some may be moving in. We are furnishing, we think sufficient, and are ready to furnish it to the individual customers if they ask for it. It is in the case we are willing to furnish the thirty-four now in there connected up to their meters. I do not think we should be ordered now to install a meter which would give them the ultimate relief which they could get if successful in the determination of this suit, reversing all your past practice and policy altogether. 10

Mr. Osborne: Because it has never happened before is no reason why it should not happen now. What we are asking, if your Honor please, is not, as Mr. Blake says, for the full number, 106, whatever the capacity of the building is. We are asking whatever the situation is from time to time that it be adequately met. This is a going concern, this is an apartment house which is gradually taking in tenants. There is a tremendous amount of money invested there and the inability to furnish the tenants with proper light and power would mean a tremendous financial loss. They are entitled to have the service, whatever service from time to time is necessary. Their first installation was a 50-ampere meter. There were two, not one, as Mr. Blake said, and that was removed by the company, that 50-ampere original installation, temporary installation for building purposes, and a 75-ampere meter put in when they consented to the hooking on of the service to the tenants in the building. 20 30

Now then it is apparent on their own exhibit which they have just introduced, and from the testimony which we offered the other day, that this practice which they now condemn in this 40

Minutes of Hearing.

company, and which they say is contrary to their policy, and which we will, we think convince your Honor is not a valid policy—they are furnishing this very service and permitting this very condition to exist in other cases. If that is so, how can they possibly justify a discrimination against this applicant, and what harm can come to them, particularly as they are being protected by virtue of the order of the Court, by a bond to be given to meet any financial loss. How can they be prejudiced if this Court exercises its authority given to it under the statute for this particular and very purpose, to compel these companies to perform their public duty, and as against the prejudice to the tenants of the building and the loss to the owner of the building; if you weigh one against the other, how can there be any question about the equity of this application and of this Court taking advantage of the statute passed for this very purpose in order to compel a reluctant company, which has been simply bent on having its own will, regardless of the consequences or the law; how can there be any question about the duty of this Board to come to the relief of a member of the public in this situation.

Mr. Blake: There is no reluctance on our part. We are not reluctant to coming to the aid of these tenants. We offered in the original case, we offered in the Court of Chancery and offered here to serve any tenant in the building that makes application to us. They have obstructed that. They put an armed guard in the building and refused to let us go in the room.

Mr. Osborne: You threatened to turn off the meters.

Mr. Blake: We had a truck load of meters there with our men, ready to install meters in that

Minutes of Hearing.

building, and had the owner's consent to go in the room and install them. This Meter Service Company refused to permit our men to go in, through an armed guard, when they had the owners' consent to replace our meters to give service there, and they say we are obstructing the rendering of service to the tenants in that building. We stand ready to go there now and put in the meters for all the thirty-four now there. We have made that offer and are willing to do it any time, and before you in evidence are applications from their tenants to put in the service. 10

They are asking us to put in meters to take care of the entire building, 106 tenants many of whom would be willing to do business with us and not through the Meter Service Company who is in the thing purely for profit. 20

Mr. Osborne: Colonel Betts at my request applied to them, asked them to continue this service and they refused.

Mr. Blake: What service?

Mr. Osborne: I called up Mr. Barber in Trenton, at least the Colonel did at my request and talked with him about it, tried to get them to do it without the informal aid of this Board. They say they were given the consent of the owner. The owner never gave consent. The owner's representative is here and he says they never gave consent. 30

Mr. Blake: The owner sat in my office, Mr. Heydecke's office and told me to go up there, and we told him we would go up and throw the armed guard out, and he said as far as I am concerned, you can do it.

Mr. Osborne: Who was that?

Mr. Blake: Mr. Lunskey.

Mr. Osborne: He is not the owner. 40

Minutes of Hearing.

Mr. Blake: He represented himself to be the owner. He said he was the owner. There are so many angles to this, we don't know who owns the building. He said he owns it.

Commissioner Gnichtel: We will take the matter up in conference.

10

(Motion taken into conference.)

(Further hearing, adjourned until Thursday, November 8th, at Newark, N. J.)

Minutes of Hearing, November 8, 1928.

BOARD OF PUBLIC UTILITY
COMMISSIONERS,

20

Newark, N. J., Thursday, November 8th, 1928.

Further hearing on complaint of Sixty-Seven South Munn, Inc., vs. Public Service Electric & Gas Company, in re refusal to supply service.	}
---	---

30

Before

COMMISSIONER FREDERICK W. GNICHTEL, Esq.

For the Complainant appears HARRY V. OSBORNE, Esq.

For the Respondent appears GEORGE H. BLAKE, Esq.

40

Mr. Blake: I am presenting Mr. Heydecke for further cross-examination on request.

Franklyn Heydecke, for Respondent—Cross.

FRANKLYN HEYDECKE, recalled on behalf of respondent.

Cross-examination by Mr. Osborne:

Q. Mr. Heydecke, on October 18th when you were on the stand, I called your attention to certain cases in which master meters had been furnished. Do you recall that? A. Yes. Those are the ones to which we made answer. 10

Mr. Osborne: Read the question.

(Question read.)

Witness: Yes, sir, I do.

Q. And you said you did not know, you had to make an investigation to see whether that was all there were or not? A. Yes, sir. 20

Q. Have you made such investigation? A. Yes, sir, I have.

Q. Is that all there are to the best of your knowledge? A. No. I discovered—

Q. Did you say, no? A. You asked if I discovered any others and I said yes, I had discovered one other.

Q. You have furnished us, as a result of our request for information, you furnished us with a list, didn't you, last week, at least you prepared a list and Mr. Blake furnished it? A. Yes. 30

Mr. Osborne: I am showing the witness, your Honor, a carbon copy of a list which Mr. Blake offered in evidence last week.

Commissioner Gnichtel: Suppose we mark it now.

Mr. Osborne: Was it your exhibit or ours?

Mr. Blake: Yours. 40

Franklyn Heydecke, for Respondent—Cross.

Mr. Osborne: Mr. Blake furnished it and we offer it.

Commissioner Gnichtel: The last exhibit I think here is P-1. We will mark it P-4.

10 (List, received and marked Ex. P-4, 11/8/28.)

Q. Do you recognize this list? A. Yes, sir, I do. I made it up.

Q. Is this a complete list? A. No, it is not.

Q. If so, in what respect is it not complete? A. I can give you the detail of that. May I say, just before I answer, that this list only covers the places which you specifically mentioned in the last hearing, the hearing where I testified.

20 Q. Did you think I needed a list to tell me what I already knew?

Mr. Blake: Now Judge, let us not be sarcastic. You asked for an investigation of this list and we made it at once. We continued our investigation and have brought it down to date.

30 Q. Didn't you understand, Mr. Heydecke, that you were to make an investigation of cases which were master metered, regardless of whether they were the ones of which I reminded you or not? A. Yes. We have done that. I was just explaining that this exhibit P-4 only covers the ones you specifically mentioned at the hearing at which I last testified.

Q. Have you a list now? A. I have a complete list now.

40 Q. A complete list of all cases in which you furnished master meters? A. Yes, sir.

Franklyn Heydecke, for Respondent—Cross.

Q. Will you give us that? A. Yes, sir, I will be glad to.

Q. Is it in such shape as to offer it as an exhibit? A. There are only totals here. There is not very much. I can give the totals.

Mr. Blake: How many more are there 10
than appear on this list?

Witness: For apartment houses, one.

Mr. Blake: One more.

Witness: One more. I would like to say that a complete survey of the State shows apartment houses where there are Public Service meters for each and every tenant in the apartment house, 2,090 such apartment houses with 45,507 apartments.

Q. Don't you think we would get along faster 20
if you will give me what I am asking for? I am asking for the cases in which you furnished a master meter for redistribution by the landlord, in apartment houses, lofts— A. I thought perhaps the entire survey would be of help.

Q. If your counsel wants to put that in, all right. All I am interested in is this service which we are asking for and which is given to everybody else and denied to us. A. Outside of the 30
three mentioned on P-4, the apartment houses, there is one more, Dwight Manor in Englewood.

Q. What about office buildings? A. In addition to the four mentioned, the Loft Company is out of the picture; three.

Q. Who put the Loft Company out of the picture? A. I beg your pardon.

Q. Who put the Loft Company out of the picture? A. That is not a master meter proposition.

Mr. Blake: You asked for it and we have 40
given it to you.

Franklyn Heydecke, for Respondent—Cross.

Witness: We have given the facts but it is not a master meter proposition.

By Commissioner Gnichtel:

10 Q. Let me ask this; have you any office building in which you have a master meter and each office has a meter of its own? A. Yes, sir.

Q. You have cases of that kind? A. There is one mentioned on P-4, which is the Peoples Trust Company Office Building in Hackensack, down at the bottom of P-4, and there is one other I believe where all the offices as well as the stores are metered.

20 Mr. Osborne: That is only two in addition to P-4?

Witness: I will give the details, Judge.

Mr. Blake: Not two in addition to P-4. He will give all of them.

Witness: There are a total of ten, which include those mentioned on P-4.

Q. That would be how many in addition to P-4? A. There are three on P-4.

Q. That is seven more? A. Seven more.

30 Q. Can you give me the names of them? A. The Kinney Building has already been covered. The Military Park Building, the Industrial Building has been covered, the Mosque Temple, the Academy Building, the Kresge Building on Market Street, Federal Trust Building, the Branford Building. Do you want the details of those, Judge?

Q. I am not interested in the details unless you think it is important.

Mr. Blake: I will put it in later.

40 Mr. Osborne: All I am interested in is the main fact, whether this sub-metering is going on.

Franklyn Heydecke, for Respondent—Cross.

Witness: The reason I asked is this: Take the Federal Trust Company Building—

Mr. Osborne: The Federal Trust? I know what the details are.

Witness: They only have a meter for the restaurant. I put that in here but they only have one meter for the restaurant. The other is unmetered.

10

Q. As long as we are on the subject; what about the Federal Government Department on the 2nd floor, the offices; what about the Internal Revenue Department on the second floor? A. In the Federal Trust Company?

Q. Yes, who succeeded an insurance company who had the same service? A. The memorandum that I have as a result of the survey made shows that only the Exchange Buffet Restaurant is on a sub-meter. The rest of the building is not sub-metered.

20

Q. You have no personal knowledge of this?

A. I have not visited these buildings, no.

Q. You have had to ask for this information?

A. I have had to ask for this information.

Mr. Osborne: Just make a note of the fact that there was an insurance company on the 2nd floor that had the same service and now the Federal Department has moved in and they are also getting service.

30

Commissioner Gnichtel: I notice the Kinney Building you have marked here, has one Public Service meter for lighting and the owner sub-meters and resells the energy to large users only. The small user's use of energy is not sub-metered. Is there any

40

Franklyn Heydecke, for Respondent—Cross.

building among these you have, I mean an office building, where they sub-meter to all the occupants?

Witness: To all the occupants?

Mr. Osborne: One at the bottom of the page.

10

Witness: As I said before, the one at the bottom of the page.

Mr. Blake: Just one.

Witness: And there is one up at Paterson. I stopped at Newark, Judge. I should add, one other in addition.

Q. Office building? A. Yes, sir. The Katz Building in Paterson. I think that makes ten altogether.

20

Q. That is all the office buildings. How about loft buildings? A. What I was going to say, that Katz Building at Paterson is similar to the Peoples Building at Hackensack.

Q. How about loft buildings, factories? A. I made no survey of that.

Q. Then the only survey you made is of office buildings and apartment houses? A. That is true.

Q. You have made no survey of factories? A. No.

30

Q. Or Loft Buildings? A. No.

Q. Or apartment hotels? A. No.

Q. Is that right? A. That is right.

Q. Do you know whether or not there are any apartment hotels having this service? A. I have no knowledge of any apartment hotel that sub-meters.

Q. Do you know whether there are any factories that have this? A. Not to my knowledge; I don't know.

40

Franklyn Heydecke, for Respondent—Cross.

Q. Not to your knowledge? Do you know whether there are any loft buildings that have this service? A. Not to my knowledge.

Q. I think I asked you, or mentioned last week Mr. Seymour. Hasn't Mr. Seymour this service which he takes and sub-lets or sells to some of his tenants? You know Jim Seymour; you have been having a controversy over this with him for years?

10

A. I know who Jim Seymour is but I cannot answer directly. My recollection is, no. I would be very glad to look into that for you. Off-hand, I would say no, he does not.

Q. Do you know where the building 792 Broad Street is, that is that office building down here in which the Mortgage Company has its plant, the United States Mortgage Company, 972 Broad Street? Haven't they a master meter, don't they resell to the first floor tenant? A. My survey does not show it.

20

Q. Would you say if your survey did not show it, that it was not so? A. I would not make that as a positive statement, no.

Q. You would not say, if your survey did not show it, that it might not be so? A. It may or may not be so. I would not say positively because the survey does not show it, that it would not be so.

30

Q. How about the Medical Tower; you know where that is? A. My answer would be the same. Yes, I know where it is.

Q. Don't you know they have a master meter and sell to the stores in the building? A. No, I don't know.

Q. How about the Union Building? We made a survey of this situation too, you know. A. My answer would be the same there.

Q. How about the Essex Building; the same answer? A. My answer would be the same.

40

Franklyn Heydecke, for Respondent—Cross.

Q. The Academy Building you have already said had a master meter and resold. A. Yes, I included that.

Q. You said the Military Park Building had, I believe. A. Yes, sir.

10 Q. And the Federal Trust Building? A. Yes, sir.

Q. What about Proctor's Theatre Building? A. My answer would be the same; it is not on the list.

Q. You have no record of it but it may be true? A. It might possibly be true.

Q. What about Loew's Theatre Building? A. My answer would be the same.

20 Q. And 37 Branford Place; that is what building? A. That is possibly the one I covered.

Mr. Steiner: I believe that was designated as the Branford Building.

Witness: I guess there is only one on Branford Place.

Q. The Branford Building, is that what you call it? A. Yes, I mentioned that.

Q. Dwight Manor, you have already given us; that is in Englewood? A. Yes, in Englewood.

30 Q. That is an apartment house of approximately 50 families, is it not? A. My record shows 92.

Q. You have done a little better than we have. The owner has a master meter and is reselling the current to all his tenants, isn't that so? A. Yes, sir.

Q. That is up in Englewood? A. Yes.

40 Q. The Katz Building you have given us that. The Alexander Hamilton Hotel in Paterson. A. That is not on my list.

Franklyn Heydecke, for Respondent—Cross.

Q. You don't know that they are reselling current to five stores on the ground floor? A. No, I do not.

Q. Do you know the Mill Building, 114, 118 Straight Street in Paterson, used in the silk industry, and sub-let to tenants; you don't know they are selling to tenants? A. That would be a loft building, wouldn't it? 10

Q. That would be a factory building. A. Yes, I did not cover any loft buildings.

Q. Also 22 Straight Street? A. Yes.

Q. Now, the Superb Building, do you know the Superb Building, 128 Market Street?

Mr. Blake: Is that Newark or Paterson?

Mr. Osborne: That is in Paterson.

Q. Do you know they have a master meter there? A. No, I do not. 20

Mr. Osborne: We have no knowledge on that that would enable us to pursue that inquiry with the implication which follows:

Witness: I would be glad to look into it for you.

Mr. Osborne: We are not sure that current is being furnished to the tenants or resold to them in that case. 30

Q. You have not kept record of these I have been calling off here. A. Mr. Blake has. I haven't any lead in my pencil.

Q. Do you recall your East Orange Office last summer, to be specific, along about the 6th of August, 1926, requesting instructions in regard to master meters from your main office? You are in charge of the main office? A. Yes, sir. In August, 1926?

Q. 1926. A. Not to my knowledge. 40

Franklyn Heydecke, for Respondent—Cross.

Q. In 1928, that is last summer, August, did your East Orange office request your office to give them instructions as to master meters? Do you know anything about that, such a letter having been received? A. The only one I remember from Orange would be the one pertaining to this particular apartment house, 67 South Munn.

10

Q. Didn't your Newark office reply to that letter of August 6th, 1928, authorizing the installation of a master meter? A. I recall now what you refer to. That is so. I was away on my vacation during August, and that was handled by someone in my office.

20

Q. But it is a fact, is it not, that last summer the Newark office, that is the main office, authorized the East Orange office to install a master meter?

Mr. Blake: Where?

Mr. Osborne: The Church Construction Company.

30

Q. Isn't that a fact? A. That is a fact, yes. Might I add, that when I returned from my vacation after Labor Day and heard of that letter, that I tried to stop the procedure and it was too late. As soon as I heard of it I tried to countermand the instructions that went out in my absence.

Q. When did you get back from your vacation? A. Of course, the matter did not come to me the day I came back from my vacation. It was some time afterwards. I could not say just when.

40

Q. Was it as late as the 22nd of September? A. I could not say positively just when it was; some time after I came back, and when it came to my attention I tried to stop it, but it was too late; installation had been made.

Franklyn Heydecke, for Respondent—Cross.

Q. Do you remember sending out a communication under date of October 15th or thereabouts to furnish you with information with regard to master meter service? A. October 15th a year ago?

Q. 1927. A. Yes, sir, that is so.

Q. You then began an investigation with regard to master meter service, did you not? A. That is so. 10

Q. And this information which you have now given us is the result of the investigation which was begun by you in October, 1927, is it? A. The information that I asked for on the 15th of October, 1927, pertained only to apartment houses and it was the answer to that questionnaire which I sent out at that time that first apprised me of the Fulton Towers and the Hampton Towers. That is the first knowledge I had of it. 20

Q. Are you sure that letter specifically confined the investigation to apartment houses? A. I am fairly sure.

Q. Have you a copy of the letter? A. No, I have not.

Mr. Blake: You must have, Judge. You seem to have all the dates and things. You seem to know more about our business than we do. 30

Witness: I am fairly certain it only covered apartment houses.

Mr. Osborne: We seem to know more about your business than you do.

Q. Did you get the information? A. Yes, sir.

Q. Did you get the information about the offices also? A. No, not at that time. Only recently, since the last time I appeared on the stand in this case. 40

Franklyn Heydecke, for Respondent—Cross.

Q. Have you sent out instructions that all of your representatives should write for a ruling, write into the main office for a ruling before granting additional master meters? A. Not for granting additional master meters.

10 Q. Not additional. Strike out additional. Before installing master meters. A. That was contained in the letter of October 15th, 1927, in which I asked for the information. The concluding paragraph of that letter said that any case where one meter was to be set in an apartment house was first to be called to my attention before anything was done.

Q. You had no ruling prohibiting it then at that time? A. An unwritten ruling.

20 Q. You had no written ruling, if you wish to distinguish? A. That is so. There are a lot of things that we haven't in black and white as rulings. That is one of them.

Q. Your ruling was an unwritten ruling? A. Dating back from the beginning.

Q. Is that right, an unwritten ruling? A. Yes.

Q. The rule to be let down—I don't want to say broken, I don't want to be quite so crude—the rule to be relaxed only upon instructions from the main office. A. No. I would say no to that.

30 Q. I thought you said you instructed them to write for a ruling before installing master meters?

Mr. Blake: There is a difference between installing a master meter and installing a master meter and permitting the resale of the energy.

Q. Isn't the only purpose of a master meter to permit the redistribution of current? A. The
40 term master meter probably would indicate that,

Franklyn Heydecke, for Respondent—Cross.

but one meter on the premises does not necessarily mean a master meter and that was the information I was going to give you when you stopped me.

Q. A master meter indicates a redistribution of current, doesn't it? A. A master meter, I would say so, inferentially it does.

Q. I assume so, too. Of course, I don't know the technique of it. If that is so, and you instructed your office to secure a ruling before installing master meters, then isn't it true that this unwritten rule was to be relaxed only upon instructions from the main office? A. No. That was not the intention of it at all. The intent was——

Q. What did you write it for? A. The intent was as between one meter for an apartment house, where there was no sub-metering and resale——

Q. What was that? I don't follow that. A. I say the intent was not directed to a master meter particularly, but embodies the thought of one meter where power and light was included in the rent as against individual meters for each tenant.

Q. I am sorry, but I do not follow you. But whatever it is you are saying or trying to say, this is all your present interpretation on the language that you used October 15th, 1927, when you said before you grant, install a master meter, write into the office for instructions; that is the fact, isn't it? A. I am not in a position, without having the letter in front of me, to say exactly what that letter said verbatim. I rather question the thought of a master meter predominating in the letter.

Q. Would it be difficult for you to get this letter and produce it? A. It is not difficult. It is in my office. I haven't got it with me. It is in my office.

Franklyn Heydecke, for Respondent—Cross.

Mr. Blake: We will produce the letter.

Q. Would it take long to produce it? A. No.

Q. I suppose you could almost get it on a telephone call in a few minutes, couldn't you? A. Yes.

10 Mr. Osborne: You say you will produce it?

Mr. Blake: Yes, sir.

Q. Now, then, how did this apartment house in Englewood get by, if these instructions went out, that it was contrary to your policy, how did that get by after these instructions went out? A. The date of the installation at the Dwight Manor is March 14, 1928. When this appeared as a result
20 of my survey, I called our agent in Englewood to inquire about it. It seems that this matter was first brought up around the spring of 1926, when he inquired as to whether one meter would be allowed in an apartment, in an apartment house, and not having any conception or idea that this Fulton Tower apartment house existed, having in mind these other sixteen apartment houses where we have but one meter and they do not sub-meter and resell, I told him that one power meter and one lighting meter would be all right. That was
30 back in the spring of 1926 and that was the last I heard of it. For some reason there was a delay, presumably in construction, because the installation was not made until March, 1928.

Q. Was all this before you had evolved this policy in your mind, in the mental mind of your corporation (if it is possible for a corporation to have a mind); was that before or after you had evolved this so-called policy you now stand on?

40 Mr. Blake: If we understand English, the witness has testified both today and other

Franklyn Heydecke, for Respondent—Cross.

days, it has always been our policy to refuse to have a master meter set for the purpose of resale. There is no change in that policy.

Witness: That would be my answer. Both Mr. P. S. Young and myself testified previously it has always been the company policy and that of course would far antedate 1926.

10

Q. A sort of an unwritten law of your company?

A. Well, I say, no written law. We have no instructions for our collectors to go out and deliver bills and—

Q. We both agree then. As long as we agree that is the end of it.

Commissioner Gnichtel: Let us go on.

20

Q. If it was the unwritten law from the beginning, how is it that you gave your acquiescence to this Englewood case? A. I can only say it was a mistake. I frankly admit it was a mistake.

Q. Are all these other buildings, these office buildings mistakes? A. I would not say so.

Q. Don't this policy apply to all meters through which the current passes for the purpose of resale? A. Some of the office buildings I would say are mistakes; not all of them.

30

Q. This policy applies indiscriminately to all master meters which are installed for the purpose of reselling current, isn't that so, or is there a discrimination in the matter? A. I would not say discrimination. I would say that there are certain conditions, such as the Kinney Building, where they sub-meter the stores facing on the street, purely incidental business to the operation or an office building; I would not say particularly that the Kinney Building was a mistake.

40

Franklyn Heydecke, for Respondent—Cross.

Q. Then you discriminate in the application of your policy, do you not—you, I mean, the company of course—representing the company you discriminate in the application of this policy? A. To that extent I would say yes.

10 Q. And using your own judgment as to how far that discrimination should go? A. Yes.

Q. The way you assume to apply it is if a store in a building faces on the street, then it is not under the ban? A. Yes, I would say so.

20 Q. Is that the only difference; is that the only thing of a discriminatory character that enables you to determine whether you will say yes or no? A. Well, it is purely an incidental part of the business of running an office building. The ones I would take exception to would be such installations as the Katz Building in Paterson and the Peoples Building in Hackensack where they meter absolutely every office in the building. I would say that would not come under our ruling.

30 Q. Well, do you consider loft buildings under this prohibition? You know what a loft building is, a building in which the landlord lets out various floors or parts of floors for manufacturing, storing, or other mercantile purposes? A. I can conceive in a loft building where conditions might be similar to an apartment house in supplying refrigeration to tenants in the building.

Q. Light manufacturing, where they would use it for machinery, operating machinery? A. It might be part of the service of the factory building, the factory owner occupying the loft.

Q. Do you or do you not say that this policy which you claim the company had adopted applies to loft buildings?

40 Commissioner Gnichtel: Can you say?

A. I would say yes, as a general answer.

Franklyn Heydecke, for Respondent—Cross.

Q. Does it apply to factory buildings, which of course is different? A. My answer of course would be the same as to loft buildings.

Q. Does it apply to office buildings? A. To the extent that I have mentioned.

Q. With the exception of stores fronting on the street? A. Stores and restaurants.

10

Q. Facing on the street? A. Yes, sir.

Q. Are you able to give us any other or better reasons for differentiation in that case than you have given us? A. None better than I have given, no.

Q. Does it apply to apartment hotels? A. I would say, yes.

Q. Does it apply to apartment houses? You say, yes, I suppose to that of course, because that is what we are quarreling about. A. What is the question?

20

Q. If this policy applies to apartment houses? A. The policy of allowing resale?

Q. Suppose an apartment house has a store in it, as some of them do, you know—I assume you know it. If you do not, I will ask for a recess to take you out and show you some. A. No, I don't know of any.

Q. Where do you live, Orange? A. Montclair.

Q. There is a building on Central Avenue, corner of Munn Avenue. You don't know of any apartment houses—whether you know of it or not; would you say that if an apartment house had a store built in it or under it or part of it, that this policy would or would not apply? A. I would say we would have to treat it the same as a store in an office building.

30

Q. That the policy would not apply, is that right? A. Yes.

40

Franklyn Heydecke, for Respondent—Cross.

Commissioner Gnichtel: You would apply it the same way as an office building with a store.

Witness: Yes.

10 Q. The only relaxation of the rule is in the case of any of the buildings where a store has street frontage, or faces on the street; in your judgment, as you understand it? A. Yes.

Q. You are speaking for the company here now, aren't you? A. Yes.

Q. There are factory buildings that have master meters, are there not? A. I don't know.

20 Q. Isn't your contact with your department sufficient to enable you to say, without asking you specifically for how many or where, whether there are or are not factory buildings in this district that have master meters? A. My answer would be no, I don't know.

Q. That was your answer to all these others too in the beginning? A. No, I did not say that in the beginning.

Q. What about loft buildings? A. The same as factory buildings.

Q. You have no knowledge of that? A. I don't know offhand, I have no knowledge.

30 Q. And you therefore do not believe there are any? Your answer would be, no, because you had no knowledge of them. A. I would say I have no knowledge, but I have to make a survey such as I did in this case.

Q. What about apartment hotels? A. My answer would be the same.

40 Q. There is no distinction in your mind between a hotel and an apartment hotel, is there? A. An apartment hotel as differentiated from an apartment house?

Franklyn Heydecke, for Respondent—Cross.

Q. No, from a hotel. In your mind the rule would apply the same whether it was a hotel or apartment hotel. A. When you speak of apartment hotels—

Commissioner Gnichtel: Haven't you answered that? Haven't you said in an apartment hotel there is no master meter, where with a hotel there is a master meter? 10

Witness: There is no master meter for a hotel. There is just one meter.

By Commissioner Gnichtel:

Q. Just one meter for a hotel? A. Yes.

Q. And for an apartment hotel they have a meter in each apartment? A. That is what I was trying to find out, what the Judge meant by an apartment hotel, whether he meant an apartment house. 20

Commissioner Gnichtel: We will not finish today, I don't think.

Mr. Osborne: Your Honor, this case is very, very important.

Commissioner Gnichtel: If you get to a good place you better stop.

Mr. Osborne: I am almost through, but I do not want to be curtailed. 30

Commissioner Gnichtel: I do not mean to curtail you. I understood the case had very little more to put in. It looks now as if we will have another day.

Mr. Osborne: I am almost through. I will try to finish.

Q. The Alexander Hamilton Hotel is an ordinary hotel in Paterson, isn't it? A. That is my understanding. 40

Franklyn Heydecke, for Respondent—Cross.

Q. That has stores downstairs, hasn't it? A. I could not answer definitely.

Q. That is on your list? A. No, it is not.

Q. I beg your pardon. It is on our list. That is one on ours that you missed. That has stores downstairs? A. My recollection is it has stores.

10 Q. And it has a master meter and resells? A. That I don't know.

Q. Can you without too much difficulty tell us whether there is a substantial number of office buildings—I mean, of loft buildings and factories which are furnished with current through a master meter and are reselling it to their tenants? A. Could I say there was a substantial number?

Q. Can you furnish us with that information; not now offhand. A. We will have to make a survey.

Q. Is that very difficult? A. It means asking every one of our twenty-five offices spread over the State.

Q. To send in a report? A. To send in a report.

Mr. Osborne: That is not a very serious matter, is it? Can you furnish us with that, Mr. Blake?

30 Mr. Blake: We will make an effort to, yes, sir, if you think it is material to the issue.

Mr. Osborne: I think it is very material to the issue, to see whether there is discrimination or not.

Mr. Blake: We are talking about apartment houses here and now you are down to loft buildings and factories.

40 Witness: The point I wanted to bring out in connection with my testimony is that apartment houses—I say, that there are sixteen that have only one meter and do

Franklyn Heydecke, for Respondent—Cross.

not sub-meter and resell but tomorrow or next week, unbeknown to us one of these sixteen might put in sub-meters without our knowing it.

Q. You have sixteen apartment houses you say that have what? A. One meter, where they include the light and power in the rent, and there are no sub-meters or reselling of service. 10

Q. But the owner through those meters redistributes to the tenants, is that right? A. No, through the one meter, through our one meter.

Q. Yes, the owner redistributes to the tenants. A. Through our meter.

Q. But makes no specific charge for that service, is that right? A. That is so.

Q. In other words, where the current is included in the rent? A. That is so. 20

Q. Sixteen cases? A. Sixteen cases.

Q. So that he resells, but covers the charge in the rent? A. We claim he does not resell.

Q. Well, whatever you and I may camouflage our respective views with, that is what happens; isn't that right, he redistributes?

Mr. Blake: Let him answer in his own way.

Mr. Osborne: I have some objections I want to put on the record with regard to some of these exhibits. 30

Commissioner Gnichtel: Are you through with this witness?

Mr. Osborne: I am through with this witness unless he can furnish me with more information. Perhaps in a few days more he can dig up a few more of these things.

Commissioner Gnichtel: We will adjourn until next Thursday. 40

Franklyn Heydecke, for Respondent—Cross.

Mr. Blake: I cannot be here next Thursday.

Commissioner Gnichtel: Thursday, two weeks.

10 Mr. Osborne: Do you suppose we have to wait for these details to get our briefs in?

Mr. Blake: I think the case ought to be concluded before.

Mr. Osborne: Your Honor has a motion before you.

Commissioner Gnichtel: I am awaiting your brief on that.

Mr. Osborne: I will be able to give it to you on Monday.

20 Commissioner Gnichtel: You wrote me a letter saying you wanted to submit a brief. As soon as I get the brief I will take it up.

Mr. Osborne: I will submit on the legal aspects of the matter the same brief I will submit in this whole case.

Commissioner Gnichtel: Will you send that to me?

Mr. Osborne: It ought to be ready by Monday.

30 Commissioner Gnichtel: Send it to Mr. Blake also. Do you want to answer it?

Mr. Blake: I want to see it.

Commissioner Gnichtel: I was ready to take that up; I got your letter, and I was studying it then, when I saw the P. S. on it; we want to submit a brief; so I laid that over.

40 Mr. Osborne: I will send Mr. Blake a copy of that as soon as it comes from the printer I will get it in your hands and send Mr. Blake a copy.

(Adjourned until Thursday, November 22nd, at Newark, N. J.)

Franklyn Heydecke, for Respondent—Direct.

Minutes of Hearing, November 22, 1928.

BOARD OF PUBLIC UTILITY
COMMISSIONERS,

Newark, N. J., Thursday, November 22nd, 1928. 10

Further hearing on complaint of
Sixty-Seven South Munn, Inc.,
v. Public Service Electric &
Gas Company, in *re* refusal to
supply service.

20

Before

COMMISSIONER FREDERICK W. GNICHTEL, Esq.

For the Complainant appears HARRY V. OS-
BORNE, Esq.

For the Respondent appears GEORGE H.
BLAKE, Esq.

Commissioner GNICHTEL: This is the main case. 30

FRANKLYN HEYDECKE, resumes the stand on be-
half of Respondent.

Mr. Osborne: Mr. Heydecke was under
cross-examination.

Mr. Blake: I thought you had concluded
with him.

Mr. Osborne: He was to produce certain 40
papers.

Franklyn Heydecke, for Respondent—Direct.

Mr. Blake: Yes.

Mr. Osborne: Certain letters and certain information. Will you develop it?

Mr. Blake: Yes.

Direct examination by Mr. Blake:

10

Q. Mr. Heydecke, you were asked to produce among other things a copy of a letter dated October, 1927? A. Yes, sir.

Q. Have you a copy of the letter? A. Yes, sir, I have.

Q. Will you produce it please? A. (Witness produces paper). Shall I read it?

Q. Hand one to Judge Gnichtel and one to Judge Osborne and then I will get you to read
20 the letter.

Mr. Osborne: Wait a minute. Just what is this; a copy, or have you the original here?

Witness: When we send out a letter of this kind we usually get it up in this form, on mimeograph stencil, and we send out any quantity and these copies that I handed out are original copies of the original stencil. This is the exact letter that went
30 out. We had some left.

By Mr. Osborne:

Q. It is a facsimile of the letter that went out?

A. It is an exact copy. This is the way the letter went out. We had some extra copies of this letter.

Q. Is that a verbatim copy? A. Yes.

By Mr. Blake:

40 Q. Will you read the letter? A. This is a letter dated October 15th, 1927. "To all division agents

Franklyn Heydecke, for Respondent—Direct.

and agents: Please let me know if there are any apartment houses in your territory to which electrical energy is supplied at a terminal point through one lighting meter and one power meter. In other words I would like to know if there are any apartment houses where we do not render service directly to the tenant as a customer. Please give me the name and location and all details in connection with any such apartment houses. 10

For any future installations in apartment houses or office buildings if the owner desires any arrangement for the supply of electrical energy by us other than service directly to the tenant as a customer of this company it will be necessary for the agent to present all the facts in the case to the general auditor for a ruling before the installation is made." Signed, Franklyn Heydecke, General Auditor, Electric Department. 20

Q. Mr. Heydecke, that letter does not, as counsel's questions indicated two weeks ago, deal with master meters? A. No, it does not.

Mr. Osborne: This letter does not?

Witness: This is the letter you questioned me about two weeks ago.

Mr. Blake: Your testimony was and your question was we sent out a letter dealing with master meters. 30

Mr. Osborne: You said this does not deal with master meters.

Witness: No, it does not.

Q. Will you explain please to the Commissioner, Mr. Heydecke the two methods through which electricity is distributed? A. In apartment houses?

Q. Yes. A. The first method is to have an individual meter for each tenant of the apartment 40

Franklyn Heydecke, for Respondent—Direct.

10 house and for the landlord for his hall lighting and whatever other needs he has, so that the landlord and each tenant of an apartment is a customer of the company. The second method is where the landlord desires one meter for the electrical service for the entire apartment house, he including all charges in his rent, electric light, refrigeration service, everything in his rent, so that the tenant of the apartment house is furnished with his lighting and refrigeration in exactly the same manner as he is furnished with his elevator service or any other general service of an apartment house.

Q. Do you term a meter for such service a master meter? A. No, I do not.

20 Q. A master meter in the trade infers what?
A. A master meter infers that the owner, apartment house owner has one meter through which the service is supplied to the entire building and then he in turn interjects either himself or through an agent individual sub-meters to each apartment, metering the service of each tenant, billing and collecting for the service used by each tenant at a rate, at an unregulated rate, he paying for the current at a much cheaper price due to the steps of the rate that we charge him for.

30 Q. That is the practice which you refuse to accede to? A. The latter practice is the one we object to and do not want introduced into our territory.

Q. Your letter of October 15th, 1927, calls for a survey of the apartment house field to find out if there were any tenants in apartment houses who were served other than through individual meters, is that correct? A. That is so.

40 Q. And also to get the names and location of the apartment houses where such practice was carried on? A. Yes, sir.

Franklyn Heydecke, for Respondent—Direct.

Q. And also contained an instruction to your agents that even if single meters were to be installed for the general use of an apartment house, they could not be installed without your special approval, is that correct? A. Without the matter coming to me with all the facts in the case and my approval given. 10

Q. Master meters have never been approved by the officers of the company? A. Absolutely not.

Q. Now, as a result of this letter certain information was given you, was it not, by your agents? A. Yes.

Q. You have made a tabulation, have you not, of some information given to you by Judge Osborne? A. Not as a result of this letter.

Q. You have made a tabulation of information given you by Judge Osborne? A. Yes, sir, I have. 20

Q. Last week you produced a tabulation and gave some of the facts that appeared upon it, but counsel objected to your going into them in extension. You showed how many apartment houses were now connected with what is known as a master meter, did you not? A. Yes, sir.

Q. And how many were shown? A. Four.

Q. That is throughout the territory served by Public Service Electric & Gas Company? A. That is so. 30

Q. How many apartment houses are served without master meters? A. There are 2,090 apartment houses with 45,507 apartments or tenants where we have an individual meter for each tenant and the landlord included, included as a tenant. We have sixteen apartment houses with 575 apartments or tenants where there is but one Public Service meter for the building and the owner includes the service in the rent and does not attempt to sub-meter and resell. 40

Franklyn Heydecke, for Respondent—Direct.

By Mr. Osborne:

Q. How many? A. Sixteen apartment houses with 575 apartments or tenants, which with the four where there are sub-meters makes a total of 2,110 apartment houses with 46,346 apartments or tenants. So that there are but four sub-meter cases out of 2,110.

By Mr. Blake:

Q. And do the 46,346 families include any of the families in the four apartments that are sub-metered? A. Yes, they do.

Q. How many families living in apartments receive service directly from the company? A. 45,507.

20 Q. How many are receiving service from the landlord but are not being billed for it according to meter readings? A. 575.

Q. 46,082 families in this State are receiving their service—living in apartments and are receiving service without master meters, is that correct? A. That is correct.

Q. How many are receiving service through sub-meters on master meter service? A. 264.

Q. 264 families out of 46,000? A. That is right.

30 Q. And those are installations which you say you have discovered and which are contrary to the company's policy, and with which the company has got to deal? A. That is so.

Q. Limited to four apartment houses? A. Yes, sir.

Mr. Blake: You asked about hotels.

Mr. Osborne: On the theory of course that the principle is exactly the same, I asked about hotels, apartment houses, loft buildings and office buildings. There is

40

Franklyn Heydecke, for Respondent—Direct.

absolutely no difference in principle, although of course it is apparent they are trying to make that distinction.

Mr. Blake: Being in Court, I will leave the Court to determine that.

Q. Mr. Heydecke, attached to the list, you also have the apartment houses, apartment hotels and loft buildings and office buildings, is that correct? 10
A. Yes, sir.

Q. Will you give us the detail as to each? A. Office buildings; there are 77 office buildings where there is only one meter, Public Service meter for all the offices and separate meters, Public Service meters for each store in connection with the office building. There are 44 office buildings with but one Public Service meter covering the entire installation. 20

Q. In that 44 there is one meter and no sub-metering in the building, is that correct? A. No sub-metering at all. There are twelve office buildings where there is one Public Service meter and the owner sub-meters and resells—I might say that two of those twelve, all the service including the offices are sub-metered and the other ten is only a very small portion of the service that is on sub-meters. 30

Q. In other words, there are two buildings; is that correct? A. There are two where there is a sub-meter for every office in the building. Those are the two I testified to, in Peterson and Hackensack. The others take in the stores in connection with the office buildings, and a few of the major tenants.

In connection with the hotels, which include apartment hotels, there are twelve where there is only one meter, Public Service meter, or rather, 40

Franklyn Heydecke, for Respondent—Direct.

there are twelve where there are Public Service meters for each tenant. There are 113 with one Public Service meter for the entire installation. There are four with one Public Service meter, where the owner sub-meters and resells.

10 Q. Sub-meters to whom; stores in the building, stores in the apartment hotel? A. In the apartment hotel, that would probably be some of the apartments, in the apartment hotel. That makes the total of 129.

Q. A total of 129 that do what? A. A total of 129 hotels, including apartment hotels, that is 12, 113 and 4, makes a total of 129.

20 Q. That do what? A. Of which only four are sub-metered. So that out of 129 there are four where there is one Public Service meter and the owner sub-meters and resells.

On major loft buildings—

Mr. Osborne: Major lofts? Did I understand him to say major lofts?

30 Witness: Major. These are furnished on two different rates and I would like to distinguish between the two. The first figures that I will read will be those that are on the uniform lighting rate. There are fifty-four where there are separate Public Service meters for each tenant in the building. There are three with one Public Service meter for the entire building and no sub-metering or reselling. There are none where there is one Public Service meter and the owner sub-meters and resells.

40 Q. There is none or one, did you say? A. None. So we have a total of fifty-seven, and no sub-metering or reselling. That is on the uniform lighting rate. Where the power rate is applied

Franklyn Heydecke, for Respondent—Direct.

and lighting and power is involved on the power rate there are nine where there are Public Service meters supplying each tenant directly. There are none where there is only one meter for the entire building and no sub-metering and there are six where there is one Public Service meter and the owner sub-meters and resells.

10

Q. In that six, is the energy used for both power and lighting? A. For both power and lighting under the power rate.

Q. Under the power rate? A. Yes.

Q. Not under this rate that would be applicable to the lighting rate? A. No, not the lighting rate. When I read the factory buildings I would like to go back and explain about the power rate. With respect to major factory buildings under the uniform lighting rate, first, there are thirty-seven with Public Service meters for each tenant. There are forty-two with one Public Service meter for the entire installation, with no sub-metering or reselling. There is one where there is one Public Service meter and the owner sub-meters and resells.

20

On the power rate, with lighting and power, there are forty-six with Public Service meters for each tenant; there are eighty-one where we have but one Public Service meter for the entire installation and the owner does not sub-meter or resell, and there are twenty-two with one Public Service meter where the owner does sub-meter and resell.

30

Q. That is how many in the factory buildings; twenty-two? A. Twenty-two on the power rate and one on the lighting rate.

Q. The twenty-two, that is the power rate, is it not? A. That is on power, yes.

Q. How many on the lighting out of all these? A. One factory building. In connection with loft

40

Franklyn Heydecke, for Respondent—Direct.

buildings and factory buildings, that is, of the twenty-eight where there is one meter and the owner sub-meters and resells and we apply the power rate, I want to say this: That the very characteristics of the power rate, due to its demand features does not make it comparable where there is sub-metering done under the uniform lighting rate for the reason that the uniform lighting rate is a straight block rate running down in steps, but the power rate is a demand rate, has demand features, so that as the installation grows, that is the tenants, the various tenants and the landlord added together, the entire demand is added together for the application of the power rate, which makes a material difference, so that the power rate characteristics in itself make sub-metering and reselling very undesirable because there is no gain, practically no gain for anybody in it.

Q. Let us take it a little bit more slowly. In the lighting rate we start from nine cents, to eight cents, to seven cents; you get into the lower blocks as your consumption increases, is that it? A. Yes, sir.

Q. So that by adding the consumption of many units together you would get an increased consumption and, therefore, have the benefit of the lower steps, is that correct? A. That is so.

Q. So far as power is concerned, the addition of units or machines increases the connected load, does it not? A. Yes, sir.

Q. And as you add those altogether you get a larger connected load, a larger demand, do you not? A. Yes, sir.

Q. In your power rate you make a demand charge, do you not? A. That is so.

Q. Therefore, as your demand increases your charge increases and therefore there is no shave

Franklyn Heydecke, for Respondent—Direct.

in it—to use that word—for anybody putting in sub-meters? A. That is so.

Q. So that the company is not deprived of any revenue through the installation of these meters where power is used?

Mr. Osborne: I object to the form of this examination. This last question preceding this one and this present question are absolutely leading. 10

Commissioner Gnichtel: It is a sort of summing up of what I understand the witness already stated. Didn't you understand that?

Mr. Osborne: I must say I could not quite follow the witness's explanation.

(Discussion.)

Commissioner Gnichtel: Strike it out and put it in the way of a question. 20

Q. Mr. Heydecke, would it make any difference to the company's revenues if the power was registered through one large meter and then redistributed, if the demand is all added together, as you have testified? A. No, it would not, because the demand feature of the power rate takes care of the revenue.

Q. If it were a block rate, if the lighting rate were established, it does, or doesn't it? A. Yes, because the lighting rate is purely a block rate, twenty at nine cents, thirty at eight cents and so on down, so if all the apartments or tenants in the apartment house, if all their consumption was added together you get down to a low step, which under a sub-metering plan the landlord gets the benefit of, but the customer tenant does not. 30

I would just like to read the total figures of all the apartment houses, office buildings, hotels in- 40

Franklyn Heydecke, for Respondent—Direct.

cluding apartment hotels, major loft buildings and major factory buildings. There are 2,325 where there is a Public Service meter for each tenant in the building. There are 299 where there is one Public Service meter for the entire installation and the owner does not sub-meter and resell.
10 There are forty-nine where there is one Public Service meter and the owner does sub-meter and resell, and of that forty-nine twenty-eight are covered by the power rate as previously explained. Making a grand total of 2,673, of which only forty-nine are sub-metered.

Q. And of the forty-nine, twenty-eight come out of that total because of the fact it makes no difference in your revenue whether it is sub-metered or not sub-metered? A. Yes. That would leave
20 twenty-one on other than the power rate.

Q. But your four apartment houses does not change, does it, out of your twenty-seven hundred? A. No.

Q. You were asked at the last hearing to investigate certain buildings wherein the inference might be drawn from the question that there was a master meter and sub-metering. The Federal Trust Company building, there was some question as to a tenant in the Federal Trust Building;
30 what did you find out? A. At the last hearing I testified they had one meter, one sub-meter for the Exchange Buffet Restaurant, and I find in addition to that there is a sub-meter for a tenant on the second floor.

Q. Formerly an insurance company, the Internal Revenue Department? A. Formerly insurance and now I believe the Internal Revenue.

Q. There is a building known as 792 Broad Street; do you know what building that is? A.
40 That is the United States Mortgage Building.

Franklyn Heydecke, for Respondent—Direct.

Q. How is that handled? A. That is one that was questioned at the last hearing, which I had not had included under a sub-meter case. I find that there is one sub-meter for a tenant on the first floor. That is included in the summary I gave this morning.

Q. It is in the summary this morning? A. Yes, sir. 10

Q. The Union Building. A. I would like to take the Union Building and the Essex Building together, if you will. They are both on the list.

Q. They are both under one ownership? A. The second check I had made on that was that there were no sub-meters, and to be absolutely certain I had a man go out again yesterday for the third check and he reported to me last night that after examining all of the meters in the building and after interviewing the janitor of each building and the chief engineer, who is the chief engineer of both buildings, they positively said and his examination showed that there were no sub-meters in the building, in both the buildings. 20

By Mr. Osborne:

Q. You did not ask the owner or agent? A. The two janitors and the chief engineer, and examined the meters. 30

By Mr. Blake:

Q. You made your own inspection yourself to see whose meters they were, your man inspected the meters themselves? A. He inspected the meters and only found Public Service meters in the place.

Q. The next was the Academy Building. A. The Academy Building was taken care of in the previous case. 40

Franklyn Heydecke, for Respondent—Direct.

Q. You took care of the Academy Building?

Mr. Osborne: That does have a master meter and resale.

Witness: I previously testified to that.

10 Q. And that is included in your summary? A. That is included in my summary.

Q. Next is Proctor's Theatre Building. A. Proctor's Theatre Building on Market Street does not have any sub-meter.

Q. No sub-meter? A. No sub-meter.

Q. Loew's State Theatre Building. A. Loew's State Theatre Building shows that there are sub-meters, the current is resold to the tenants, and that is included in my summary.

20 Q. 57 Branford Place, 37-57 Branford Place. A. I previously covered that.

Q. Dwight Manor, the Katz Building, Alexander Hamilton Hotel. There is a mill building at 114-118 Straight Street, Paterson. A. That is covered in the survey this morning, in the summary of the survey this morning.

Q. A Mill Building at 22 Straight Street, Paterson. A. 22 Straight Street—this is Paterson—is on the corner of Montgomery Street and the survey shows that there is a so-called saloon on the ground floor and the second and third floors are occupied by negroes and there is no electricity in the place at all, consequently there are no electric meters.

30 Q. The Superb Building on Market Street.

Commissioner Gnichtel: What building is that?

Witness: Superb Building, 128 Market Street, Paterson. We could not find it. 128 Market Street is where Hamilton Street intersects, and one corner is marked 126

40

Franklyn Heydecke, for Respondent—Direct.

and the opposite corner is marked 130. There is no 128. 130 Market Street is known on our records as 9 and 11 Hamilton Street and that installation has separate meters for each tenant. I could not identify the Superb Building, unless the reference was made to 130 Market Street where we have meters, for each tenant. 10

Mr. Osborne: The Superb Building is in Newark.

Witness: Mr. Blake asked that question of you at the last hearing, Judge, and you specifically stated it was Paterson.

Mr. Osborne: I may have, because I find some on this list that Mr. Blake is using now.

Witness: I did not look in Newark. I looked in Paterson, because you were emphatic that it was Paterson. 20

Mr. Blake: I think your notation will clear it up anyway. Superb Building; this building has a master meter and the owner gives free light to tenants.

Q. George W. Loft Building in Newark. I think you covered that, didn't you, before? A. I had previously testified on that at the last hearing. I said it was out of the picture. The Judge objected to my calling it out of the picture. The reason I said that was that there are no sub-meters; each tenant is billed directly, with the exception of those accounts which are in the name of Loft, but each store where the account is in the name of Loft is billed as a separate installation, just as if Loft was an individual tenant in each store. 30

Q. Each store pays for the consumption in each store, recorded by meter at the regular rate? A. Absolutely. 40

Franklyn Heydecke, for Respondent—Direct.

Q. Pays it to Public Service Electric & Gas Company? A. Yes, sir.

Q. We have covered the Fulton Towers, Hampton Apartments, Peoples Trust, Church Construction, Industrial Office Building and Kinney Building. James Seymour, Mechanic Street. A. In the Seymour installation, Mr. Seymour has had his own plant for a number of years, generating current and metering it to his tenants. We have more recently furnished him with breakdown service in this way: Our service enters the building and runs to A. C. motors and those motors in turn drive D. C. generators and backs up his private plant. If his private plant breaks down or is not running he throws on the switch and takes our service.

20 Q. But he has his own plant in there to take care of certain tenants in his building and you have breakdown service into his plant? A. Backing up his private plant.

Q. The summary that you read this morning took into consideration all the instances which you have given the details of here, is that correct? A. Yes, sir.

Q. They are all included in your summary that you offered this morning? A. Yes, sir.

30 Mr. Blake: I would like to offer that letter in evidence.

Mr. Osborne: On the letter; I do not understand that this is the letter about which we were inquiring. We were inquiring about a letter which had specific reference to a master meter service, a letter which was directed to that end and that inquiry, and which I am informed was a three paragraph letter with single spacing, to the best

Franklyn Heydecke, for Respondent—Direct.

of the recollection of the person who saw it. It was on or about October 15th.

Commissioner Gnichtel: 1927?

Mr. Osborne: 1927. The witness produces a letter which he specifically says does not refer to master meter service, and that statement by him confirms our belief 10 that he has mistakenly of course brought the wrong letter here. This is not the letter that we inquired about; it is not the letter that we testified about. I therefore object to it. Before doing so perhaps I would like to inquire of the witness as to what search he has made for any other letter on or about that date referring to master meter service.

Witness: I have no knowledge or recollection whatever about any other letter on that subject. 20

By Mr. Blake:

Q. Mr. Heydecke, did you ever write a letter concerning master meters in October, 1927, two, three or four paragraphs? A. I would say no. I have no recollection of such a thing.

Q. Did you ever write any letter concerning meters other than this letter, in October, 1927? A. 30 No.

By Commissioner Gnichtel:

Q. You said this does not relate to master meters. Don't the last paragraph refer to the subject matter, the kind of buildings that demand master meters? A. The last paragraph I would say refers to the installations where the landlord wants one meter for service for an entire building 40

Franklyn Heydecke, for Respondent—Direct.

and wants to include the lighting and power in his rent.

Q. What would you call such a meter? A. It is just one meter. It is not a master meter.

Q. What is the difference between such a meter and a master meter? A. One meter in that case
10 is where the landlord furnishes the light and power in his rent.

Q. What is the difference in the meter; a larger size meter? A. It would be the same size meter.

Q. It would be the same meter? A. It would be the same meter.

Mr. Osborne: Then the designation master meter merely refers to its use and not to the physical characteristics of the meter
20 itself.

Mr. Blake: Yes. You have interjected the word "master meter" in the case. If you will take Mr. Heydecke's testimony earlier in the case, Mr. Heydecke testified it was brought to his attention that there was a remetering going on in our territory and thereupon he addressed a letter to all his agents to find out if that were true and where the occurrence had been, and further instructed them that no meter was to be
30 set, single meter in an apartment house, without bringing it to his knowledge and getting a ruling on it. That is the testimony in the case. He testified he sent such a letter and here is the letter he sent. We have never recognized master meters. We never sent out and said we will set master meters here and there. We will set a meter, not for the purpose of resale; it will be the same physical meter whether for resale
40 or whether included in the rent.

Franklyn Heydecke, for Respondent—Direct.

By Commissioner Gnichtel:

Q. Do you in your business have any style meter that you call a master meter? A. No. There is no such thing to my mind.

Q. I was misled in that. I thought they called this a master meter because it was larger. A. 10
A master meter inferentially would mean that it is backed up by sub-meters to register at different points.

Mr. Blake; That was the basis of my question this morning.

Witness: That is the only distinction I could make.

Mr. Blake: He said it would infer there was a resale of energy. 20

Q. This letter you said did not refer to master meters. But it does refer to the subject matter we have had under investigation here. A. It refers to one meter supplying an entire building.

Q. It refers to the subject matter of supplying apartment houses either by one meter or an individual meter in every apartment? A. It refers to that subject, yes.

Commissioner Gnichtel: Do you object to its admission? 30

Mr. Blake: They have asked for it. I do not see how they can keep it out.

Commissioner Gnichtel: He objects on the ground this is not the letter he asked for. I think it relates to the subject. I will admit it.

(Copy of letter dated October 15, 1927, addressed to all division agents and agents, signed Franklyn Heydecke, General Auditor, Electric Department, received and marked Ex. R-3.) 40

Franklyn Heydecke, for Respondent—Cross.

Cross-examination by Mr. Osborne:

10 Q. This letter was dated October 15th, 1927. Were any of these installations you told us about made after that date? A. I have said that this letter of October 15th, 1927, brought up the two installations that had been made of the Fulton Towers and Hampton Towers; those were the only two apartment houses where there was sub-

metering and resale at that time.
Q. Now then, you mean to say they are the only ones you knew of? A. Yes. The survey today shows the same thing.

20 Q. I asked you whether there has been any sub-metering with your knowledge in office buildings, loft buildings, factories, apartment houses and apartment hotels since the date of this letter, October 15th, 1927? A. This letter only dealt with apartment houses and I had made no survey of conditions with respect to factories, loft buildings, hotels or office buildings.

Q. At that time? A. This letter dealt specifically with apartment houses; nothing else.

30 Q. Your prohibition if you choose to call it that, or whatever you might term these inquiries to be in the nature of, only referred to apartment houses and did not extend to any other class of buildings? A. The language of the letter is very clear, Judge. It says apartment houses.

Q. You can say yes to that, can't you? You could say yes to that if you would. A. Well, I will say yes.

40 Q. Your policy then only applied to apartment houses and not to apartment hotels, office buildings, factory buildings or lofts, the policy that you have brought in here? A. I would say no. The mere fact that the letter only dealt with apart-

Franklyn Heydecke, for Respondent—Cross.

ment houses does not mean the policy is limited to that extent.

Q. Then as a matter of fact is this so-called policy which you say you have at some time or other adopted applicable to all resale through a master meter? A. Yes.

Q. When was this policy adopted as such? A. 10
Well, I have said at the previous hearing, and the hearing before that, and Mr. Young has testified, that it has always been the policy of the company.

Q. Won't you answer the question? What Mr. Young testified and what you said before only loads the record. A. It has always been the policy of the company.

Q. Always? A. Always.

Q. So all these cases where you have testified, 20
where sub-metering has been permitted and practiced and been going on, have been in violation of the so-called policy of the company? A. I would say so.

Q. And with your consent? A. Well, the general office did not have any knowledge of this condition until I asked for the survey recently.

Q. The general office had no knowledge of it until you asked for the survey recently? A. Yes.

Q. When was that; within the last two weeks 30
you mean? A. On other than apartment houses, since this hearing started.

Q. You mean to say you had no knowledge until this hearing started that this practice was going on as widespread as it is now apparent that it is going on, in hotels, in factories, lofts, office buildings? A. We do not admit that it is widespread.

Q. Of course you do not admit it. I am not asking you what you admit.

Mr. Blake: Did you know it?

40

Franklyn Heydecke, for Respondent—Cross.

Q. I am asking what you know. A. I would say no, that we had no specific knowledge of these individual cases.

Q. And it was not until we brought them to your attention that you knew anything about them? A. Yes.

10 Q. (By Commissioner Gnichtel) These apartments in which separate meters were put in each apartment, where were they obtained, do you know?

(Answer stricken out as not responsive.)

Q. What I asked you was; where they were obtained. You said generally. Take one apartment house here, what is that Towers? A. Fulton
20 Towers and Hampton Towers.

Q. They have separate meters? A. I don't know where they got them.

Mr. Blake: They did not get them from us, did they?

Q. Did they get them from you? A. No, they did not get them from us.

Q. You are sure of that? A. Yes. They did not get them from us. I don't know where they
30 bought them. I was just answering the general question.

Q. I did not ask for that. I just wanted to know if you put them in? A. No.

Q. You never put them in? A. No, sir.

Q. You never sold any meters to any of these buildings for sub-metering? A. No, sir.

Q. Not even to this building? A. No.

Q. Those meters in the stores down here are not your meters? A. No, sir.

Franklyn Heydecke, for Respondent—Cross.

By Mr. Osborne:

Q. You say no; are you sure about that? I don't want you to make any more mistakes. A. I am quite certain. In other words it is the company policy that we shall not sell meters to anyone. The only meters that we sell are these meters that have served their usefulness and we want to get rid of them, scrap meters as we call them. 10

Q. Who do you sell them to; anybody that would buy, I suppose? A. Scrap meters, I suppose.

By Commissioner Gnichtel:

Q. If the meter service people want them you can sell to them? Do you sell to the meter service people? A. I don't know to whom we sell the meters. Some of them might eventually get in the hands of the Meter Service Corporation. I could not say. 20

By Mr. Osborne:

Q. You have no knowledge as to that? A. No. I hope they don't.

Mr. Blake: Your Honor is familiar with the Board's rules that require a utility to own their own meters and therefore we have to own our own meters. 30

Commissioner Gnichtel: I was wondering whether they in any of these apartments or office buildings furnished the meters for the stores or separate apartments. He says not.

Witness: We would not do it.

Q. Do you know the Branford Building? A. Yes, I know where it is. 40

Franklyn Heydecke, for Respondent—Cross.

Q. Are you familiar with the fact that in the Branford Building they have a master meter and are reselling to all the stores? A. Yes, sir.

Q. Do you know that you sold them the meters? A. No, sir.

10 Q. You don't know that? A. No, sir. I would be very much surprised if that were so.

Q. You may be surprised at lots of things about your business apparently. But I wonder whether you would deny the fact, if it is a fact, that in the Branford Building you sold the meters to the company operating the building, the landlord? A. I would say this, in answer to that question, that if the company did sell those sub-meters to the Branford Company, that would be absolutely positively contrary to the rules of the company and
20 the policy of the company.

Q. Of course now. You speak of rules of the company. Where are they? You come here and talk about rules and talk about policy, but where are they; are they written down; have they been filed with this Board, or is it something in your own imagination, evolved in your own mind? A. Rules of conduct and procedure do not necessarily have to be filed with the Board. If we did not want to sell our meters, I am not so sure that we would
30 have to file such a rule with the Board. When it comes to rules there are two classes of rules: one, written rules, and the other unwritten rules, and, as I tried to point out at the last hearing, we have got big stacks of routine rules and there are a lot of rules that we have—for instance, there are no written rules for a man to go out and read a meter; there is no written rule for a collector to go out and deliver a bill and collect money, but those are rules of the company just the same. I
40 do not see that a rule lacks its force because it is not in black and white.

Franklyn Heydecke, for Respondent—Cross.

Q. But it is very convenient to invoke it at any time it may suit your convenience if it is not in black and white? A. If the company policy changed.

Commissioner Gnichtel: Just put in the facts and you can argue later.

10

Q. You spoke of a breakdown service that you are rendering to Mr. Seymour? A. Yes, sir.

Q. Is that the only case of that kind? A. Where we furnish breakdown service and the landlord remeters it to his tenants?

Q. Yes. A. That is the only case that has come to my knowledge and attention.

Q. Is that the only case where you furnish breakdown service? Oh, no. We have a great many cases where we furnish breakdown service.

20

Q. Mr. Seymour and the company have been in controversy over this question for a long time. A. I know there was——

Q. I know all about it so you may as well come across and tell us. A. You apparently know more about it than I do.

Q. You had a controversy with Mr. Seymour about this question of sub-metering and resale of current for a long time, haven't you? A. There was a long controversy with Mr. Seymour years ago.

30

Q. The final result is he manufactures his own current and you furnish him with breakdown service? A. We back up his private plant.

Q. Are you familiar with the Percival case in New York? A. No.

Mr. Osborne: Your Honor will find it in our brief and it is exactly parallel of that situation.

40

Franklyn Heydecke, for Respondent—Cross.

Q. I asked you a little while ago, and you never answered the question, whether any of these cases which you have testified to in detail were installed after October 15th, 1927. You may recall that you did not answer that question.

10 Mr. Blake: I thought he did. He said only two came to his attention and four now.

Mr. Osborne: He said lots of things but he did not answer the question.

Commissioner Gnichtel: Can you say now?

20 Witness: Yes. I started out to say that Hampton Towers and Fulton Towers were two that were prior to this letter and the other two were subsequent to this letter.

Q. I am talking about all the buildings as a class, not confining my inquiry to apartment houses. A. That was part of the question I tried to answer, Judge. I said this letter only dealt with apartment houses and I had no knowledge of the other conditions, so I could not say.

30 Q. I asked whether, if you know, any of these installations all of which you say are contrary to the policy of the company—

Mr. Blake: He has answered it now. He said he don't know except as to apartment houses and I think he said only two apartments were subsequent to this.

Witness: Two before and two after.

40 Q. You have told us that there is a difference in the rate, the power rate and the lighting rate, which differentiates these cases and makes it proper to sub-meter in one case where it would not be proper to sub-meter in another, haven't

Franklyn Heydecke, for Respondent—Cross.

you? A. No, I did not say it would be proper in one case and improper in the other. What I meant to convey was that where there was sub-metering, which we do not approve of, under the power rate, the very characteristics of the power rate protected the company in its revenue.

Q. The power rate starts at three cents, doesn't it? A. I am talking about the demand rate.

Q. That is the power rate, isn't it? A. Three cents is the energy rate.

Q. Didn't you distinguish in your rates between the power rate and the lighting rate, on the basis that one was a stepdown from eight cents and the other was a demand rate?

Mr. Blake: Yes. The demand is different from the three cents.

A. Yes. If you will proceed I think I can bring it out.

Q. Won't you explain that a little bit more clearly for me, please? A. When you say three cents, you are referring to the wholesale power rate.

Q. I assume these people are getting the wholesale power rate or whatever it is. A. Some may be getting the retail rate. It does not make any difference; it is the same principle. The wholesale power rate is divided into two parts, a demand rate and an energy rate. The energy rate is the first 3,000 kilowatt hours at three cents, the next 7,000 at two cents and over 10,000 at one cent.

Q. So it goes from three cents down to one? A. Three to one. That is the half of the rate dealing with the energy, but the other half of the rate, which is just as much a part of the rate, is the

Franklyn Heydecke, for Respondent—Cross.

demand feature of the rate, based on the horsepower connected of the installation.

Q. What is that? Do you know what that is?

A. I want to be absolutely sure.

10 Mr. Blake: That is something you pay whether you use energy or not.

Mr. Osborne: Exactly. We will come to that. That is in the nature of a standby or service charge, isn't it. Never mind what it is. It is there.

20 Witness: I will give it to you in just a minute. \$1.50 per month for the first 200 horse power maximum demand; \$1.35 per month per horse power for the next 200 horse power maximum demand and \$1.20 per month per horsepower for all over 400 horsepower maximum demand.

Q. A service charge based on your connected load? A. Not a service charge; a demand charge.

Q. A demand charge as distinguished from an energy charge? A. A demand charge which you must pay whether you use the current or not.

30 Q. You say because that is a feature of the power rate that you are thereby able to differentiate it from the ordinary lighting rate, household rate; that is what you say, isn't it? A. I don't like the term, to differentiate. I said the power rate protected the revenue of the company in sub-meter cases, where the lighting rate did not.

Q. Is there no service charge in the lighting rate schedule, a minimum charge? A. A minimum charge of \$1.00.

40 Q. So that you do have an analogous charge in the lighting rate schedule, haven't you? A. There is a minimum charge in the wholesale rate of \$300.

Franklyn Heydecke, for Respondent—Cross.

Q. Lighting or power you are talking about now? A. Wholesale power.

Q. You say, as I understand the purpose of your explanation, you say that because of this condition it is impossible for a landlord of a factory or loft building to resell power under the power rate and make a profit? A. I said that the power rate protects the revenue of the company. The characteristics of the power rate would not make sub-metering effective. I don't know how it would work out. Maybe the landlord would make a cent or two. 10

Q. You testified—if you will return to this list—regarding Loews State Theatre Building, that in that building there was a resale only to tenants above the first floor—I mean on the first floor, is that right? A. Did I testify to that fact, did you say? 20

Q. Did you? A. No, I did not.

Q. Do you know what the condition is in Loews State Theatre Building? A. The survey shows that the tenants are sub-metered. The consumption is sub-metered and the tenants are billed on the resale basis.

Q. Billed by the landlord or by you? A. By the landlord, with this qualification; that I understand one of the tenants or lessees of the building sub-leases a few of the offices and the tenant has sub-meters and he sub-meters and resells the current which the landlord sub-meters and resells to him. 30

By Commissioner Gnichtel:

Q. Which building is that? A. Loews State Theatre Building.

Franklyn Heydecke, for Respondent—Cross.

By Mr. Osborne:

Q. And that tenant of the building is K. Burns, isn't it? A. I don't know.

By Commissioner Gnichtel:

10 Q. In these cases where they sub-lease and put in a meter do you know anything about the charge; whether they simply charge him with the portion he uses or whether they get the retail rate? A. I could not say. As a matter of fact, I have no knowledge of any charges made in sub-metering except what has been testified in this case.

By Mr. Osborne:

20 Q. Reverting a moment to a question I started to ask but lost the thread of for a moment in connection with this power rate; you say the company is protected in the power rate schedule; in either case the landlord pays the schedule rate filed by you, doesn't he, whether it be power or commercial? A. The payment of the bill to the company by the landlord?

Q. Yes. A. Oh, yes, that is our standard rates.

30 Q. That is your filed schedule rate? A. Oh, yes, absolutely.

Q. Then you lose nothing in the transaction, if you get for a given amount of power the amount of money that you advertise to sell that power for, do you? A. Yes. If you want to go over that again, it is a long explanation; we have been over that.

Q. Do you think you have covered that? A. I think we have sufficiently covered it in this hearing.

40 Q. But there is no question about your offering this rate to everybody that will use a given amount

Franklyn Heydecke, for Respondent—Cross.

of current? A. It is a standard rate which we offer to everybody. Judge, will you permit me to also explain the retail power rate? I have explained the wholesale.

Q. Yes. Will you just hold that one second while I get rid of another question I have in my mind. You have mentioned two classes of cases, we have discussed two classes of cases; one, where the landlord submeters and resells current which he buys from you at your wholesale rate, and the other where he buys it from you at your wholesale rate and distributes it and collects for it in the rent. You mentioned that particularly this morning too. A. Yes. 10

Q. The result to the company is just the same in either event? A. We claim not. It is a long story; we have gone over that. We will go over it again if you wish. 20

Q. Except for the waste that is induced by the landlord furnishing it without metering. A. There is a whole lot more than the waste.

Mr. Blake: We do not use the word waste either.

Witness: My answer to that would require a long explanation which we have been all through and is in the record. 30

Q. All right; if you say it is in the record we will not pursue it. A. Yes, sir, it is.

Q. Now I will be glad to have you continue your explanation. A. I just wanted to explain the retail power rate. When you asked me about the rates I only explained the wholesale. The retail power rate, the first step of the rate at nine cents is an amount equal to twenty kilowat hours per horse power of maximum demand. If you take the landlord's installation and add on to that each one 40

Franklyn Heydecke, for Respondent—Cross.

of his tenant's installations, you are going to get a very high horse power of maximum demand at which the nine cents rate applies. Do I make myself clear? So that he has got to pay for more current at nine cents by having his entire tenant installation enter in than he would if he just had his own installation.

10

Q. Under this master meter plan we are discussing? A. One way or the other, whether it is a master meter or otherwise.

Q. This demand charge is applicable only to the first step, is it not? A. In the retail power rate, yes.

20

Q. So that after that, as the price is stepped down the use of the current goes up, the volume goes up, there is no further demand charge? A. That is so with respect to the energy charge. Of course the minimum charge is based on fifty cents per horse power.

Q. Is that true of every household, every customer? A. Every customer to whom the retail power rate is applied.

30

Q. Is it optional with the owner of the building whether he shall contract to take electricity under the wholesale or retail rate? A. Oh, yes, of course. We offer the most advantageous and most beneficial rate to the customer, if it be the retail rate or the wholesale rate, whichever his installation would entitle him to, he would receive. That is true with all our customers.

Q. Does this list which you have enumerated in detail include office buildings which sub-meter to stores; these figures which you gave us? A. Yes, sir.

40

Q. It includes every building in this class, every building which sub-meters? A. Yes, sir.

Franklyn Heydecke, for Respondent—Cross.

Q. There was one figure of forty-nine; your total amount, forty-nine sub-metering cases; did that include office buildings? A. Yes, sir.

Q. Where they sub-meter only to stores? A. It included office buildings where there was but one sub-meter or whether sub-meters for everything in the building. 10

Q. That forty-nine included every case of sub-metering as I understand it, including buildings which sub-meter to stores only, is that right? A. The forty-nine includes every case of sub-metering of apartment houses, office buildings, hotels including apartment hotels, major loft buildings, major factory buildings.

Q. Just listen to my question. You just answer the questions. It would be lots simpler. A. I thought I was answering you. 20

Q. You are doing much more. I asked one question and you answered a half dozen. Stores only, buildings sub-metering to stores only, that is the question; are they included in that computation?

Mr. Blake: It is every place where it is sold by us and resold. It must be all inclusive. That is the testimony. He reiterated it five or six times.

Commissioner Gnichtel: What is your answer to that? 30

Witness: Yes.

By Mr. Blake:

Q. And of that forty-nine, twenty-eight of them are where you are protected because of the power rate? A. That is so.

Mr. Osborne: I object——

Mr. Blake: Your revenues are protected.

Mr. Osborne: —To the statement in the 40

Franklyn Heydecke, for Respondent—Cross.

question that the revenues are protected because of the power rate, because I cannot see that means anything and it is injecting into the question an element which is not proven in the case. I do not know what he means by protected.

10

Commissioner Gnichtel: The witness has answered. I will let it stand.

By Mr. Blake:

Q. Mr. Heydecke, the demand charge to which you have referred, as I understand is a charge that must be paid whether any energy is used or not, is that correct, that assumption? A. That is so.

20

Q. If five factories occupying individual factory buildings have a demand charge and energy charge, each would be billed, is that correct; first the demand charge would have to be paid and then the energy charge would also be paid? A. That is so.

Q. If they went into a single loft building and the landlord put in one meter and sub-metered, would the collective demand be placed together and the demand charge made? A. Yes.

30

Q. And that would have to be paid whether any energy was used or not, is that correct? A. That is so.

Q. So as far as the company is concerned it would make no difference whether they are in one building or in five buildings? A. The demand charge would be the same.

Q. The energy charge would be grouped; is that correct? A. Yes, sir.

40

Q. If there was any saving anywhere it would be on the combination of the energy charge? A. That is so.

Franklyn Heydecke, for Respondent—Cross.

Q. And your steps there are 3,000, the very first step, are they not? A. 3,000, three cents.

Q. And then 7,000 before they come to the next step, is that correct? A. Yes.

By Mr. Osborne:

Q. At three cents? A. 7,000 at two cents. 10

Q. And then it runs down to one? A. Yes.

Q. As against nine cents, the beginning with the lighting? A. The retail rate starts at nine cents.

Q. Don't you have a minimum charge for your wholesale lighting rate? A. Yes, \$300 a month.

Q. Isn't that analogous to the so-called demand charge in your power rate? A. No.

Q. Don't that protect the company in the same way and isn't that the purpose of it? A. No. 20

Q. What is it for, what is the \$300 a month for, minimum? A. The customer to whom the wholesale rate will apply must guarantee at least a \$300 bill under that rate.

Q. That protects the company doesn't it, for your benefit? A. Yes, surely.

Q. And it performs the same office, as far as you are concerned, as this so-called demand charge in the power rate? A. It is part of the power rate.

Q. I am talking about the lighting. 30

Mr. Blake: There is no demand charge in the lighting rate.

Q. There is a minimum charge? A. There is a minimum charge of \$1.00 a month.

Q. Isn't there a minimum charge to the landlord of an office building who has a master meter?

A. Whatever rate is applied, the minimum charge.

Q. What would be the minimum charge to the landlord of any one of these buildings that you 40

Franklyn Heydecke, for Respondent—Cross.

have enumerated here? A. Under the lighting rate it would be \$1.00 a month.

Q. Is there any record anywhere of an office building ever using that minimum or at least not using over that minimum? A. I could not conceive of such a case.

10 Q. There is nothing to prevent, if it becomes necessary to protect the company, your placing a demand, a minimum rate on office buildings or any building using the power rate, is there—the lighting rate—all you have to do is file it with the Board and make it part of your rate schedule. A. If we wanted such a rate, yes.

Q. You said in some of these cases in these factories, they were obtaining lighting at the power rate? A. Yes, sir.

20 Q. Is that proper? A. Yes, sir, under certain conditions.

Q. Isn't that discriminatory? A. No.

Q. To let anybody turn the lights on and pay for them as power? A. The rule in that case is that an industrial or a manufacturing concern having an installation greater than fifty horsepower connected load is entitled to lighting under the power rate up to fifty per cent. of the connected load. He has got to be an industrial or manufacturing concern. The theory of that is that the lighting in a factory is purely incidental to the purpose of the service of the building.

30 Q. Do any office buildings get that maximum demand rate, power rate? A. If the power load in an office building were of sufficient size so that the power rate for the power and the lighting rate for the lighting would be most beneficial, of course they would have that arrangement.

40 Q. A department store, for instance, like Kresge's, have such a rate, don't they? A. No,

Franklyn Heydecke, for Respondent—Cross.

Kresge's does not. Kresge obtains our wholesale energy rate which is a large lighting and power rate.

Q. It is a combination rate? A. It is a combination rate.

Q. Then you have a combination rate? A. Yes. But the limitations on that rate would only make it desirable to a very large customer. 10

Mr. Osborne: That is all.

Mr. Blake: That is all.

Commissioner Gnichtel: Have you any other witness?

Mr. Osborne: No, I think not.

(Discussion.)

Commissioner Gnichtel: The case is closed? 20

Mr. Osborne: Yes.

Commissioner Gnichtel: We have the brief of Judge Osborne. When will we receive yours?

Mr. Osborne: Can't we have a time. I think this case is important to have some definite time. It is customary to fix a time and limit the time.

Commissioner Gnichtel: Will two weeks be sufficient? 30

Mr. Blake: Yes, sir.

Mr. Osborne: May I have the privilege, if there is any matter that he brings up that I have not covered in my brief, of answering?

Commissioner Gnichtel: Certainly.

(Briefs to be filed in two weeks.)

(Matter taken into conference.)

Order.

STATE OF NEW JERSEY.

BOARD OF
PUBLIC UTILITY COMMISSIONERS.

10	THE SIXTY-SEVEN SOUTH MUNN, INC. vs. PUBLIC SERVICE ELEC- TRIC & GAS COMPANY in re re- fusals to install a master meter.	} Order.
----	---	----------

20 The complaint in this matter having been duly heard and the Board, on the date hereof having made and filed its decision, stating its findings of fact and conclusions thereon, which decision by reference thereto herein is hereby made part hereof, the Board of Public Utility Commissioners

HEREBY ORDERS that the complaint shall be and the same is hereby dismissed.

This order shall become effective December 13, 1928.

Dated December 11, 1928.

30	BOARD OF PUBLIC UTILITY COMMISSIONERS, (Seal)	By (Signed) JOS. F. AUTENRIETH President.
	Attest: (Signed) ALFRED N. BARBER Secretary.	

40 I HEREBY CERTIFY the foregoing to be a true copy of an Order adopted by the Board of Public Utility Commissioners at its meeting held Tuesday, December 11, 1928, and recorded in the minutes of said meeting.

ALFRED N. BARBER
Secretary.

Decision.

STATE OF NEW JERSEY.

BOARD OF
PUBLIC UTILITY COMMISSIONERS.

THE SIXTY-SEVEN SOUTH MUNN, INC. vs. PUBLIC SERVICE ELEC- TRIC & GAS COMPANY in re re- fusal to install a master meter.	} Decision.
--	-------------

10

HARRY V. OSBORNE, Esq., for the Sixty-Seven
South Munn, Inc.

WM. E. CLARK, Esq., for the Sixty-Seven 20
South Munn, Inc.

GEORGE H. BLAKE, Esq., for Public Service
Elec. & Gas. Co.

The complainant, Sixty-Seven South Munn, Inc., the owner of a recently built apartment house, in the City of East Orange, applied to the Public Service Electric and Gas Company to install a master meter; the petitioner proposing to purchase and resell electric current to tenants in the building. The respondent has refused to install such meter. It expresses itself as willing to install and maintain a meter to measure such electricity as may be required by the owner for lighting halls and the operation of elevators; also to install meters in the apartments of those of the tenants who desire to use electric current. 30

The position of the complainant is stated in counsel's brief as follows: 40

Decision.

10 “The complainant, herein referred to as the owner, proposes to purchase from the respondent, herein referred to as the power company, electric current sufficient for its needs and for the needs of its tenants, to be measured by a master meter furnished, maintained and read by the power company. The owner to pay the power company for all such electric current delivered to it through such master meter at the prevailing rate of the power company for a like amount of current consumed. The owner has contracted to furnish its tenants with electric current for light and other domestic purposes at the prevailing rate of the power company for a like amount of current consumed as approved by the Board of Public Utility Commissioners (see Exhibit P-3). To this end, the owner employs an agent, Meter Service Corporation, a corporation organized under the laws of New Jersey, which furnishes, installs, reads, tests, maintains and calibrates individual meters, or sub-meters, for each of the tenants, renders bills to the tenants and collects from them, as agent of the owner, and, as agent of the owner, pays the bills submitted to the owner by the power company (see Exhibit P-1). The compensation to be paid by the owner to its agent, for this service, is regulated by private contract between them and has no relation to or bearing upon this case whatsoever.”

20

30

As rates are based on quantities consumed the prevailing rate to each tenant would be higher than the rate applicable to the quantity delivered through the master meter. The difference between the aggregate of the sums which would be collected from the tenants and the amount paid to the respondent would be material. This difference, according to the testimony, would be divided

40 between the owner of the building and the com-

Decision.

pany installing the meters. The respondent contends that it is not its duty to supply electricity at a quantity rate to be sold by the purchaser at a profit to those who otherwise would be its customers. This the complainant disputes, contending that the owner of the apartment house is a customer entitled as a matter of right to receive current for resale to the tenants.

10

In support of this contention reference is made to the Board's rules applying to electric utilities; to various provisions of the public utility act and to numerous decisions of the courts.

The Board does not regard the definition of a customer as given in its rules as depositive of the case before it. These are general rules applicable to various conditions of construction, equipment and service. Obviously no system of rules of this kind can be sufficiently comprehensive to dispose automatically of the many complex details involved in the regulation of electric utilities, and if a construction of the Board's rules would deprive an applicant of equitable relief such relief should be afforded notwithstanding the rules.

20

It seems to us a decision of the case should be based upon something broader than a construction of the rule defining a customer. Nor do we feel that the decisions of the courts cited by the complainant are controlling. The decisions of the courts of other states should be given the serious consideration they merit, but this should be with due regard to the law and public policy of New Jersey, and the application of such law and public policy to the case before us.

30

The cases decided by the United States Supreme Court, referred to by Counsel, do not appear to be based upon facts similar to those before the Board. The decision in *New York and*

40

Decision.

10 *Queens Gas Company v. McCall et al.* (245 U. S. 345) was upon an appeal from an order of a State Commission requiring a gas company to extend its mains. The issue before the Court was whether the return compared with the cost of the extension involved confiscation of the company's property. In *Consumers Co. v. Hatch* (224 U. S. 148), the question was whether a water company should at its expense lay a pipe from the curb to its main, or this cost should be borne by the customer. In both cases, the decisions were against the utilities.

20 Certain findings were made as to their duties, but these in the Board's opinion do not control in the different state of facts existing in the instant case. In this case, the question is whether it is the duty of a public utility to furnish electric current which the purchaser does not propose to use himself but to sell to others the utility is able and willing to supply.

30 The complainant contends that the nature of the use is immaterial; that refusal to supply it is an unlawful attempt by the respondent to pick and choose its customers and an unlawful discrimination against the complainant. The complainant asserts that electric current is property, quoting from Curtis on the Law of Electricity.

40 But though electric current may be property it differs from other property, in that its distribution and sale on a large scale requires the use of public highways. Because of this the electric utility may not charge more for current sold than public authority determines to be just and reasonable. Its property, property rights and equipment facilities are subject to supervision, regulation and control by a department of the State government. But while the State restricts the free-

Decision.

dom of public utilities in the conduct of their businesses it assures to them a certain measure of protection. Because of this the right of a municipality to grant a franchise is restricted. The public utility act (Chap. 195, P. L. 1911, Sec. 24) provides that:

10
 “No privilege or franchise hereafter granted to any public utility as herein defined, by any political sub-division of the State, shall be valid until approved by said board, such approval to be given when, after hearing, said board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests, and the Board shall have power in so approving to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience 20
 and interests may reasonably require.”

This, it seems to us, expresses a principle which underlies a privilege to make a special use of public highways. Whether the privilege shall be granted is not to be determined by the question whether it will be profitable to the utility, or afford to others an opportunity to purchase and sell at a profit something the utility could not distribute without such privilege. It is determined by the question whether the grant “is necessary and 30
 proper for the public convenience and properly conserves the public interest.” In ruling upon this question, it is the Board’s duty to determine whether a utility operating in a given territory supplies adequate and proper service and should furnish the service contemplated by a franchise grant to others.

It is true that electric utilities, by virtue of state law, may place poles and wires in public highways and their conduits and cables beneath 40

Decision.

them without the franchise grants that must be obtained by gas and water companies. A corporation organized

10 “for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, shall have full power to use the public roads or highways, streets, avenues and alleys in this state for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures, upon first obtaining the consent in writing of the owners of the soil; provided, however, no posts or poles shall be erected in any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed and the manner of placing the same
20 * * *” (P. L. 1895, p. 322).

But the power given by this act is subject to limitation by later enactment. The Board of Public Utility Commissioners has authority,

30 “After hearing, upon notice, to determine, between public utilities supplying electric light, heat or power, questions in dispute as to territories to be served; to enjoin, pending hearing, the construction of facilities for such supply, and, upon finding and determination that such construction is not necessary and proper for the public convenience, and will not properly conserve the public interest, to issue orders prohibiting the same” (Chap. 150, P. L. 1926).

In the instant case the dispute is not between two electric lighting companies as to which should supply a certain territory. It seems to us, however, a similar principle is involved.

40 The respondent is ready and willing to supply service to the tenants of the apartment house.

Decision.

The evidence shows that a large number of tenants are willing to have respondent's meters installed in their apartments. It does not show the tenants prefer that meters should be installed by the Meter Service Corporation. They would have no better rate if meters of the latter are installed. The Meter Service Corporation is not a public utility. Because of this it would not be subject to the Board's rules which require electric utilities to provide and maintain apparatus and facilities for testing meters and to periodically test the same. In the event of dispute as to a bill rendered, it could discontinue service to enforce payment without right of appeal by the customer to this Board. Under such conditions it cannot be reasonably contended that it conserves the public interest for the considerable part of the public who live in apartment houses to be dependent for service upon meters installed by supply companies in partnership with landlords rather than to depend upon public utilities subject to regulation and control. This if limited in its effect to the parties immediately concerned in the instant case might not be of public concern. But a ruling as to the duty of the utility may have a far reaching effect.

An electric utility operating upon a large scale in an extensive territory, if it provides, as it should, adequate service, must do more than maintain power houses, wires and cables. Among other things it must have adequate facilities for testing meters; it must keep proper records of the same and use every reasonable and practicable precaution to avoid error and injustice in dealing with its customers.

It seems to us to be in the public interest that a company which has developed an efficient organi-

Decision.

zation for doing this, so long as it properly serves the convenience of those wanting electric current, should supply the meters required to measure it and be responsible for their accuracy and the records of registration.

10 The costs of doing this are distributed among the customers. As their number increases the unit cost per customer for the service rendered naturally decreases, and as rates are directly affected by the cost of supplying service it is in the public interest that the utility should operate at the lowest cost consistent with good service. Rate schedules of electric utilities generally provide for lower rates for large quantities. To an extent, the low rate is designed to make attractive the
20 purchase of electricity from a public utility by those who otherwise would maintain private plants.

A meter supply company; not a public utility, and not subject to regulations prescribed to protect the interests of customers; by buying current at the low quantity rate and selling at the utility's rate for smaller quantities might have a considerable margin of profit. Apparently the complainant who proposes to share the profit believes this to be so. Otherwise it is difficult to see why
30 there should be insistence upon the company supplying the current in the manner desired. If arrangements between owners of apartment houses and meter supply companies, by virtue of which the latter are substituted for electric utilities in supplying service to tenants, are profitable, it would be natural for other owners to make similar arrangements. A multiplicity of such cases would take from the utility a large number of those who would be its customers.

40 Removed from the protection, to which if customers of a public utility they would be entitled,

Decision.

there would be no advantage, but a disadvantage to those served by the supply company. Loss of customers would tend to increase the unit cost per customer of supplying service to those remaining and whom the respondent must serve.

The adverse effect upon the utility and the public served might equal if not exceed that which would result if another electric utility extended its lines into a part of the territory in which the respondent is under obligation to supply service. 10

In the event of an attempt by a public utility to make such extension, it would be the Board's duty to prohibit it if it did not appear to be necessary and proper for the public convenience and would not properly conserve the public interest. This being so, is it the Board's duty to issue an order which in effect, would turn over to be served by a meter supply company those who would be otherwise customers of the respondent? Should this be done, in the face of an evident disadvantage to the customers who do not complain that they cannot obtain service from the respondent? 20

It is contended that in principle "there is no difference between furnishing electric energy to the owner of an office building, loft, factory, or an apartment hotel, than to the owner of an apartment house. There is a resale of current by the landlord whether through metered service or concealed in a rent charge" (Complainant's brief, page 25). 30

We are of the opinion that there is, in principle, a difference between the instances cited and the case before us. There is involved a question of public policy, one which relates to the practical application of a well defined State policy in matters of regulation. It is essential that the efficiency of regulation should be maintained, consistent with the practical handling of the sale and dis- 40

Decision.

tribution of electric energy and the preservation of reasonable and proper relations between the customer and the public utility furnishing the service. Long established relations between a utility and its customers which relations are generally regarded as serving the public convenience differ materially from the relations it is proposed shall exist in the case before us.

Office buildings, hotels, and apartment hotels are generally operated in such a manner that there is furnished to the tenant as part of the rent, services such as heat, light, refrigeration, janitor and maid services. All of these services are included in the monthly or annual rent charges and become part of the incidents to the tenancy. The relations between the parties according to the terms of the lease or contract are those of landlord and tenant. Where, however, electric energy is to be delivered to the landlord and he resells electricity to his tenants, not as part of the terms and conditions of the tenancy but as a separate commodity, the energy to be measured by the installation of meters and sold at a rate per k.w. to be determined by the landlord, the relation of landlord and tenant does not exist. The landlord, in effect, is performing some of the usual functions of the public utility company. The landlord or the landlord's agent (in the instant case, The Meter Service Corporation) proposes to fix the rates to the tenant and have under its own supervision and control the character of the service it will render. Meter inspection will be optional with it. If the meter becomes fast, it is a problem for the Meter Service Corporation or the landlord to dispose of as they see fit. They may charge the same rate to the customer as all other customers of the public utility company pay, or may exceed this rate if they choose. It will be ob-

Decision.

served that such an intermediate agency between the consumer and the company which supplies the energy is entirely without regulation or control, although performing in effect functions similar to a public utility company which is under the control and supervision of the State.

It was intended by the Legislature in establishing the Public Utility Commission, with the powers set forth in the statute, that all phases of public utility activities, relating to their dealings with the public as to rates and service should be under the control and supervision of the State. If the public utility company itself desired to create an agency to purchase its current and redistribute it in the manner requested by the complainant, that agency would not be subject to regulation and it might well be regarded that the utility company, through subterfuge, was reselling its current to the consumers free from regulation as to rates of service. Any plan or method which takes from the State the power to fully regulate and control rates and service between the public and the company cannot be regarded with favor by this Board. Such a plan is opposed to the policy of regulation adopted by the State and is not in harmony with the best interests of the public.

Questions similar to that now before the Board have occasionally arisen in the past, and were dealt with according to the conditions surrounding the individual case. The Board is of the opinion that it is not against the policy of the State if electric energy is sold to a landlord through a master meter to be distributed to tenants in a building as part of the service supplied and included in the cost of the rent, and that this is not objectionable. But where the electric energy is

10

20

30

40

Decision.

10 sold to the landlord to be in turn sold and distributed by him as a separate commodity, in quantities measured by the installation of meters at rates to be fixed and determined by him or his agent, it removes from the field of regulation an element of public utility activities which, under the policy of the State, should be subject to regulation. It seems to us that practices of this kind should be regarded as discriminatory and unlawful.

20 In the testimony in the case before the Board, it appears that there are instances, somewhat similar in character to that now presented for determination with respect to which the Public Service Electric & Gas Company is rendering service. In any case where electric energy is sold to a landlord of a building for resale or redistribution through the medium of meters, and which is not a service charged for in the rent this should be discontinued. This will be required by the Board.

30 The complainant contends that the Public Utility Commission may not interfere with the contractual rights of landlord and tenant. The Board does consider that the contractual relation of landlord and tenant is an issue to be determined. The question is one of rendering safe, adequate and proper service by a public utility in accordance with the statute.

For the reasons stated herein, the Board finds and determines that the respondent's refusal to install a master meter is not a denial of adequate and proper service nor an unjust or arbitrary discrimination against the complainant.

Decision.

The complaint, therefore, is dismissed. An order will so enter.

Dated December 11th, 1928.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By

10

(Seal)

(Signed) JOS. F. AUTENRIETH

Attest:

President.

(Signed) ALFRED N. BARBER

Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of a Decision adopted by the Board of Public Utility Commissioners, and ordered filed by said Board.

20

ALFRED N. BARBER

Secretary.

30

40

CHAPTER I

THE HISTORY OF THE

REIGN OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

EMPEROR

OF THE

Opinion of Supreme Court.

Filed November 14, 1929.

Argued May 3, 1929. Decided November 14, 1929.

1. Electric current, in the aspect of sale and purchase, is property. 10

2. It is possible for lawful restrictions to be imposed on the sale thereof.

3. The refusal by a public utility to sell electric current to an apartment house owner for the purpose of being remetered and resold to tenants is not violative of such owner's constitutional property rights.

4. The Board of Public Utility Commissioners has general supervision and regulation of, jurisdiction and control over, electric current, so long as it is in the ownership of the utility; and such Board has power to fix just and reasonable classifications, practices and service to be furnished with respect thereto. 20

5. It being the uniform practice and policy of the utility to refuse to sell electric current at wholesale to a retailer for redistribution and resale by the latter to the consumer at retail rates, the application of the practice in a given case is not discriminatory; and the action of the Board of Public Utility Commissioners in refusing to compel the utility to make such sale is not an unreasonable or otherwise unlawful exercise of power. 30

For prosecutor: Osborne, Cornish & Scheck; Merritt Lane.

For Board of Public Utility Commissioners: J. O. Bigelow.

For Public Service Electric and Gas Company: William H. Speer. 40

Opinion of Supreme Court.

The opinion of the Court was delivered by
CASE, J. This case comes upon writ of cer-
tiorari issued at the instance of The Sixty-seven
South Munn Inc., the owner of an apartment
house, to review an order made by the Board of
Public Utility Commissioners in effect refusing
10 to direct the Public Service Electric and Gas
Company to deliver electricity at the prosecutor's
apartment house to a master meter at wholesale
rates to be redistributed and resold through the
agency of the Meter Service Corporation to the
respective tenants of the property. The real
issue is whether the Public Service Electric and
Gas Company is to be compelled, contrary to its
own policy and against the order of the Public
Utility Commission, to sell at wholesale rates
20 electric current to be remetered and resold at re-
tail to the ultimate consumer by either the land-
lord or its agent.

Seventeen points are argued by the prose-
cutor in its main and supplemental briefs. For
the purposes of this discussion these points will
be thus consolidated:

1. Electric current is property a commodity,
and the owner thereof may use the same as he
will, subject only to the lawful exercise of the
30 police power.

2. The owner of an apartment house, being
also the owner of the commodity known as elec-
tric current, may contract as he will with respect
to that commodity and any effort on the part of
either the State or any agency of the State, such
as the Board of Public Utility Commissioners or
otherwise, to interfere with such contractual
rights is an impairment of the obligation of con-
tracts and an interference with his property
40 rights and therefore unconstitutional.

Opinion of Supreme Court.

3. The Legislature of the State of New Jersey has not authorized the Board of Public Utility Commissioners to control the owner of an apartment house in the redistribution and resale of electric current inasmuch as such owner is not a public utility.

4. The owner is a customer and is entitled as a matter of right to receive current for resale to its tenants and the refusal of the electric company to supply the current is unjust, discriminatory and unreasonable; and the refusal of the Board to compel the company to supply the current is a violation of its obligation under the utility law. 10

Applying these contentions, the prosecutor claims that it is entitled as of right to be supplied at its master meter with electricity at wholesale rates, which electricity it may then redistribute and resell to its tenants at such rate as it may arrange with them and that the function of installing and owning the sub-meters, checking the current used, billing the tenants for the same, collecting from the tenants for the current used, and remitting to the owner, shall be delegated to a third party, namely, the Meter Corporation of New Jersey, which corporation, after calculating the expenses, is to divide the profits with the owner. The owner calls the Meter Company its agent, and for present purposes the relationship will be considered one of agency. 20 30

It is an accepted proposition that electric current is property, and it is admitted for the purposes of this case that it is a commodity; and it may be assumed that the owner of an apartment house, having also become the owner of electric current, may, unless in its activities it 40

Opinion of Supreme Court.

becomes a utility, resell and redistribute without being under the control of the Board of Public Utility Commissioners, and without limitations on its right of resale, except such conditions as may have been lawfully imposed in the transaction by which title to the commodity was acquired. It frequently occurs that the purchaser of property, either real or personal, finds himself restricted in the use or disposition of the same by the terms under which it was acquired. Likewise it is possible for the owner of electric current to be limited in the disposition thereof by restrictions lawfully imposed as an incident of the sale to him. The prosecutor's difficulty, so far as Point One as set out above is concerned, is that he is not yet the owner, either with or without restrictions, of the current that he wishes to sell.

With respect to the proposition contained in Point Two above: We do not understand how the constitutional provision with respect to the protection of private property is violated when the prosecutor has not acquired title to the property and has no right as yet in the property. If he has a right, it is the right to have property sold to him, which is a very different proposition and hardly within the purview of that constitutional provision. Neither do we understand how the refusal of the electric company to sell its current to the prosecutor, or the refusal of the Board of Public Utility Commissioners to direct such sale to be made constitutes a violation of any contract made between the prosecutor and the prosecutor's tenants. If the prosecutor has contracted to sell that which it does not own and for any reason is unable to procure the subject matter of the sale in order to make delivery, that is its mis-

Opinion of Supreme Court.

fortune but not necessarily an impairment of its right to contract. A may contract with B whereby A undertakes to sell to B and B undertakes to buy from A the property which belongs to C, and if A is able to procure the property and make delivery thereof all is well; but the refusal of C to convey can scarcely be called an impairment of A's right to contract nor, indeed, a violation of any contractual rights. 10

As to the Third Point: The Board of Public Utility Commissioners does not, by its order, undertake to control the operations of the prosecutor in selling to its tenants any electric current which it may become possessed of or which it may itself manufacture so long as the prosecutor is able to perform such functions without contact either with a public utility or the commodity sold by such public utility. The prosecutor is not a public utility and the Meter Company is not a public utility, and these parties, either as principal and agent or otherwise, may sell and distribute electric current without interference by the Board of Public Utility Commissioners so long as there is no effort on the part of the prosecutor or the Meter Company to invade the sphere within which manifestly the Board of Public Utility Commissioners does have power. 20 30

It seems that the controversy resolves itself into the matters contained within Point Four.

It should be noted that since all parties to the cause concede and base their contentions upon the proposition that electric current is property, it must necessarily follow that the Board has general supervision and regulation of, jurisdiction and control over the same if and so long as it is in the ownership of the Utility; Paragraph 15 of the Act Concerning Public Utilities, P. L. 40

Opinion of Supreme Court.

1911, p. 374 at 376; *Atl. Coast Elec. Ry. Co. v. Public Utility Board*, 92 N. J. L. 175; and that the Board has power to fix just and reasonable classifications, practices and service to be furnished with respect thereto; *Utilities Act, supra*, par. 16. We know of no inherent right in the
10 prosecutor by virtue of which it may compel the sale and delivery by the respondent of the latter's product. The State of New Jersey, through governmental channels, has granted certain franchises and incidental monopolies to the respondent, as a consequence of which the State has subjected the respondent to certain duties, obligations and responsibilities, conspicuously to general supervision and control exercised by the Board of Public Utility Commissioners. For
20 the efficient administration of this governmental scheme it is apparent that not only the Utility, but also the persons whom the Utility serves, and, indeed, the general public, are subject, within jurisdictional limitations, to the direction of the Board. A tolerance by the Board of discriminatory and unreasonable practices on the part of the Utility, or the promulgation by the Board of orders that in themselves are discriminatory or unreasonable, would be an abuse of power that
30 this court could, and would, correct. But, if the disputed practice is applied generally, that is to say, if the Utility uniformly and as a matter of policy declines to sell at wholesale to a retailer for re-distribution and re-sale by the latter to the consumer at retail rates, we find nothing discriminatory in the practice. No prospective consumer is denied electric current; the question involves merely the manner and personnel of delivery. Neither does it seem to be an unreasonable or unlawful exercise of power on the
40

Opinion of Supreme Court.

part of the Commission to refuse to direct the Utility to sell under the circumstances. This view has in mind not merely the business of the Utility but also the public welfare. *Hunter v. Public Utility Commissioners*, 1 N. J. Misc. Reports 408. If the Utility should be compelled to submit to this practice, it is conceivable that the Meter Company, or some like concern, could become a very real competitor. The Meter Company could take each square block as a unit of operation and, by keeping its paraphernalia off the public streets, refrain from becoming a utility, keep out of the control of the Board of Public Utility Commissioners, take its power through a master meter somewhere in the square and compete with the Utility for sale and delivery to the various users within the block. It might or might not develop that the distributing agency was dishonest and irresponsible; that the consumers' meters were inaccurate; that the rates were unfair; that the service was faulty. No matter what the abuse neither the individual consumer nor the general public could obtain redress from the Board. In the single case at bar the public concern is slight; but a ruling may be far reaching. The Board of Public Utility Commissioners determined that the practice in question is not in the public interest. We consider that the Board acted quite within its lawful discretion in so finding and in refusing to issue a compelling order against the Utility.

The prosecutor argues that the landlord who receives his current by meter and pays for it at such rates as the amount consumed shall justify and allows his tenants *ad libitum* without specific charge to use electricity in their several apartments is not to be distinguished from the land-

Opinion of Supreme Court.

lord who sets up a master meter, and individual meters in the premises of each tenant, and conducts with each such tenant the business of sale of electricity at a profit. We think that to state that proposition is to refute it. In the one instance the service to the consumer is by a controlled utility. In the other it is not.

The order of the Board of Public Utility Commissioners will be affirmed.

20

30

40

No. 228, May Term, 1929.

Rule for Judgment.

This cause coming on to be heard before the Court upon a writ of certiorari allowed therein, and the Court having examined said writ, the return thereto, and the other proceedings had before said Board and in said cause, and the reasons for reversal filed by the prosecutor, and having read the briefs and heard the arguments of counsel therein, and having duly considered the same, and being satisfied that the order of the Board of Public Utility Commissioners made on December 11, 1928, dismissing the complaint filed before said Board by The Sixty-seven South Munn, Inc., a corporation, prosecutor, against the Public Service Electric and Gas Company, in refusal to install a master meter, should not be disturbed or set aside but should be affirmed,

It is adjudged and decreed that said order of said Board is therefore affirmed, with costs to the defendants.

Rule entered this 12th day of December, A. D. 1929.

On motion of

WILLIAM H. SPEER,
Attorney for Defendant,
Public Service Electric and Gas Company.

J. O. BIGELOW,
Attorney for Defendant,
Board of Public Utility Commissioners of
the State of New Jersey.

Notice of Appeal and Grounds of Appeal.

Filed December 27, 1929.

10 To William H. Speer, Esq., attorney for defendant Public Service Electric & Gas Co., and John O. Bigelow, Esq., attorney for Board of Public Utility Commissioners of New Jersey.

20 PLEASE TAKE NOTICE that the prosecutor in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause upon the ground that the New Jersey Supreme Court erred in affirming the order of the Board of Public Utility Commissioners brought up by the writ of certiorari and in giving judgment for the defendants and against the prosecutor, whereas, in fact, it should have reversed and set aside the order of the Board of Public Utility Commissioners brought up by the writ of certiorari for one or more of the reasons filed in the New Jersey Supreme Court.

Respectfully,

OSBORNE, CORNISH & SCHECK,

Attorneys of Prosecutor.

30 Dated December 20, 1929.

New Jersey Court of Errors and Appeals

THE SIXTY-SEVEN SOUTH MUNN,
INC.,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS OF NEW JERSEY and
PUBLIC SERVICE ELECTRIC AND
GAS COMPANY,
Respondents.

On Appeal from
Supreme Court.

REPLY BRIEF OF APPELLANT.

(Italics, etc., ours, except where otherwise noted.)

I.

Respondents devote a considerable portion of their brief to the citation of, and quotations from, cases in the Supreme Court of the United States holding that all property, and included in the word "property" is the right to "contract", is held by the owner subject to the reasonable and lawful exercise of the police power. That is conceded.

The questions in this case are:

1. Has the Legislature delegated to the Board of Public Utility Commissioners power to regulate in the manner it did?
2. If such power be delegated is the act of the Board a reasonable and lawful exercise of the police power?

II.

Respondents insist, p. 20 of their brief, that the Board has power to control indirectly the relations between landlord and tenant because it has power to control *all property of the public utility*.

But its power to control property of the public utility is limited by the inherent right of any person to obtain service or commodity of a public nature from a public utility without unjust discrimination (p. 11 of the original brief) which right is protected by the statute (Point III of the original brief, p. 19).

In arguing that the Board may prevent a customer from obtaining from a utility electric current at the same rates others obtain it, respondents not only overlook the provisions of the Public Utility Act but also chapter 271 of the laws of 1912 Cum. Supp. to C. S. of N. J., Secs. 136-3770M (3) (p. 23 of the original brief).

The right to obtain a commodity from a public utility is not only protected by the common law and by the statute but by the provisions of the 14th amendment to the constitution of the United States (Point IV, p. 24 of the original brief).

The matter comes down to this,—is a classification based upon the fact that the landlord resells the current to his tenants, making a specific charge for the electric current, rather than including the charge in the rent rate reasonable and lawful?

III.

Respondents at many points of the brief refer to the fact that the electric current has not yet become that of the landlord and that he is attempting to protect rights in a commodity which he does not own and this was also stated by the Supreme Court.

Both the Supreme Court and respondents overlook, we submit, that the *right to obtain the current and commodity without unjust discrimination* is a right of property protected by the common law, the statute and the constitution of the United States for this right cannot be taken from him except by due process of the law nor may he be deprived of the equal protection of the law.

IV.

Respondents are not satisfied with the basis of classification stated by the Supreme Court which was—"In the one instance the service to the consumer is by a controlled utility. In the other it is not", which basis of classification we dealt with in our original brief, pp. 7, 13 and 45, and attempt to indicate another difference, *i. e.* (p. 29 of the brief), that, where the charge for the electricity is included in the rent "the relation is entirely one of landlord and tenant, and any just complaint about the electric service finds its reflection, protection and remedy in the right of the tenant to terminate the entire relationship, cease paying his rent, surrender the premises, claim an eviction, etc.", and then respondents say: "But as to apartment houses where the sub-metering company, acting either as a partner or joint venturer with the landlord, or as his agent, deals with the tenant only as to the electric current, the lease as to the premises is entirely distinct therefrom."

We do not know upon what this statement of fact is made. *The landlord* furnishes the electricity as part of his obligation as a landlord assumed by him in the lease. The Meter Corporation acts merely as his, the landlord's, agent.

But assume the statement of respondents to be true. The tenant is under no obligation to enter

into contractual relations with his landlord. Here, again, respondents attempt to rely upon the *protection which should be accorded to tenants*. However one may look at it, it is an attempt of the Board to interfere with the contractual relations between landlord and tenant and that right has not been delegated to the Board (Point I, p. 14 of the original brief).

Under the statute, so far as this case is concerned, the only interest of the utility or of the Board is as to the amount of money which the utility gets and it gets precisely the same amount whether the landlord resells the current through submeters or includes the charge in the amount of the rent (pp. 7, 13 and Point VII, p. 33 of the original brief).

We get back to the point assuming the right of the Board to control all the property of the utility, as to whether there may be a classification in rates depending upon the *use* to which the purchaser puts the commodity where the purchaser is not subject to regulation.

No case is cited by respondents which supports such a classification, and wherever the question has arisen it has been answered against the power to make the classification (Point VII, p. 33 of the original brief).

At p. 23 of Respondents' Brief they attempt to distinguish *Lewis v. Potomac Electric Power Company* mentioned in our original brief, pp. 7, 16 and 42. The attempted distinction is based upon the statement of respondents, p. 23—"that the District of Columbia statute expressly and definitely *excludes* such activities as those of the landlord and sub-metering company from the jurisdiction of the Utility Commission, while our statute as definitely *includes* them. That this is so cannot admit of serious argument".

But the only argument made is on p. 24—
 “That there is no language in our statute which
takes out of the jurisdiction of the Public Utility
 Board the matter of sub-metering; * * *” The
 answer was made on p. 42 of our original brief.

While the District of Columbia statute expressly excluded control of the Board “where electricity is made, generated, produced, or transmitted by a private person or private corporation on or through private property solely for its own use or the use of tenants of its building and not for sale to or for the use of others”. Our statute confers jurisdiction on the Board over all public utilities, and then defines a public utility as “Every individual, co-partnership, association, corporation or joint stock company * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any * * * electric light * * * system, plant or equipment for public use *under the privileges granted or hereafter to be granted by the State of New Jersey or by any political subdivision thereof*”, Section 14 of the Public Utility Act, 2 Cum. Supp. to C. S. of N. J. 1911-1924, p. 2880 (p. 16 of the original brief).

What is the difference between the *effect* of the two statutes?

Respondents suggest that the language of Judge Stafford in the *Lewis* case to the effect that “the court is unable to see any reason or legal basis for such a distinction (that is a distinction between those cases in which the landlord sub-meters and those in which he includes the charge for the electricity in the rent) nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition” has reference to the language of the District of Co-

lumbia act. It has not. The Court quoted the statute merely to indicate that the Board was not given express jurisdiction over the relations of landlord and tenant with respect to the furnishing of electricity. Just as in the case at bar—our statute gives the Board no express control over such relations, on the contrary the statute excludes such control by its definition of a public utility.

The District of Columbia statute conferred power over public utilities as such and their property to the same extent as does our statute and the District of Columbia statute did not, by express terms, give a landlord any greater right to secure electricity from a utility than any other person. It did not say that the Board should not interfere with the *furnishing of electricity by the public utility to the landlord*. It merely said that there should not be included in the class of public utilities those instances “where electricity is made, generated, produced, or transmitted by a private person * * *”.

If there were a *reasonable* distinction between those cases in which the landlord furnishes electricity to his tenants through sub-meters and those where he furnishes electricity, the charge included in the rent, the Board of the District of Columbia would have the *same* power, no greater no less, as has our Board because of its control over the Public Utility *and its property*.

Judge Stafford so indicated when he said: “The *sole question would seem to be* whether in thus charging the tenants for the electricity bought by the apartment house owner and by him transmitted to them the amount of such charge may be ascertained by the use of a meter so that each tenant may be charged for what he actually uses instead of being charged a lump sum by way of increased rent, or without reference to the amount

used by the particular tenant", and, after stating this question the Court said: "The Court is unable to see *any reason or legal basis for such a distinction*, nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition."

The District of Columbia statute no more indicates a legislative intent "to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants and to charge its tenants therefor" by the use of the words which except from the jurisdiction of the Board "where electricity is made and generated * * * by a private person * * *" than does our statute when it *confines the power of the Board* to instances where a privilege of the State or a political subdivision is exercised in view of the fact that our statute requires a Public Utility to furnish electricity to *any customer without unjust discrimination*. We reiterate that this classification is illegal and that in every case in which the point was made the classification has been condemned and no case is cited by respondents in which it has been sustained.

See Point VII, p. 33, of the original brief for cases where the point has been raised and analogous cases holding generally in the language of Pond on Public Utilities, Third Edition, sec. 282:

"Nor is there any justification for making a greater charge for municipal public utility service to a particular customer *on account of the greater value to him of such service or the greater profit that would probably accrue to him than to some other customer*. The public service corporation is not permitted to discriminate against a competitor in its service * * *".

V.

Throughout the brief there is vigorous language used with respect to the sub-metering company. It is called a "parasite" and a "middleman" and all of that. The answer is found under Point IX, p. 50, of our original brief and we will not here repeat. It is clear that the Public Utility seeks a monopoly of the furnishing of electricity. The legislature has not yet ordained that such monopoly is in the public interest.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,

MERRITT LANE,

Of counsel with appellant.

New Jersey Court of Errors and Appeals

THE SIXTY-SEVEN SOUTH MUNN, INC., <i>Prosecutor-Appellant,</i> <i>vs.</i> BOARD OF PUBLIC UTILITY COM- MISSIONERS OF NEW JERSEY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, <i>Respondents.</i>	} <i>On Appeal from Supreme Court.</i> } <i>Sat below: JJ. Trenchard, Lloyd and Case.</i>
--	--

BRIEF FOR RESPONDENT.

Public Service Electric and Gas Company.

The appellant in its brief, on page four thereof, states the points involved as follows:

"The contentions of appellant were, and are, that: electric current is a commodity and the owner may use it as he will subject only to the lawful exercise of the police power; the owner of an apartment house is, under the common law and the statute law of this State, entitled, *as matter of right*, to receive current at such rates as the electric company furnishes current to any other customer taking a like amount; it is no concern either of the State or of the electric company what the owner of such an apartment house may do with such current after he shall have received it unless he himself becomes a public utility in so dealing with it, in which event the Public Utility laws would apply to him (and it is not contended in this case that appellant intends to so deal with the electric current as that he will become a public utility); to deprive the owner of the

right to obtain the current and to deal with it in the manner contemplated, *i. e.*, to resell it to his tenants, is to deprive him of his property without due process of law and deny him the equal protection of the law within the meaning of the 14th Amendment to the Constitution of the United States, and to impair the obligation of his contracts with his tenants within the meaning of the Constitution of the United States and to create an unjust discrimination as against him within the meaning of the public utilities law."

The Supreme Court in its opinion, in dealing with the proposition that "electric current is a commodity and the owner may use it as he will subject only to the lawful exercise of the police power," said:

"It is an accepted proposition that electric current is property, and it is admitted for the purposes of this case that it is a commodity; and it may be assumed that the owner of an apartment house, having also become the owner of electric current, may, unless in its activities it becomes a utility, resell and redistribute without being under the control of the Board of Public Utility Commissioners, and without limitations on its right of resale, except such conditions as may have been lawfully imposed in the transaction by which title to the commodity was acquired. It frequently occurs that the purchaser of property, either real or personal, finds himself restricted in the use or disposition of the same by the terms under which it was acquired. Likewise, it is possible for the owner of electric current to be limited in the disposition thereof by restrictions lawfully imposed as an incident of the sale to him. The prosecutor's difficulty, so far as point one as set out above is concerned, is that he is not yet the owner,

either with or without restrictions, of the current that he wishes to sell."

This is, of course, a complete and conclusive answer to this point.

The Supreme Court of the United States has dealt with this subject in the case of *Chicago, etc., R. R. Co. v. McGuire*, 219 U. S. 567, where it said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of *arbitrary* restraint, not immunity from reasonable regulation and prohibitions imposed in the interests of the community."

Again, in *Atlantic Coast Line R. R. v. Goldsboro*, 232 U. S. 548, the following language is used by that court:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

These principles establishing the indubitable rule that constitutional restraints upon the impairment of the obligations of contracts do not prevent the *State* from exercising such powers as are necessary in the exercise of its sovereign right to protect the lives, health, morals, comfort and general welfare of the public, though

contracts previously entered into between individuals may thereby be affected, is settled by the unvarying line of decisions in the Supreme Court of the United States. The leading case of this kind is *Marigault v. Springs*, 199 U. S. 473, in which Justice Brown said:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, *and is paramount to any rights under contracts between individuals*. Familiar instances of this are where parties enter into contracts perfectly lawful when made, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment of continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. The leading case upon this point is *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the legislature to establish a parallel bridge between the same points."

As to the right to exercise the police power in the regulation of a party in the use of his property, the classic citation is that found in *Holden v. Hardy*, 169 U. S. 392, where, in speaking of due process of law and the right to control contracts in the exercise of the police power, the Court said, quoting Shaw, C. J., in *Commonwealth v. Alger*, 7 Cush, 84:

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide-water, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations as established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This power legitimately exercised can neither be limited by contract nor bartered away by legislation."

In the light of these thoroughly settled principles, certain pertinent observations would seem to be apposite.

It will be remembered that appellant's first argument, found on page fourteen of its brief, is, "Electric current is a commodity and when

sold and delivered becomes the absolute property of the purchaser to be dealt with as he sees fit."

A considerable amount of space and a great number of cited cases are employed in the endeavor to make it appear that certain indisputable principles of law are applicable to the case in hand, when the fact is that while no one would dispute the principles, practically every one would dispute their application.

Inasmuch as the observations which will be made by me in this part of my brief, with respect to the lack of application of the principles and cases cited, bear not only upon Point I in the argument, but directly upon several of the other points, I shall deal with these together.

As an instance of this, prosecutor contends, "The owner of property has the right to use it as he will, subject only to the lawful exercise of the police power and any interference with this right is unlawful." I have cited cases to show that rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations as established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient, and that this power, legitimately exercised, can neither be limited by contract nor bartered away by legislation.

The appellant contends that the State may not interfere with the contractual rights of the owner under the guise of regulation. I have hereinbefore cited cases from the Supreme Court of the United States to show both the right and the

legitimate extent of is application. And just as in respect to this point, so in respect to the contention that "The owner of property has the right to use it as he will, subject only to the lawful exercise of the police power and any interference with this right is unlawful," and point one, which is that "electric current is a commodity and when sold and delivered becomes the absolute property of the purchaser to be dealt with as he sees fit," and point six, that "appellant is entitled, as of right, to service at the wholesale rates under the provisions of the Statute and the rules of the Board," which involves the claim that appellant is a *customer* and is entitled as a matter of right to service, I shall present general considerations to show that while the principles stated in some of these points may be absolutely sound, they have absolutely no application to the case now *sub judice*.

The first consideration deals with all of these points, although the immediate discussion would seem to confine it to Point One. That electric current is a commodity and when sold and delivered becomes the absolute property of the purchaser, to be dealt with as he sees fit, has been disputed by very high authority, and it has been contended that far from being a commodity, electric current, when served under the conditions involved in this and similar cases, is a *service*. However, for the purpose of this argument, and only for such purpose, I shall assume that electric current is a commodity, and when sold and delivered becomes the absolute property of the purchaser, to be dealt with as he sees fit. Admitting, as above limited, this proposition, several questions immediately pose themselves for consideration and decision.

The first question is that if electricity is a commodity and when sold and delivered becomes the absolute property of the purchaser, to be dealt with as he sees fit, it immediately presents to the mind the situation that in the instant case the precise point advanced for decision is that the utility company involved refuses to sell and deliver to the owner of the apartment house the electric current which he desires to purchase, and it follows, therefore, that no matter how much of a commodity electricity may be, if it has not been sold and delivered to the owner of the apartment house it cannot and does not become his absolute property, and he not only cannot deal with it as he sees fit, but he cannot deal with it at all.

The next observation which would occur to any thoughtful mind is—assuming electricity to be a commodity—what kind of commodity is it?—when circumstanced as it is in the present case; that is to say, when it is manufactured and distributed by a company which is admittedly a public utility and carrying on a business affected with a public interest. The answer must necessarily be that under such circumstances the electricity thus manufactured and delivered by a public utility is a commodity which is subject to regulation in the legitimate exercise of the police power by the appropriate departments of the government. That electric energy, even though a commodity, thus manufactured, owned and distributed may be regulated in the public interest admits of no dispute whatever.

If, in the exercise of such regulation, the Board of Public Utility Commissioners, which is the body entrusted under the laws of New Jersey with such regulatory power, prohibits the public utility company from selling the same

at the wholesale rate to the owner of an apartment house and a submetering company with which such owner is in partnership in the business of reselling the same for a profit, and deems it in the public interest to establish a regulation which would prevent the insinuation into the situation of an alien and parasitical body, not subject to its jurisdiction or regulatory powers, as being inimical to such public interest, surely such exercise of such jurisdiction and power upon the part of the Board of Public Utility Commissioners is an exercise of that police power for the public good and welfare, and is so obviously in the public interest that the courts will not interfere with the same.

It will perhaps not be amiss to remember that the Board of Public Utility Commissioners, in dealing with a question of this kind, where the very essence of its duty is regulation in the *public* interest, must have in mind not only the welfare of one branch of the public, *i. e.*, the landlord, but must consider as well the welfare and interests of the tenant and of the consuming public. The purpose and effect of the contract between 67 South Munn, Inc., and the Meter Service Corporation is to remove from the regulatory control and jurisdiction of the Board of Public Utility Commissioners a large part of the service which, under the regulation of the Board, which is sought to be set aside in this proceeding, is retained by it.

While it may be true that the landlord would be entitled to erect on his own premises a plant for the manufacture of electric energy, and to sell the same to his tenants without subjecting himself to the jurisdiction of the Board of Public Utility Commissioners, that is not the situation which is now under the scrutiny of this

Court. The description of the contract between Meter Service Corporation and 67 South Munn, Inc., and of the contract with the tenants in that apartment house, which will be found rather sketchily stated in the testimony of Philip Lipschutz, state of case, p. 26, *et fol.*, and of Sven Gafvert, the president of the Meter Service Corporation, on p. 62, *et fol.*, is a most illuminating and convincing argument against setting aside the order of the Board of Public Utility Commissioners which is challenged in this case.

I should not neglect to point out in this connection that for some reason not stated, but easily imaginable, neither said contract nor said lease, although offered in evidence before the Public Utility Board, has been included by appellant in the printed State of Case.

I should further say that the relationship which exists between appellant and the Meter Service Corporation, which is a mere parasite which has insinuated itself between the utility company and the tenants of appellant, who would otherwise purchase the current from the utility company and pay for it the retail price therefor, is stated on page two of appellant's original brief as follows:

"The owner employs an agent, Meter Service Corporation, a corporation organized under the laws of New Jersey, which furnishes, installs, reads, tests, maintains and calibrates individual meters, or sub-meters, for each of the tenants, renders bills to the tenants and collects from them, as agent of the owner, and, as agent of the owner, pays the bills submitted to the owner by the power company.

"The compensation to be paid by the owner to its agent, for this service, is regulated by private contract between them

and has no relation to or bearing upon this case whatsoever.”

This description of their relationship is highly revealing. Appellant calls Meter Service Corporation his agent, and perhaps in legal strictness is justified in so doing, since it is obvious that the relationship existing between the two is that of a partnership or joint venture for mutual profit, and consequently under well-established law each partner is agent for the others; but the description also shows that the arrangement simply is that Meter Service Corporation is the actor in every material detail, and that the owner is but the passive recipient of his share of the profit represented by the difference between the wholesale and retail rates charged under the condition indicated.

I should also direct attention to the fact that appellant claims that “The owner has spent approximately \$30,000 in electric wiring and equipment, the sufficiency and adequacy of which have been approved by the Board of Fire Underwriters and the municipal authorities.”

On page 26 of the State of Case, beginning with line 10 and the cross examination of Mr. Lipschutz, who is the assistant secretary of the corporation 67 South Munn, Inc., by Blake, appears the following:

“Q Mr. Lipschutz, the electric wiring in this building, whether it cost \$30,000 or \$40,000, is wiring and fixtures that would be required whether Public Service Electric & Gas Company set a master meter and permitted you to resell the energy to the tenants or whether Public Service Electric & Gas Company itself serves directly the tenants in your building; isn't that correct?
A That is right.

“Q You would have that capital expense regardless of the method of service to the tenants; isn't that true, sir? A Yes, sir.”

It will thus be seen that the point made in appellant's brief in this respect is entirely without legal support. Prosecutor is in no way deprived of the use of its property or of any property right, contrary to the Constitution of the United States. A lot of cases are cited that have no bearing whatever upon the issue involved.

Another observation which will arise with respect to the investment of \$30,000 in electrical equipment, installed for the purpose of enabling it to furnish electric current to its tenants for light and other domestic uses, is that the owner has no right that has been advanced either in the brief of appellant or which can by the mi- nutes search be found elsewhere to require the public utility company to enable him to earn, out of profits which would otherwise go to it, a fair return upon his investment in such equipment. It would be much more reasonable, as was suggested in the decision of the Chief Justice in denying the writ, that inasmuch as these instrumentalities are put into the building for the advantage and benefit of the tenant, just as the four walls and the roof are placed there to house him, and give him that privacy which he seeks, that the additional advantage of such equipment should be paid for by the tenant in the way of increased rent than it would be to say that the utility company should be required to pay for it to the landlord, with whom such company has no relationship whatever as tenant.

The next observation which I desire to make is that in every case cited in the brief of appellant with respect to the commodity argument, the underlying principle which must appeal to

every reasonable mind is that stated in appellant's own original brief, quoting from the opinion of Judge Morris in the case of *U. S. Elec. Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, where he says, "The property in question (meaning the electricity) is the property of the electric light company, and remains its property until it is delivered to the Club under the contract, when it become the property of the Club." It will therefore be seen that if the Board of Public Utility Commissioners is endowed—as appellant has not the hardihood to deny—with the power of lawful regulation, and it has exercised that power in the subject-matter involved in the instant case in such wise as to prevent the owner of the apartment house from becoming the owner of the current under the conditions which such owner seeks to obtain the same, then such owner is never endowed with the title to the electric energy and cannot deal with it as he sees fit, or in any other way than that provided for by the regulations of the Board of Public Utility Commissioners.

On the oral argument before the Supreme Court, Mr. Lane, seeing the force of the above argument, sought to minimize, if not destroy, the same by saying that I had failed to distinguish between electricity as a commodity which might be manufactured and distributed by a company which did not have the right to use the public streets with its conduits or equipment, and had not therefore become a public utility, and the company which distributed the same and used such instrumentalities and had become a public utility, claiming that the commodity itself was not subject to regulation because it was not affected with a public interest, but that the company which distributed the same was carrying

on a business affected with a public interest and that therefore the company was subject to such regulation. Of course, the obvious and conclusive answer to this attempted distinction is that we cannot divorce the electricity involved in the current legal proceeding from the facts connected with its production and distribution by a company which produces and distributes the same, and is admittedly carrying on a business affected with a public interest and therefore indubitably subject to regulation by the Board of Public Utility Commissioners.

If the Board of Public Utility Commissioners cannot exercise its regulatory powers over the service, the distribution, the rates of charge, and other matters essential to the supply of electricity, the Board is entirely devoid of ability to protect the public against practices which would be highly injurious to its interest and welfare. The fact is, as I stated on the argument, that when electricity is in the possession, ownership and control of a utility company carrying on a business affected with a public interest, it is a commodity which both in the manner, matter and price of its distribution is subject to regulation by such regulatory bodies, and unless the regulation essayed is essentially arbitrary and illegal, the same will stand, and the owners of property who seek such service are as much under the dominion, regulations and orders made by the regulatory bodies with respect to the distribution of such electric current as is the company which manufactures and distributes the same.

Appellant's Point VI. that it is "entitled, as of right, to service at the wholesale rates under the provisions of the Statute and the

rules of the Board," since it is a *customer*, is conspicuously without merit.

Paragraph 16 of "An Act concerning Public Utilities; to create a Board of Public Utility Commissioners and to Prescribe Its Duties and Powers," (P. L. 1911, p. 374, approved April 21, 1911), under the title "Powers of Board," provides,

"16. The board shall have power:

"(e) After hearing, by order in writing to fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed, and followed thereafter by any public utility as herein defined."

And in paragraph 18, under the title "Prohibitions against Utilities," it is enacted that

"No public utility as herein defined shall:

(a) Make, impose or exact any *unjust* or *unreasonable, unjustly discriminatory or unduly preferential* individual or joint rate, commutation rate, mileage and other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this State.

"(b) Adopt or impose any *unjust or unreasonable classification* in the making or as the basis of any individual or joint rate, toll, fare, charge or schedule for any product or service rendered by it within this State.

"(c) Adopt, maintain or enforce any regulation, practice or measurement which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in violation of law; nor shall any public utility as herein defined provide

or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said board.

“(d) Make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever.”

It would seem, in the light of the foregoing quotations from the statute conferring power upon the Board of Public Utility Commissioners, and defining its duties, that it would be too plain to justify extended argument—had it not been for the argument advanced by appellant in its brief in this case—that the policy of this State contemplated that classifications would be adopted by the Board of Public Utility Commissioners and that the test of the propriety of such classifications should be that they must be just and reasonable; and that said statute also contemplated that the public utility company itself might allow discriminations and preferences in rates, charges, tolls, fares, etc., for its product or service when supplied or rendered by it within this State, and that it might adopt and impose classifications in the making or as the basis of any individual or joint rate, toll, fare, charge, or schedule for any product or service rendered by it within the State, the only limitation being that such discrimination or preferential rate, charge, or schedule should not be unjust or unreasonable, or unjustly discriminatory or unduly pref-

erential, and that such classification should not be unjust or unreasonable.

It is therefore perfectly clear that if the classification practised by Public Service Electric and Gas Company and embodied in the Order of the Board of Public Utility Commissioners is a just and reasonable classification, it not only is not antagonistic to the provisions of the statute of our State, but is in entire harmony with it and in conformity thereto.

The second branch of the contention, that appellant is entitled as of right to service at the wholesale rates under the provisions of the Statute and the rules of the Board, because it is a customer, is equally without legal foundation, and cannot be used as a basis for the claim that such classification under the rules of the Board would deprive appellant of its property without due process of law and deny it the equal protection of the law, within the meaning of the 14th Amendment to the Constitution of the United States, and would impair the obligation of its contracts with its tenants, etc.

Even if it were true (which it is not) that the Board of Public Utility Commissioners had defined the word *customer* in such wise as to permit the inclusion within its meaning of the appellant herein as a customer, it is a perfectly settled rule of law that the Board might legally and constitutionally adopt a different classification and exclude it therefrom, if it were deemed by the Board, upon sufficient grounds, to be in the public interest so to do. The law is perfectly settled in the Supreme Court of the United States against the contention of appellant in this respect. It has been uniformly held that "no person has a vested right in any general rule of

law or policy of legislation entitling him to insist upon its remaining unchanged for his benefit, nor is immunity from change of general rules of law to be implied as an unexpressed term of an express contract." *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 76; *Pennsylvania R. R. v. Miller*, 132 U. S. 75, 83; *N. Y. Central R. R. v. White*, 243 U. S. 188, 189; *Chicago & Alton R. R. v. McWhirt*, 243 U. S. 422-425; *No. Pacific R. R. v. Puget Sound Co.*, 250 U. S. 332.

And it is equally well settled that the enforcement of uncompensated obedience to legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment. *Chicago, B. & R. R. v. Chicago*, 166 U. S. 226, 255; *New Orleans Gas Co. v. Drainage Comm.*, 197 U. S. 453, 462; *C., B. & Q. Ry. v. Drainage Comm.*, 200 U. S. 561, 591; *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 78.

Police Power and Power of the Board.

The police power of the State cannot be abdicated nor bargained away, is inalienable even by express grant, and all contract and property rights are held subject to its fair exercise; it embraces regulations designed to promote public convenience or general welfare as well as those in the interest of the public health, morals or safety. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 68.

Valid regulations enacted pursuant to this power, that is, those designed to promote the health, comfort, safety, or welfare of the community, those which are not arbitrary, but which have a real and substantial relation to the

avowed purpose, are not within the constitutional prohibitions against the taking of property without due process of law or the impairment of contract obligations, although such regulations may operate to limit or burden the use of property, impair or even destroy its value, require the expenditure of money to comply therewith, or invalidate contracts previously lawful.

Mugler v. Kansas, 123 U. S. 623, 629, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 101, 102, 32 L. ed. 352, 354, 2 Inters. Com Rep. 238, 9 Sup. Rep. 28; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 557, 38 L. ed. 269, 270, 14 Sup. Ct. Rep. 437; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 73, 74, 42 L. ed. 948, 953, 954, 18 Sup. Ct. Rep. 513; *New Orleans Gas Co. v. Drainage Comm.*, 197 U. S. 453, 461, 462, 49 L. ed. 831, 835 25 Sup. Ct. Rep. 471; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 594, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 594, 52 L. ed. 630, 635, 28 Sup. Ct. Rep. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 343, 54 L. ed. 1060, 1064, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; *Grand Trunk Western R. Co. v. Railroad Comm.*, 221 U. S. 400, 404, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 438, 58 L. ed. 671, 674, 34 Sup. Ct. Rep. 400; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 559, 58 L. ed. 721, 726, 727, 34 Sup. Ct. Rep. 364; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 127, 59 L. ed. 157, 160, 35 Sup. Ct. Rep. 82; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77, 59 L. ed. 1204, 1210, 1211, 35 Sup. Ct.

Rep. 678; *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 480, 55 L. ed. 297, 302, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep 265.

The whole purpose and scope of the public utility act of the State of New Jersey, as well as its mainfest design, is to protect the public. To accomplish this purpose the public utility act was intended to give full control over all public utilities to the Board of Public Utility Commissioners. *Atlantic Coast Line R. Co. v. Bd. of P. U. C.*, 92 N. J. L. 168 at 175; *O'Brien v. Board of P. U. C.*, 92 N. J. L. 44, aff'd *ibid.* 587; *P. S. Ry. Co. v. Board*, 276 Fed Rep. 979; *Perth Amboy v. Board*, 118 Atl. 782; *West Jersey & S. S. R. v. Board*, 87 N. J. L. 170.

In the case first above cited the court said,

It remains only to consider whether the Public Utility Act of 1911 warrants the order made by the Board. *The scope of that 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 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 commisison is given power, among other things, to fix just and reasonable *individual* rates, to fix just and reasonable standards, classifications, regulations, practices, measurements of service, to require railroads and street railways to establish just and reasonable connections."

It will have been noticed above that the power of the Board is to fix just and reasonable *individual* rates. In *Public Service Gas Co. v. Board of P. U. C.*, 84 N. J. L. 463, this was held to

mean "the rate to the *individual consumer*." If then, the Board has by this legislation been given *full* control of *all* public utilities, so far as it could be done by legislation; if, as is undoubtedly true, until sold to consumers, the electric current is the *property* of the electric company; if the Board is given general supervision and regulation of and control over *public utilities* and *over their property*; if Public Service Electric and Gas Company is a public utility, and the current is its property; if one of the benign purposes of the act is to bring about just and reasonable *individual* rates; if the practices of the landlord and the sub-metering company are fraught with the certainty of removing this *property* from the general supervision and regulation and control of the Board, and with the possibility and likelihood of thereby jeopardizing the desideratum of just and reasonable *individual* rates, it would seem that a construction of the act which would bring about this frustration of the legislative purpose, remove a large portion of the public now protected as to rates, services, etc., from the protection of the act, and diminish the scope and area of the Board's jurisdiction and effectiveness, must be a wrong construction.

It would seem, on the other hand, that a construction which would keep the whole subject under Board control, under an act which expressly authorizes just and reasonable *classifications*, and only denies efficacy to those preferences and discriminations which are *unjust and unreasonable*, and not to preferences and discriminations generally, would be the one likely to be adopted by the Court.

Furthermore, the balance of *public* advantage is preponderantly on the side of the latter con-

struction, since the great bulk of small tenants will be benefited, while only a few *middlemen*, whose sole purpose is the derivation of a large collateral profit from dealing in electric current, will be unfavorably affected. And what is more important still, the entire public purchasing electricity will, in all likelihood, have the cost thereof increased (should the former construction be adopted) to them, since the natural and necessary effect of diverting the profit which otherwise would go to the company, and tend to lower or keep down electric rates generally, will be to decrease its income and thereby increase to all consumers the rates necessary to be charged to pay fixed charges, operating expenses, and to earn a fair return on the property. It was stated by Matthew Sloan in the public hearing into these matters in the State of New York, and quoted in the entire press of the country, that the profits of sub-metering companies in New York were ten million dollars a year. This amount would have to be distributed in increased rates among the remaining consumers to allow the partnership or joint venture carried on by landlord and sub-metering companies to extract the collateral profit from the business; and it is also indicative of the enormous amount of public utility service heretofore under the jurisdiction of the Board which would be removed therefrom and placed entirely under the control of the sub-metering company.

The great tragedy of current waste is laid by most economists to the middlemen. It would therefore seem that additions to this admitted nuisance are not to be encouraged. Furthermore, the hallmark of a *public utility* is the exercise by it of a public privilege or franchise in the streets, etc. It would be passing strange if

after obtaining control of its product the Board could be robbed of its exercise of supervision and regulation thereof by the transparent device and subterfuge of sub-metering.

Furthermore, the proofs in the case, which will be found in the testimony of Mr. Sven Gafvert, beginning on page 55 of the State of Case, demonstrated that there would be no compensating advantage, since the service to customers by the public utility has been shown, and is frankly admitted therein, to be more effective than that by the sub-metering company.

Myron P. Lewis, et al. v. Potomac Electric Power Company.

The decision of Judge Stafford in the cases of *Myron P. Lewis, et al. v. Potomac Electric Power Company*, in the Supreme Court of the District of Columbia, much relied on by appellant (its brief, p. 42, *et fol*, and printed as an addendum to its brief, p. 56 *et fol*), deserves but a few words of comment to show the hollowness of the suggested analogy and pertinency.

It would be quite sufficient and dispositive of the matter to point out that the District of Columbia statute expressly and definitely *excludes* such activities as those of the landlord and sub-metering company from the jurisdiction of the Utility Commission, while our statute as definitely *includes* them. That this is so cannot admit of serious argument. Judge Stafford said:

“Four of the same plaintiffs brought suits in this Court in which they claimed that the Commission’s approval of this condition made the order of the Commission void. *Those suits were treated as brought under the statute* and not as an appeal to the general equity power of the Court. There was a motion to dismiss the bills and the

motion was sustained upon the ground that the order of the Commission was not necessarily void by reason of its approval of said condition; that such condition might be legal or illegal but that in any case the Commission had no jurisdiction over the matter of sub-metering by apartment house owners *inasmuch as the statute in question took out of their jurisdiction the situation here presented in its definition of the term 'electrical corporation.'* ”

There is no language in our statute which *takes out* of the jurisdiction of the Public Utility Board the matter of sub-metering; on the contrary, as has been herein-before demonstrated, the entire subject of regulating the utility, its property, equipment, facilities, etc., and the subject-matter of just and reasonable classifications is expressly placed under the jurisdiction of said Board. Furthermore, by our statute, the matter of just and reasonable classification is conferred upon the utility company, subject to the right and duty of the Board to set such classification aside if unjust or unreasonable.

Again, Judge Stafford says of the prior decision of the Supreme Court of the District of Columbia,

“The decision was that this language *showed a plain legislative intent to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants and to charge its tenants therefor.*”

We have no such statute in New Jersey, but on the contrary one which expressly places the matter of classifications under the jurisdiction of the Board, and upon which the Board in this case has acted.

Judge Stafford then proceeds to say,

"This question having been determined by the prior decision," (that is to say, that the language of the statute showed a plain legislative intent to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants, and to charge its tenants therefor, and that the utility commission was without jurisdiction to interfere or intervene) "the sole question would seem to be whether in thus charging the tenants for the electricity bought by the apartment house owner and by him transmitted to them the amount of such charge may be ascertained by the use of a meter so that each tenant may be charged for what he actually uses instead of being charged a lump sum by way of increased rent or without any reference to the amount used by the particular tenant."

Bearing in mind that the prior decision had settled the construction of the statute to be that it "showed a plain legislative intent to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants and to charge its tenants therefor,"—in other words, that the legislature had declared a policy and a right conformable to sub-metering by the landlord, it is not strange to read Judge Stafford's conclusion that "the Court is unable to see any reason or legal basis for such a distinction, nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition," *i. e.*, that the apartment house owner would engage that he would not charge his tenants for such electricity on the basis of the amount used by the tenants as ascertained by a meter, or else that the apartment house owner will engage not to resell the electricity to its tenants.

This conclusion of Judge Stafford would seem supportable upon the ground that it was the express command and clear intent of the legislature "to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants and to charge its tenants therefor,"—in other words, to allow apartment house owners to become the owners of the electricity, and consequently, not being under the jurisdiction of the Commission, to deal with the electricity as they saw fit, it being their property, without let or hindrance from the utility company from whom they had purchased it. Of course, there is no such legislation and no such policy in New Jersey, and the Lewis case is therefore totally inapplicable to the case now *sub judice*.

Classification and Discrimination.

The opinion of the Supreme Court in this case quite completely and conclusively disposes of the matter of the propriety of the classification and the alleged discrimination. I shall, however, add a few considerations which are not mentioned in the opinion of the Court, but which are themselves a complete answer to the argument of appellant in that matter.

It is claimed by appellant in Points VIII, IX, X and XI of its brief that not only does the denial of the Board of Public Utility Commissioner of the relief asked by the appellant and affirmed by the Supreme Court create a distinction "between landlords based solely upon the matter as to whether they resell measured or unmeasured electricity, but a practical discrimination was accomplished between appellant and those landlords who were, in fact, reselling meas-

ured electricity." It is argued that there are many instances in which electric current is furnished to a landlord who resells it unmeasured to his tenants, the charge being hidden in the rent.

It is first to be pointed out that the Decision and Order of the Utility Board (State of Case, p. 206) states,

"In the testimony in the case before the Board, it appears that there are instances, somewhat similar in character to that now presented for determination with respect to which the Public Service Electric & Gas Company is rendering service. In any case where electric energy is sold to a landlord of a building for resale or redistribution through the medium of meters, and which is not a service charged for in the rent this should be discontinued. This will be required by the Board."

It is therefore apparent that the challenged order confines the right of the company to sell to the tenants thru individual meters and not to the landlord thru a master meter to the case of apartment houses, but does not apply to office buildings, hotels, and apartment hotels, which are generally operated in such manner that there is furnished to the tenant as a part of the rent services such as light, heat, janitor service, and maid service, all of which are included in the monthly or yearly rent charges, and become part of the incidents of the tenancy.

Appellant, therefore, contends that the inclusion of office buildings, hotels, and apartment hotels in one class, and of apartment houses in another, constitutes an unreasonable classification. The Decision and Order of the Public Util-

ity Board completely answers this contention of appellant in one way, and the Supreme Court, in the last paragraph of its opinion, gives the complete answer in these words:

"The prosecutor argues that the landlord who receives his current by meter and pays for it at such rates as the amount consumed shall justify and allows his tenants *ad libitum* without specific charge to use electricity in their several apartments is not to be distinguished from the landlord who sets up a master meter, and individual meters in the premises of each tenant, and conducts with each such tenants the business of sale of electricity at a profit. We think that to state that proposition is to refute it. In the one instance the service to the consumer is by a controlled utility. In the other it is not."

I stated hereinbefore that I would set forth other and different considerations than the conclusive one just excerpted from the opinion of the Supreme Court which would lead convincingly to the same result. I shall first, however, set down the criteria by which the matter of classification is governed in the opinions of the Supreme Court of the United States.

In *Orient Ins. Co. v. Daggs*, 172 U. S. 562, Mr. Justice McKenna, speaking for a unanimous court, said:

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283. We said in that case that 'the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for

such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. *It suffices if it is practical, and is not reviewable unless palpably arbitrary.*"

The classification adopted in the Order of the Board of Public Utility Commissioners is practical and not palpably arbitrary. On the contrary, it rests upon substantial grounds of difference in relationships and consequences. There is absolutely no identity on the one hand between the suggested cases of office buildings, hotels, and apartment hotels, where the electricity charged for is said to be concealed in the rent, and on the other hand that of an apartment house. The differences are so marked, and other consequences so striking, that bare mention of them will be sufficient.

In the cases where the charge is included in the rent, the relation is entirely one of landlord and tenant, and any just complaint about the electric service finds its reflection, protection and remedy in the right of the tenant to terminate the entire relationship, cease paying his rent, surrender the premises, claim an eviction, etc. But as to apartment houses where the sub-metering company, acting either as a partner or joint venturer with the landlord, or as his agent, deals with the tenant only as to the electric current, the lease as to the premises is entirely distinct therefrom. Bad service or no service as to electricity would have no effect on the lease: no eviction would result from non-service, no right of surrender or removal would arise. The tenant could not remove without liability under the lease. There would therefore be no protection resulting from the electric charges being part of the entire contract of lease, and the only remedy would be on the electric contract alone.

In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 693, Brewer, J., said:

"This distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these cases; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good."

A very good statement of the rule elsewhere phrased is "that private individuals cannot remove their property from the control of the police power by making contracts about it, and then alleging such contracts to be beyond impairment by the government."

Much is said in appellant's brief to the effect that "the Legislature has not as yet attempted to regulate the relations of landlords and tenants with respect to the supply of electricity or the right of private individuals to supply it, if in so doing they are not obliged to exercise a privilege conferred by the State or a political sub-division thereof, but that they will indirectly permit the regulation of those relations and the supply of current by private individuals by preventing landlords and private individuals from securing the current from a public utility upon the same terms as others, so that the landlords and the private individuals will not have the current to furnish," etc.

The whole realm of the applicable Federal law is honeycombed with cases which show the utter fallacy of this contention. In *Hooper v. California*, 155 U. S. 655-6, it is said:

"The State of California has the power to exclude foreign insurance companies alto-

gether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such company to enter her confines, to determine the conditions upon which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, *and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end.* The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

In *Frisbie v. United States*, 157 U. S. 160-165, Brewer, J., said:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase of lottery tickets; to the minor the right to assume all obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract

in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

A matter to which I previously adverted and which should not be lost sight of is that with regard to the cases cited on appellants brief from other States. It must be borne in mind that the Court of Chancery has decided this case against appellant; that the Chief Justice of the Supreme Court of our State has done likewise, and that the Supreme Court itself in the judgment now under review has also decided the same against appellant. It must furthermore not be lost sight of that the majority of cases cited in appellant's brief as to the propriety of the policy contended for by appellant have arisen in the State of New York, where the Court will judicially notice a situation has arisen which shows that the sub-metering practice apparently crept in in that State with the knowledge, if not with the connivance, of the electric companies, and obtained a wide application and a foothold which explains the general trend of the cases being favorable to the practice, inasmuch as until recently no opposition thereto was made in a case of this kind by any of the utility corporations.

With regard to the other citations: the manner in which the case came into court, the state of the practice in the locality where the same arose, and the fact that the precise question here involved did not arise—these considerations are sufficient to show their inapplicability to the present case.

It is also well perhaps at this point to direct the Court's attention to the fact that the testi-

mony in the case shows that whatever ground there was for the suggestion that discrimination existed in an infinitesimally small number of cases out of the upwards of 700,000 customers served by the Public Service Electric & Gas Co. was a discrimination which had arisen without the authority of the respondent company, and that the order of the Board discontinuing the same was a proper direction under the circumstances. The number of cases of such discrimination in apartment houses would not exceed seven.

At any rate, it will be seen by reading from page 206 of the State of Case, hereinbefore quoted, that the Public Utility Board has completely disposed of any possibility of discrimination.

As further bearing upon the propositions so stoutly contended for by appellant, that the landlord is not subject to regulation because it is not a public utility company, and therefore does not come within the regulatory powers of the existing legislation upon the subject, and also as bearing upon the application of the case of *Allgeyer v. Louisiana*, 165 U. S. 578, cited by appellant in its brief, I desire to say a word or two.

The case of *Allgeyer v. Louisiana*, 165 U. S. 578, cited by prosecutor, if it can be held to have any pertinency to the present inquiry, is distinctly in favor of respondent's contentions. Justice Peckham, at page 591, says: "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right of making all *proper* contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business

within the jurisdiction of the State *may be regulated and sometimes prohibited* when the contracts or business conflict with the policy of the State as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State," etc. It is clear from this excerpt that a person, as a part of his liberty, may make all *proper* contracts in relation to acquiring, holding and selling *his* property. It is also clear therefrom that this right may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State.

In the case now under consideration, it must be borne in mind that the contract which the appellant claims it has a right to make is one with respect to *property* which it has not yet acquired and does not yet own, and further, that it is property subject to regulation by the express language of the Public Utility Act, and that it actually has been regulated by the order now under consideration, which was made by the Board of Public Utility Commissioners in pursuance of the express power conferred upon it by the statute of its creation, giving it general supervision, regulation of, jurisdiction and control over all public utilities, and also over their property, property rights, equipment, facilities, and franchises.

The contention of appellant that the order constitutes a regulation of a contract or contracts made or to be made by it with its tenants is entirely without efficacy, since unless and until it has become the owner of the electric current, it has no right to contract to sell the same to its tenants, and the fact that it has

attempted by contract to do so does not cast upon Public Service Electric and Gas Co. the duty of selling current to it in order that it may carry out its contracts with them.

The effort of appellant seems to be to claim that a landlord has a right to contract to sell the current to his tenants, and that inasmuch as the relation between itself and its tenants is something with which the public utility company manufacturing and selling the current has no connection, that therefore a refusal on the part of the utility company to furnish the current is in some way a violation of the rights of the landlord; and also, that, the contract between the landlord and the tenant being a contract between two parties neither of whom is carrying on a business affected with a public interest so as to bring it within the jurisdiction and regulatory powers of the Board of Utility Commissioners, said Board is entirely devoid of authority and power to make an order whose effect would be to render the contractual effort of the landlord with its tenants abortive.

This contention is an analogue of the contention made by the railroads when it was sought by the Interstate Commerce Commission to control the activities of a railroad in intrastate business where such a control was necessary to a complete regulation of interstate carriers. This subject has been thoroughly dealt with and the contention of the prosecutor herein fully answered in the case of *Houston & Texas Rlwy. v. United States*, 234 U. S. 343. In that case Mr. Justice Hughes, reading the opinion of the Court, said:

“Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact ‘all appro-

priate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile v. Kimball*, *supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Whenever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." Citing cases. Pages 351, 352.

This principle is dispositive of the question involved in the present case. Power and jurisdiction is given to the Board of Public Utility

Commissioners to control public utilities and their property and property rights, as well as their facilities and franchises and equipment. If individuals by making contracts with respect to this current, which is the property of the public utility, can remove it from the jurisdiction and control of the Board, the whole scheme and purpose of the legislation providing for regulation by the Board falls to the ground and becomes incompetent for the purposes committed by the legislature to its care. The answer, of course, to the pretensions of the landlord, and the Meter Service Corporation is complete, and is found in the cases cited in my original brief, as well as in the excerpt from the case last hereinbefore referred to, and in the very cogent reasons stated in the opinion of Mr. Justice Case in the Supreme Court in the decision of the case now under review.

It will thus be apparent from the foregoing discussion of the cases cited that appellant, in the statement on page 4 of its brief of "The Points at Issue," has stated a succession of points that are entirely without legal basis to sustain them. It may be true that electric current is a commodity, and the owner may use it as he will, subject only to the lawful exercise of the police power, but in the case *sub judice* the landlord is not the owner, and is not entitled under the conditions under which he seeks to obtain the current to become the owner thereof; and the lawful exercise of the police power of the State by the Board of Public Utility Commissioners, to whom the same has been committed, makes it legally impossible for the landlord to become such owner, under the terms and at the rate demanded by him.

It is also clear that the owner of an apartment house is not under the common law and the statute law of this State entitled as a matter of right to receive current at such rates as the electric company furnishes current to any other customer taking a like amount, since the Board of Public Utility Commissioners, a body possessing power and authority so to do, has adopted a classification which is practical and rests upon grounds which are not only not palpably arbitrary, but which are at once just and reasonable; that it is a matter of great concern to the State and to the electric company, and especially of the public, what the owner of such an apartment house may do after he has received it. And it has been amply demonstrated hereinbefore that to deprive the owner of the alleged right to obtain the current and to deal with it in the manner contemplated, *i. e.*, to re-sell it, does not deprive him of his property without due process of law, or deny to him the equal protection of the law within the meaning of the 14th Amendment to the Constitution of the United States; nor does it impair the obligation of his contracts with his tenants within the meaning of the Constitution of the United States; nor does it create an unjust discrimination as against him within the meaning of the public utilities law.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

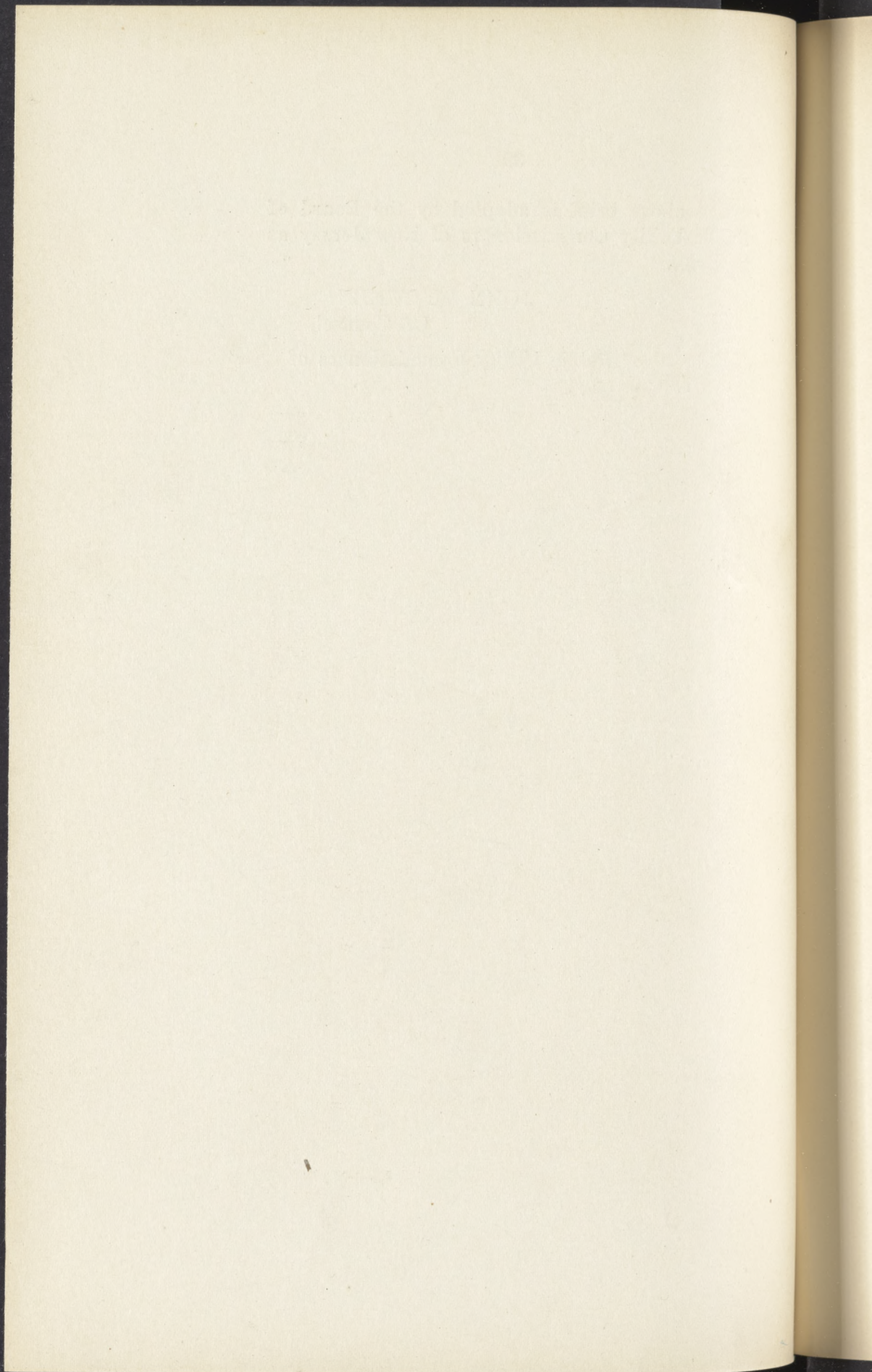
Respectfully submitted,

WILLIAM H. SPEER,
Of Counsel with Respondent,
Public Service Electric and Gas Company.

The above brief is adopted by the Board of Public Utility Commissioners of New Jersey as its Brief.

JOHN W. QUEEN,
Of Counsel,

Board of Public Utility Commissioners of
New Jersey.



SUBJECT-INDEX.

	PAGE
Statement of the Case.....	1
Statement of the Facts.....	2
The Points at Issue.....	4
The Decision of the Board of Public Utility Commissioners, and the Opinion of the Supreme Court	5

ARGUMENT.

I .

Electric Current is a commodity and when sold and delivered becomes the absolute property of the purchaser to be dealt with as he sees fit.....	14
---	----

I I .

The right of a Landlord to sell electric current to his tenants is a right of property protected by the provisions of the 14th Amendment to the Constitution of the United States and (1) the Legislature of this State has not assumed to regulate or interfere with such right and (2) it would be beyond the power of the Legislature to obliterate the right.....	15
---	----

I I I .

The Landlord has not only the inherent right to obtain the electricity from the Electric Company upon the same terms as others but that right is recognized by the Statute and one of the prime purposes of the Statute is to enforce it.....	19
---	----

I V .

This right to obtain service from a Public Utility without unjust discrimination is one protected by the provisions of the 14th Amendment to the Constitution of the United States.....	24
---	----

V .

Appellant has an investment of approximately \$30,000.00 in electrical equipment, consisting of wiring, conduits, outlets and fixtures installed for the purpose of enabling it to furnish electric current to its tenants for light and other domestic uses.....	26
---	----

V I .

Appellant is entitled, as of right, to service at the wholesale rates under the provisions of the Statute and the rules of the Board.....	27
---	----

V I I .

A Landlord may resell current. There is no reasonable basis for a classification between Landlords who furnish electric current through meters and those who furnish it where the charge is hidden in the rent. Classification based upon difference in benefits to customers is improper	33
---	----

V I I I .

Not only does the denial by the Board of the relief asked by Appellant, affirmed by the Supreme Court, create a distinction between Landlords based solely upon the matter as to whether they resell measured or unmeasured electricity but a practical discrimination was accomplished between Appellant and those Landlords who were, in fact, reselling measured electricity.....	49
--	----

IX.

Appellant is the real party in interest in this case.	
It is immaterial if it were not so. If the sub-	
metering corporation is conducting a lawful	
business it is entitled to have its rights pro-	
ected	50

X.

Even assuming that there may be some question as	
to the reasonableness of the classification which	
would put it within the power of the Board to	
determine, by the express terms of the Statute	
the burden of proof is on the electric company to	
show the reasonableness, and it has not sus-	
tained this burden.....	52

XI.

The application of Chapter 271 of the Laws of	
1912, 2 Cum. Supp. to C. S. of N. J. 1911-1924,	
p. 2353, Sec. 136-3770 M (1).....	54
Conclusion	55

TABLE OF CASES CITED.

A.

	PAGE
Aldis & Co. <i>vs.</i> Commonwealth Edison Co., P. U. R. 1925 E-363	39
Allgeyer <i>vs.</i> Louisiana, 165 U. S. 578; 41 L. Ed. 832	12, 25, 50
Armour Packing Co. <i>vs.</i> Edison Electrical Ill. Co., 115 App. Div. 51; 100 N. Y. Supp. 605.....	22
Atchison, T. & S. F. Ry. <i>vs.</i> D. & O. R., 110 U. S. 667, 28 L. Ed. 291.....	11

B.

Barr <i>vs.</i> Essex Trades Council, 53 N. J. Eq. 102, 30 Atl. 881	24
Bronx Gas & Electric Co., 9 P. S. C. R. 1st Dist. N. Y. 963.....	39

C.

Consumers Co. <i>vs.</i> Hatch, 224 U. S. 148, 56 L. Ed. 703	21
---	----

D.

Dobbins <i>vs.</i> Los Angeles, 195 U. S. 223, 49 L. Ed. 169	18, 26
---	--------

F.

Fickeisen <i>vs.</i> Wheeling Electrical Co., 27 L. R. A. (N. S.) 893, 67 S. E. 78.....	14
--	----

H.

Hackensack Water Co. <i>vs.</i> Board of Public Utility Commsrs., 96 N. J. L. 184, 115 Atl. 528.....	46
Hill <i>vs.</i> Pacific Gas & Electric Co., <i>et al.</i> , 136 Pac. 492, 22 Cal. App. 788.....	14

Hirsh <i>vs.</i> Block,	
50 App. D. C. 56, 267 Fed. 614, (first appeal)....	17
267 Fed. 631, (second appeal).....	17
256 U. S. 134, 65 L. Ed. 865, (third appeal).....	17
Hollander <i>vs.</i> Westchester Lighting Co., 79 Misc.	
646, 140 N. Y. Supp. 544.....	52
Hydrox Co. <i>vs.</i> Commonwealth Edison Co. (1924),	
Commonwealth Public Utility Reports, 324.....	34

I.

<i>In Re</i> : Minimum Monthly Charge for Lighting	
Service, 1 P. U. C. 239.....	31
<i>In Re</i> : Rate Schedules of N. Y. Edison & United	
Electric Light & Power Commission, 6 P. S. C.	
R., 1st Dist. N. Y.—289.....	38
Interstate Commerce Comm. <i>vs.</i> D. L. & W. R. R.,	
220 U. S. 235, 55 L. Ed. 448.....	33

J.

Jacobs <i>vs.</i> Chesapeake & Potomac Tel. Co., 2	
Maryland P. S. C. Repts. 190.....	27
Jonas <i>vs.</i> The Swetland Co. (Ct. of Appeals, Ohio)	
162 N. E. 755 (affirming opinion at 162 N. E. 45)	34

L.

Levine <i>vs.</i> Brooklyn Union Gas Co., 146 App. Div.	
464, 131 N. Y. Supp. 255.....	52
Lewis <i>vs.</i> Potomac Electric Power Co., decided	
Jan. 27, 1930. Copy of opinion annexed.....	7, 16, 42

M.

Maysville Water Co. <i>vs.</i> Stockton, 299 S. W. 582—	
(Kentucky).....	41
Messenger, <i>et als.</i> <i>vs.</i> Penn R. R. Co., 36 N. J. L.	
407.....	10, 11, 20
Middleton, Allen C., <i>vs.</i> Cumberland County Gas	
Co., (N. J. Comm.) 7, P. U. C. Repts. 484.....	32

N.

	PAGE
Nectow <i>vs.</i> City of Cambridge, 277 U. S. 183, 72 L. Ed. 842.....	18
New York & Queens Gas Co. <i>vs.</i> McCall, 245 U. S. 345, 62 L. Ed. 337.....	21, 33
North Carolina P. S. Co. <i>vs.</i> Southern Power Co., 282 Fed. 837.....	21

P.

Passaic Consolidated Water Co. <i>vs.</i> Board of Public Utility Commsrs., 5 N. J. Misc. 1078.....	46
People, <i>ex rel.</i> N. Y. Edison Co. <i>vs.</i> P. S. Commission, 191 App. Div. 237, 181 N. Y. Supp. 259.....	37
People, <i>ex rel.</i> N. Y. Steam Co. <i>vs.</i> Strauss, 186 App. Div. 787, 174 N. Y. Supp. 868.....	47
People, <i>ex rel.</i> Perceval <i>vs.</i> P. S. Comm., 163 App. Div. (N. Y.) 705, 148 N. Y. Supp. 583.....	22, 36
Pinney & Boyle Co. <i>vs.</i> Los Angeles Gas & Elect. Corp., 141 Pac. 620, 168 Cal. 12.....	15
Postal Tel. Co. <i>vs.</i> The Associated Press, 228 N. Y. 370, 127 N. E. 256.....	22
Public Service Railway Co. <i>vs.</i> Public Utility Commissioners, 81 N. J. L. 363, 80 Atl. 27.....	9, 20

S.

Schmeer <i>vs.</i> Gas Light Co., 147 N. Y. 529.....	22
Schmitt <i>vs.</i> Edison Electric Ill. Co., 58 Misc. 19, 110 N. Y. Supp. 44; affirmed, 125 App. Div. 909	52
Seigfried <i>vs.</i> Washington Electric Co., 6 P. U. C. 551	31
Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394	24
Souder, J. A., <i>vs.</i> Paulsboro Water Co. (N. J. Comm.) 7, P. U. C. Repts. 56.....	31, 51
Stadtlander <i>vs.</i> N. Y. Edison Co., 6 P. S. C. R. 1st Dist. N. Y. 48 (1916-B, P. U. R. 635).....	35

	PAGE
State, <i>ex rel.</i> Mason <i>vs.</i> Consumers' Power Co., 199 Minn. 225, 137 N. W. 1104.....	53
Supervision Co. <i>vs.</i> P. S., 10 P. U. R. 163, June 10, 1922	29, 30, 51
Survel Realty Corp. <i>vs.</i> Brooklyn Edison Co., N. Y. Law Journal, June 14, 1928, p. 1321.....	41

T.

Truax <i>vs.</i> Corrigan, 257 U. S. 311, 66 L. Ed. 254....	18, 26
---	--------

U.

United States <i>vs.</i> Carlos (1911), 21 Philippine 553, L. R. A. 1918 C, 582.....	15
U. S. Electric Lighting Co. <i>vs.</i> The Metropolitan Club of Washington, 6 App. D. C. 536.....	14

W.

Western Union Tel. Co. <i>vs.</i> Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765.....	20
William <i>vs.</i> Fears, 179 U. S. 270, 45 L. Ed. 186.....	24

THE JOURNAL OF THE

AMERICAN GEOGRAPHICAL SOCIETY

FOR THE YEAR 1891

EDITED BY

JOHN W. COOPER

NEW YORK

1892

PUBLISHED BY

THE AMERICAN GEOGRAPHICAL SOCIETY

115 N. 4TH ST. PHILADELPHIA

AND

115 N. 4TH ST. PHILADELPHIA

AND

115 N. 4TH ST. PHILADELPHIA

AND

115 N. 4TH ST. PHILADELPHIA

AND

115 N. 4TH ST. PHILADELPHIA

AND

115 N. 4TH ST. PHILADELPHIA

New Jersey Court of Errors and Appeals

THE SIXTY-SEVEN SOUTH MUNN,
INC.,
Prosecutor-Appellant,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS OF NEW JERSEY and
PUBLIC SERVICE ELECTRIC AND
GAS COMPANY,
Respondents.

On Appeal from
Supreme Court.

Sat Below:

J. J. Trenchard,
Lloyd and Case.

BRIEF FOR APPELLANT.

(Italics, etc., ours except where otherwise noted.)

Statement of the Case.

A writ of certiorari (p. 1) was allowed to bring up for review an order of the Board of Public Utility Commissioners (p. 194) dismissing a complaint by the Sixty-Seven South Munn, Inc., against the Electric Company charging that the Sixty-Seven South Munn, Inc., had made application to be supplied with electric current at 67 South Munn Avenue, East Orange, an apartment house owned by it, the current to be furnished through a master meter, at the regular wholesale rate of the Electric Company under the schedule approved by the Public Utility Commissioners, the current thereafter to be supplied by the Sixty-Seven South Munn, Inc., to its tenants through sub-meters upon terms as provided by agreements with them and that the Electric Company had denied the request. The order followed a decision

(p. 195). The testimony taken before the Board was returned with the writ (p. 16). Reasons were filed (p. 3). The opinion of the Supreme Court is found on p. 209. It resulted in a rule for judgment affirming the Board (p. 217). From that judgment, appeal was taken to this Court (Notice and Ground of Appeal, p. 218).

Statement of the Facts.

Appellant is the owner of an apartment house at No. 67 South Munn Avenue, East Orange.

Public Service Electric and Gas Company is a public utility engaged in furnishing electric current to the public under regulations as to rates and service prescribed by respondent Public Utility Commission.

The owner claims the right to contract, and has actually contracted, with tenants upon said premises to furnish electric current for light and other domestic purposes at the prevailing rate of the electric company for a like amount of current consumed, as approved by the Board of Public Utility Commissioners.

The owner proposes to purchase from the electric company current sufficient for its and its tenants' needs, to be measured by a master meter furnished, maintained and read by the electric company, the owner to pay for all such current delivered at the prevailing rate of the electric company for a like amount of current consumed.

The owner employs an agent, Meter Service Corporation, organized under the laws of New Jersey, which furnishes, installs, reads, tests, maintains and calibrates individual meters, or sub-meters, for each of the tenants, renders bills to and collects from the tenants, *as agent of the owner*, and, *as such agent* pays the bills submitted to the owner by the electric company.

The compensation to be paid by the owner to its agent is regulated by private contract between them and has no bearing on this case.

The owner has spent approximately \$30,000 in electric wiring and equipment, the sufficiency and adequacy of which have been approved by the Board of Fire Underwriters and the municipal authorities.

It appeared in evidence that in over 400 cases apartment houses, apartment hotels, factories, office and loft buildings in the territory served by the electric company electric current is being re-distributed and sold by the owner, directly or indirectly, to tenants of the premises (pp. 201, 207 incl.), and that this practice has continued for a long period with the knowledge and consent of the electric company. In forty odd cases electric current is resold through sub-meters and the resale purchasers are charged by the landlords for the actual current used—just as is here proposed (pp. 168-176-189).

Application was made by appellant to the electric company on or about August 31, 1928, for the installation of a meter to measure the quantity of electricity purchased by appellant from the electric company, such current to be distributed by appellant to its tenants in the building through meters.

The electric company refused to install a meter for that purpose on the ground that it was contrary to its "policy" to permit an owner to purchase and resell current to tenants on the premises.

In this refusal it was sustained by the Board of Public Utility Commissioners and has now been sustained by the Supreme Court.

The Points at Issue.

While ten reasons for setting aside the order brought up were assigned in the Supreme Court and the argument in the Supreme Court was made under seventeen points, the Supreme Court in its decision consolidated them into four (pp. 210, 211).

The contentions of appellant were, and are, that: electric current is a commodity and the owner may use it as he will subject only to the lawful exercise of the police power; the owner of an apartment house is, under the common law and the statute law of this State, entitled, *as matter of right*, to receive current at such rates as the electric company furnishes current to any other customer taking a like amount; it is no concern either of the State or of the electric company what the owner of such an apartment house may do with such current after he shall have received it unless he himself becomes a public utility in so dealing with it, in which event the Public Utility laws would apply to him (and it is not contended in this case that appellant intends to so deal with the electric current as that he will become a public utility); to deprive the owner of the right to obtain the current and to deal with it in the manner contemplated, *i. e.*, to resell it to his tenants, is to deprive him of his property without due process of law and deny him the equal protection of the law within the meaning of the 14th Amendment to the Constitution of the United States, and to impair the obligation of his contracts with his tenants within the meaning of the Constitution of the United States and to create an unjust discrimination as against him within the meaning of the public utilities law.

**The Decision of the Board of Public Utility
Commissioners and the Opinion of
the Supreme Court.**

The decision of the Board of Public Utility Commissioners is found on p. 195. It is conceded that the act of the owner in reselling the current and the acts of the Meter Service Corporation render neither public utilities subject to the control of the Public Utilities Commissioners. The Board held that this *should not* be so and, so holding, to prevent a situation arising which it assumed to believe was against public policy, it claimed the right to permit the Electric Company to refuse to furnish the current to the owner at the same rates at which current would be furnished to others.

It said, in effect, that, while it had no jurisdiction under the statute to interfere with the relations between landlord and tenant or with the business of the sub-metering concern, it would prevent such relations arising and such business being created because, if they arose or it was created, they would not be subject to regulation. The Board overlooked that its jurisdiction did not extend to regulation of the *furnishing of electricity*. The statute confers upon it the power to regulate, *not* the furnishing of electricity, but the furnishing of electricity *by a public utility* which by the statute is defined, section 15 of the Public Utility Act, P. L. 1911, ch. 195, section 15 (*2 Cum. Supp. to C. S.*, p. 2880, Sec. 167-14), to be:

“Every individual, co-partnership, association, corporation or joint stock company * * * that now or hereafter may own, operate, manage or control within the State of New Jersey, any * * * electric light * * * system, plant, or equipment *for public use under the privileges granted or hereafter to*

be granted by the State of New Jersey, or by any political sub-division thereof."

It may be that the Legislature may have the right to regulate the *business of furnishing electricity* as such and that it may forbid private production, where no privilege or franchise of the State of New Jersey is exercised, and that it may interfere with the relations between landlords and tenants and forbid landlords either generating their own current and furnishing it to their tenants at such rates as they see fit, or purchasing it from a public utility or from private companies and furnishing it to their tenants at such rates as they see fit. But the Legislature has *not* so provided, and to so provide is a legislative function and not the privilege of the Board under existing legislation.

The Board likewise overlooked those provisions of the Public Utility Act which will be hereafter set forth, which provide, in effect, that there shall be no unreasonable discrimination and, in effect, that rates for current are to be based on classifications of the amounts used and not upon the uses to which the current may be put after it is furnished.

It recognized that many owners of property secure current at wholesale rates and then permit their tenants to use that current without making a fixed charge to them. *This practice is countenanced.* While both the Board and the Supreme Court held that there *was* a distinction in principle between those cases and this, the Supreme Court contenting itself with saying that to state the proposition that there is no distinction "is to refute it. In the one instance the service to the consumer is by a controlled utility. In the other it is not," we still submit that there is *no* distinction and that the distinction indicated by the Supreme

Court is wholly illusory, and in this we are sustained by an opinion of the *Supreme Court* of the District of Columbia handed down January 27, 1930, a copy of which is annexed to this brief. The answer to the suggestion of the Supreme Court to the effect that the distinction is that the service in one case is by a controlled utility and that the other is not is that such a distinction, in the light of the law, is without force.

The statement indicates an adherence to the idea of the Board that all current to paying consumers should be furnished by public utilities subject to the control of the Board, *but the legislature has not so ordained*. Electricity may be generated by an owner for his tenants' use and by a private company for sale to consumers and the Board will not have any control unless, in the furnishing of the current, a privilege is exercised, granted either "by the State of New Jersey or by any political subdivision thereof", just as is the effect of the statute in the District of Columbia considered by the Court in *Lewis vs. Potomac Electric* which will be referred to on page 42 of this brief. It is, of course, absurd to say that, in a case where the landlord furnishes current to his tenants without making any specific charge, there is no charge made for it. The charge is hidden in the rent. *Where is the difference between that case and the one at bar where the landlord furnishes the current to his tenants at a fixed price?* The effect upon the public utility is precisely the same for the amount of money received by the utility in each instance is the same. The *only* difference is that in one case the charge by the landlord to his tenant is hidden in the rent and in the other it is not. Is this a substantial difference?

The Board said it was because (p. 203):

"There is involved a question of *public policy*, one which relates to the practical ap-

plication of a well defined State policy in matters of regulation. It is essential that the efficiency of regulation should be maintained, consistent with the practical handling of the sale and distribution of electric energy and the preservation of reasonable and proper relations between the customer and the public utility furnishing the service. Long established relations between a utility and its customers which relations are generally regarded as serving the public convenience, differ materially from the relations it is proposed shall exist in the case before us."

We understand the words but we do not understand their application to the case at bar. The Board is, in effect, saying that no one should be permitted to furnish current to customers except a public utility but nowhere in the law do we find any such provision or any announcement of any such public policy and it is not for the Board but for the legislature to determine public policy.

The Board is mistaken when it says on page 204 that, in the first case, the relations between the parties are those of landlord and tenant, whereas, in the second, they are not. In *both* cases the relations are those of landlord and tenant. The contract by the owner to furnish current, and by the tenant to take, is a *part of the terms of the lease* and we repeat that the sole distinction is that, in the one case, the charge is *hidden* in the rent, and in the other it is not.

To revert to the language of the Supreme Court, page 216, to the effect that the distinction is that in the one instance the service to the consumer is by a controlled utility and in the other it is not, we submit that this language is but another way of putting the idea entertained by the Board, *i. e.*, that public policy requires that public utilities only shall sell electric current, which is not the law.

The Supreme Court, in sustaining the right of the Board to permit the Electric Company to refuse to furnish current, in support of its theory that, while electricity is a commodity when delivered and the person to whom delivered may do as he pleases with it and that no constitutional rights of the landlord are affected if the Board permit the Electric Company to withhold the furnishing of current under the circumstances in the case at bar, said (p. 214):

“We know of no inherent right in the prosecutor by virtue of which it may compel the sale and delivery by the respondent of the latter’s product.”

It makes little difference if there *is* no inherent right if there is a right granted by statute for the provisions of the constitution of the United States apply, not only to rights which may be called “inherent”, but also to those which have been created by statute. It is as much an offense against the constitutional rights of an individual to deprive him of property to which he is entitled by virtue of a statute without due process of law or to deny him the equal protection of the law or to impair the obligation of a contract with respect thereto, as it is to perform similar acts with respect to property to which he is *inherently* entitled. But we submit that the Supreme Court is mistaken in its assumption that the landlord has no inherent right to compel the sale and delivery by the respondent Electric Company of the latter’s product. The Electric Company is a public utility. As such, and *irrespective of the statute*, it is obliged to furnish its commodity to all comers and without undue preference.

This Court in *Public Service Railway Co. v. Public Utility Commissioners*, 81 N. J. L. 363, at p. 365, said:

“The Public Utility act does not abrogate the system of three cent fares maintained by the railway company, because section 18 applies only to such preferences as are ‘undue or unreasonable’. *This was not the enactment of a new condition, nor did it create a new legal status. It was the immemorial rule of the common law.* Messenger v. Pennsylvania Railroad, 7 Vroom 407; Atchison, T. & S. F. Ry. v. D. & N. O. R., 110 U. S. 667.”

“When the railway, a decade ago, instituted the system of three cent fares upon some of its lines, and entered into contracts in the form of municipal ordinances on other lines, it did so under the aegis of this common law rule, now *transmuted* into statute law.”

“The *only* change therefore that has been effectuated by this legislation which can be said to affect the railway at all at this juncture is, that the legislature has created a commission and conferred upon it the power to determine what preferences are ‘undue or unreasonable’.”

In *Messenger, et al. v. Pennsylvania R. R. Co.*, 36 N. J. L., p. 407, this Court, speaking of the obligation at common law of common carriers to furnish service to all without undue discrimination, said:

“It is important to remark, that this obligation of this class of bailees is always said to arise *out of the character of the business*. Sir William Jones, importing the expression from the older reports, declares that this, as well as the other peculiar responsibilities of the common carrier, *is founded in the consideration that the calling is a public employment*. Indeed, the compulsion to serve all that apply could be justified in no other way, as the right to accept or reject an offer of business is necessarily incident to all private traffic.”

The fact that, at common law, a railroad company is prohibited from discriminating unreasonably in favor of one or against another and that it must furnish service to all is recognized in *Atchison, T. & S. F. Ry. v. D. & N. O. R.*, 110 U. S. 667, 28 L. Ed. 291, at p. 297.

It is true that these cases deal with common carriers but the basis of the rule, as stated in *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 410, is that "the calling is a public employment".

A general rule of the common law embraces not only all objects which may be within its scope at the time it had its genesis but *all* objects which may come within its scope at any subsequent time for all substantive rules of the common law are based upon an underlying principle. Electric companies enjoying grants and privileges from the State are engaged in a "public employment". It is because they are so engaged that the legislature may legislate with respect to them. The fiat of the legislature does not make them public utilities for the legislature has no power to legislate with respect to them unless they are, *in essence*, public utilities. If they are, in essence, public utilities, then the rules of the common law, with respect to those engaged in a public employment, apply, and, even if the public utility law was not in existence, the Electric Company would be bound under the common law to furnish all applicants without undue discrimination. There is, therefore, an *inherent* right residing in appellant to compel the sale and delivery by the Electric Company of the latter's product without undue discrimination.

This inherent right is but perpetuated and protected by the provisions of the statute. It is not created thereby but, if so created, it is a right with respect to which the person entitled thereto is protected by the federal constitution.

The Supreme Court, in considering the constitutional questions raised, holds that no constitutional rights of appellant can arise with respect to property unless he first becomes possessed of the *physical* property (pp. 212, 213). The Court ignores the fact that the provisions of the 14th amendment are not concerned solely with physical property. The right to do business free from any unlawful interference is property within the meaning of the constitutional provision.

The right to contract and to employ agents is property.

Allgeyer v. Louisiana, 165 U. S. 578; 41 L. Ed. 832, at p. 836.

The right to deal with others and to contract to receive property and to secure property without unlawful discrimination, based upon common or statute law, is as much property, within the meaning of the constitutional amendment, as is the physical property when reduced to possession.

Both the Board and the Supreme Court have, in effect, said that they recognize that electricity, when reduced to possession, is property within the meaning of the constitutional provisions and that the State cannot interfere unreasonably with the right of the possessor to contract with respect thereto but that they will prevent the mantle of the constitution falling upon appellant by sustaining the alleged right of a public utility which, under the common law, is bound to serve all comers without undue discrimination, which duty is recognized and enforced by the statute, to refuse to furnish the commodity; and that they recognize that, assuming the right, the Legislature has not as yet attempted to regulate the relations of landlord and tenants with respect to the supply of electricity or the right of private individuals

to supply it, if in so doing they are not obliged to exercise a privilege conferred by the State or a political sub-division thereof, but that they will *indirectly* permit the regulation of those relations and the supply of current by private individuals by preventing landlords and private individuals from securing the current from a public utility upon the same terms as others, so that the landlords and the private individuals will not have the current to furnish; and that they will permit a discrimination by the public utility furnishing current between customers based solely upon the fact that, in dealing with the current in the one case the landlord sells it to his tenant at a rate fixed by measurement and in the other at a rate which is hidden in a rent charge.

Remembering that the utility in each case gets precisely the same amount of money, is such a classification under the law one of substance? That is the crux of this case and, in its determination, regard must be had not alone to what the legislature has done with respect to regulation but what it has not done. It all comes back to the statement of the Supreme Court on p. 216 that the distinction consists in this: "In the one instance the service to the consumer is by a controlled utility. In the other it is not." Both the Board and the Supreme Court have, we submit, conceived that public policy demands that electricity should be furnished to the consumer direct by a "*controlled utility*" and that there should be a monopoly and that the utility and the Board are authorized to perform such acts as may be in accord with such *supposed* public policy overlooking that it is for the legislature to determine whether there should be any such public policy and to authorize the performance of such acts, if within its power, as would effectuate it and that the legislature has not done that thing.

ARGUMENT.

I.

Electric current is a commodity and when sold and delivered becomes the absolute property of the purchaser to be dealt with as he sees fit.

This is conceded by the Supreme Court but may not be admitted by the respondents here.

Curtis on the Law of Electricity says (pp. 6-7):

"In spite of its invisibility, electricity is considered in law as personal property subject to ownership, sale and disposal as inanimate objects. It has a substance which may be measured. And one, having the ownership and possession of an electric wire, may properly be said to have possession of the electricity with which the wire is charged."

In *United States Electric Lighting Company v. The Metropolitan Club of the City of Washington*, 6 App. D. C. 536, Mr. Justice Morris, at p. 543, said:

"The property in question (electric current) is the property of the electric lighting company, and remains its property until it is delivered to the club under the contract, when it becomes the property of the club."

That electricity is property and that all the incidents of ownership are inherent in the purchaser, including the right to dispose of it as he pleases, is also indicated by the following cases:

Hill v. Pacific Gas & Electric Co., et al.,
136 Pac. 492, 22 Cal. App. 788;

Fickeisen v. Wheeling Electrical Company, 27 L. R. A. (N. S.), p. 895 (W. Va.) 67 S. E. 788.

In *Pinney & Boyle Co. v. Los Angeles Gas & Electrical Corp.*, 141 Pac. 620, 168 Cal. 12, the Court said:

“Generally speaking, the public utility can and does have no interest in or control over the commodity which it furnishes when it has passed into the possession of the customer. It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility.”

Electric current may be the subject of larceny.

Curtis on the Law of Electricity, Sec. 4;
U. S. v. Carlos (1911), 21 Philippine 553,
 L. R. A. 1918 C. 582.

II.

The right of a landlord to sell electric current to his tenants is a right of property protected by the provisions of the 14th Amendment to the Constitution of the United States and (1) the Legislature of this State has not assumed to regulate or interfere with such right, and (2) it would be beyond the power of the Legislature to obliterate the right.

It is hardly necessary to argue the second sub-division because no contention can be made that the Legislature has assumed either to obliterate or to regulate the right of a person who becomes possessed of electric current to sell it or do with it as he pleases, provided he does not exercise a privilege conferred by the State or by any political sub-division thereof. The Legislature has assumed to regulate and to confer power upon the

Board to regulate *only* public utilities as defined by the act.

Section 14 of the Public Utility Act, 2 Cum. Supp. to C. S. of N. J., 1911-1924, at p. 2880, defines a public utility:

“Every individual, co-partnership, association, corporation or joint stock company * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any * * * electric light * * * system, plant or equipment for public use *under the privileges granted or hereafter to be granted by the State of New Jersey or by any political subdivision thereof.*”

See *Lewis v. Potomac Electric Power Co.* in the Supreme Court of the District of Columbia, opinion rendered January 27th, 1930, a copy of which opinion is annexed to this brief.

It is the business of furnishing of electricity *by a public utility, as thus* defined, which is subject to regulation *not* the business of furnishing electricity.

It *may* be that the Legislature has the right to *regulate* the business of furnishing electricity *as such* and that it may forbid private plants generating electricity for sale to private customers, where no privilege or franchise of the State of New Jersey is exercised, and that it may interfere with the relations between landlords and tenants and forbid landlords generating their own electricity or purchasing it from a public utility or from private companies and furnishing it to their tenants at such prices as they see fit. But the Legislature has *not* so provided, and to so provide is a legislative function and not the privilege of the Board under existing legislation.

We deny that the State could interfere with the furnishing of electricity to tenants in the manner last indicated for the reason that such inter-

ference would not be within the purview of the police power. While the right of the State to interfere in the business of operating a public utility is extensive, it is *not* unlimited and the mere fact that a commodity is assumed to be such a public necessity as that individuals furnishing the commodity may be subject to regulation does not indicate that the commodity itself is the subject matter of legislative control. Electricity when reduced to the possession of a person being private property, the regulation of its use, which includes the right to resell, *must be based upon some relation to the public safety, health or welfare*. The owner who may be engaged in reselling electric current, exercising no privilege or grant from the State, cannot be defined a utility by legislative fiat merely because he is selling electricity.

In *Hirsh v. Block*, 50 App. D. C. 56, 11 A. L. R. 1238, 267 Fed. 614, on second appeal, 267 Fed. 631, the Court at 267 Fed. 620, on first appeal, said:

"A private business cannot be made public, or impressed with a public interest, merely by legislative fiat. A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power. In both instances, the power resides in the judiciary to restrain the law-making power within constitutional limitations."

This case was reversed by the Supreme Court of the United States, 256 U. S. 134, 65 L. Ed. 865, but the reversal did not affect the principle above indicated. The case involved the housing laws of the District of Columbia which were adopted as *emergency measures* during the war. The reasons of the Supreme Court of the United States for its reversal are indicated in the following quotations from the opinion:

"These cases are enough to establish that a public exigency will justify the Legislature

in restricting property rights in land to a certain extent without compensation. * * * The only matter that seems to us open to debate is whether the statute goes too far. *For just as there comes a point at which the police power ceases and leaves only that of eminent domain*, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking without due process of law. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. Ed. 743, 744, 27 Sup. Ct. Rep. 440.

* * * * *

The regulation is put and justified only as a temporary measure. See *Wilson v. New*, 243 U. S. 332, 345, 346, 61 L. Ed. 753, 772, L. R. A. 1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Ft. Smith & W. R. Co. v. Mills*, 253 U. S. 206, 64 L. Ed. 862, 40 Sup. Ct. Rep. 526. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

As it was, the Chief Justice (White) and Justices McKenna, Van Devanter and McReynolds dissented. It is one of the five to four opinions of the Court. There is no such national, state or municipal emergency present in the case at bar as was present in that case. The case is important in indicating *what* emergencies and exigencies *must* be present before the Legislature may interfere with the right to contract as between landlord and tenant.

An interference with the right of the landlord to resell to tenants would be within the principle of *Dobbins v. Los Angeles*, 195 U. S. 223; 49 L. Ed. 169; *Truax v. Corrigan*, 257 U. S. 311; 66 L. Ed. 254; *Nectow v. The City of Cambridge*, 72 L. Ed. 842, 277 U. S. 183 (Zoning case).

It cannot be urged that the Legislature may interfere to protect tenants upon the ground that, although the rate now to be paid to the landlord

by the tenant is the same as that for which the tenant could purchase the current from the Utility, there is no assurance that the price may not be raised in the future, unless it be that the contractual relations of landlord and tenant *generally* are subject to legislative regulation, even to the extent of determining the amount of rent which may be charged, for the right to obtain electricity is no more important than the right to obtain a place to live in. The answer is that no tenant is obliged to become such if he does not so desire. He may either take the apartment upon the conditions offered by the landlord or leave it.

The Legislature cannot interfere because of any inherent or other right of the tenant to compel the utility to furnish current directly to him for a tenant to exercise such a right must be in a position to take the current. He may disable himself from so doing by contract with his landlord. His right is against the utility, not against the landlord.

But however that may be, the Legislature has *not* assumed to regulate the relations between landlords and tenants with respect to the supply of electricity.

III.

The landlord has not only the inherent right to obtain the electricity from the electric company upon the same terms as others, but that right is recognized by the Statute and one of the prime purposes of the Statute is to enforce it.

We have already referred to cases in our own State recognizing the duty of a public utility under the common law to furnish its commodity to all comers without undue discrimination.

Public Service Railway Co. v. Public Utility Commissioners, 81 N. J. L. 363, at p. 365; 80 Atl. Rep. 27;
Messenger v. Pennsylvania R. R. Co., 36 N. J. L. 407.

A duty is always based upon a corresponding right. If there be no right there is no duty. The admission of the duty admits the right.

Wyman on Public Service Corporations, sec. 1288, says:

“ * * * All persons are entitled to have the same service on equal terms and at uniform rates.”

In *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92, 45 L. Ed. 765, Mr. Justice Brewer, in delivering the opinion of the Court, at page 100 of 181 U. S. stated:

“Common carriers whether engaged in interstate commerce or in that wholly within the state are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any differences in charge *which is not based upon difference in service, and even when based upon difference in service must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.*”

In *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. Ed. 337, Mr. Justice Clarke, in delivering the opinion of the U. S. Supreme Court, at page 351 stated:

“Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.”

See also

Consumers Co. v. Hatch, 224 U. S. 148, 56 L. Ed. 703.

A public utility must serve a competitor upon the same terms as others.

In *North Carolina Public Service Company v. Southern Power Company*, 282 Fed. 837 (certiorari dismissed 263 U. S. 508, 68 L. Ed. 413), the Court, at page 844, stated:

“There is high authority for the general proposition of law that one competitor in business cannot demand service of another in promotion of its business. *But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority, and it must serve all alike.* In such public service it cannot pick and choose its customers.”

And see

Pond on Public Utilities, 3rd Ed., sec. 282, quoted on page 34 of this brief.

In *People ex rel. Percival v. Public Service Commission*, 163 App. Div. (N. Y.), 705, 148 N. Y. Supp. 583, the Court, at page 707, said:

“The Edison Company is a Public Service Corporation holding a franchise from the State and enjoying, by reason of its public character, certain valuable privileges not usually accorded to a private individual or corporations for its own individual benefit, not the least of which is the right to use the public streets and highways for carrying the conduits. Having undertaken to perform a public service and accepted special privileges in consideration of such undertaking, it is bound to serve impartially every member of the community who demands its service and stands ready to pay therefor and to comply with proper and reasonable regulations respecting such service. *Gibbs v. Baltimore Gas Company*, 130 U. S. 396; *Central Union Tel. Co. v. Averill*, 199 N. Y. 128.”

See also

Schmeer v. Gas Light Co., 147 N. Y. 529.

In *Postal Telegraph Cable Company, Appellant, v. The Associated Press, Respondent*, 228 N. Y. 370, 127 N. E. 256, the Court said:

“A public service corporation is not at liberty to grant extraordinary facilities to one man and arbitrarily refuse them to another. What it grants to one, it must, in like conditions, when detriment would follow preference, grant impartially to all, within the limits of capacity. Plaintiff cannot justify discrimination among customers by dividing contracts into new and old, and applying a different rate to each. The obligation of the law qualifies, and in case of conflict overrides, the obligation of the contract.”

In *Armour Packing Co. v. Edison Electric Ill. Co.*, 100 N. Y. S. 605, 115 App. Div. 51, the Court said:

"A corporation engaged in furnishing electric light and power * * * may not charge a customer greater rates than it charges others for the same service and under the same conditions, and this notwithstanding that the charges are made the customer in question under a written contract."

Section 167-24 of the Public Utility Act, 2 Cum. Supp. to C. S. of N. J., p. 2886 provides that no public utility shall:

"24 (b) Adopt or impose any unjust or unreasonable classification * * *; or

"24 (c) Adopt, maintain or enforce any regulation, practice, or measurement which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory * * *", nor, "* * * provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said Board.

"24 (d) Make or give * * * any undue or unreasonable preference or advantage to any person or corporation."

Chapter 271 of the laws of 1912, regulating the use of electricity in cities for light, heat and power governing standards, approval of wiring, inspection, etc., provides that (Sec. 3) (2 Cum. Supp. to C. S. of N. J., secs. 136-3770 M (3), p. 2354):

*"It shall be unlawful for any person, real or artificial, engaged in the business of furnishing electricity for light, heat or power purposes, to refuse to supply electrical current for such purposes upon the production of a written certificate of the inspector of electrical wires, etc. * * *."*

It is necessary only to refer to the foregoing sections of the statutes to indicate that the com-

mon law right of all comers to obtain a product from a public utility upon the same terms as others, subject only to reasonable classification, is perpetuated by the statute and that one of the *primary* purposes of the statute is to enforce the right.

IV.

This right to obtain service from a public utility without unjust discrimination is one protected by the provisions of the 14th Amendment to the Constitution of the United States.

We have already referred to those cases in the Supreme Court of the United States holding that the constitutional provisions apply not only to physical property but to the right to contract, and, indeed, to *any valuable* right whether it refers to tangible property or not.

A man's business, occupation, profession or calling is his property and is protected and guaranteed by the constitution of the United States.

Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394;

Barr v. Essex Trade Council, 53 N. J. E. 101, 112; 30 Atl. 881.

In *William v. Fears*, 179 U. S. 270, 45 L. Ed. 186, Chief Justice Fuller delivered the opinion of the Court and said:

“The liberty, of which the deprivation without due process is forbidden, ‘means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be *free in the enjoyment of all his faculties*; to be free to use them in all lawful ways; to live and work

where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

Rights to deal with property or to conduct business which are protected by the constitution include the right to make any contract necessary or convenient for the dealing with such property or the conduct of such business subject, of course, to reasonable police regulation.

Allgeyer v. Louisiana, 165 U. S. 578; 41 L. Ed. 832.

The *business* of appellant is the *operation* of an apartment house. It is the owner of that house. It has invested upwards of \$30,000 in electrical equipment, consisting of wiring, conduits, outlets and fixtures installed for the purpose of enabling it to furnish electric current to its tenants for light and other domestic uses. It is necessary, or at least convenient, which is sufficient, for it to secure electric current for its tenants. It may not be deprived of that right by the legislature. It has not been so deprived. On the contrary, under the common law, it has the inherent right to obtain electricity from a public utility, without unreasonable discrimination, and that right is protected by the statute, and it has, under the common law and the constitution of the United States, the right to make contracts with its tenants with respect to the supply of electricity.

We know of no reason why this right to obtain current is not one of those within the purview of the 14th amendment as interpreted by the Supreme Court of the United States.

We reiterate that the sole basis of the decision of the Supreme Court that no constitutional rights

of appellant are involved is its assumption that the right to secure service from a public utility upon such terms and conditions as the common law provides and as the statute directs is not a right protected by the constitution of the United States and in this we submit the Supreme Court erred.

It is not only that provision of the 14th amendment which protects against the taking of property without due process of law but also that provision which forbids the denial of the equal protection of the law which is here involved.

Dobbins v. Los Angeles, 195 U. S. 223;
49 L. Ed. 169;

Truax v. Corrigan, 257 U. S. 311, 66 L.
Ed. 254.

V.

Appellant has an investment of approximately \$30,000.00 in electrical equipment, consisting of wiring, conduits, outlets and fixtures installed for the purpose of enabling it to furnish electric current to its tenants for light and other domestic uses.

It is entitled to such use of this property as will enable it to obtain a fair return upon the investment and any act which makes it impossible for it to so use its property is unlawful, a deprivation of its property right and contrary to the constitution of the United States.

This matter has already been argued and is made a separate point merely to again direct the attention of the Court to the fact that this investment has been made.

VI.

Appellant is entitled, as of right, to service at the wholesale rates under the provisions of the Statute and the rules of the Board.

It is a customer.

That the ultimate user is not necessarily the "customer" is demonstrated in *Jacobs v. Chesapeake and Potomac Telephone Co.*, 2 Maryland Public Service Commission Reports, June 19, 1911. Ambler, Chairman (Opinion, condensed) said:

"Complainant alleges that the Telephone Company required him to pay ten cents for telephoning from a booth in the lobby of Kernan's Hotel to his office, both points being within the city, when its published schedule shows a rate of five cents on local messages from any public pay station.

The equipment, constituting what is known as a 'private branch exchange', was installed by the telephone company and rented to the hotel under a contract whereby the hotel agreed to pay a fixed rental and in addition a toll of three cents on all outgoing local messages and the regular rates on long distance messages. The 'private branch exchange' is controlled by the hotel, which not only pays all expenses connected with its operation, including salaries of the operators, but fixes and collects all charges for the use of its facilities, including coins deposited in the slot boxes. The telephone company keeps a record of the outgoing messages and is paid for them at the rate of three cents each, according to the number shown by its monthly accounts, regardless of the amount that may have been collected by the hotel.

Complainant contends that by entering the booth and taking down the receiver, he be-

came a customer of the defendant, entitled to service at the regular rates.

In our opinion this contention is not sound. The plaintiff could not, by merely entering the booth and taking hold of the receiver, make himself a customer of the telephone company."

The landlord's position in the instant case is the same as that of the hotel keeper. He owns and controls the current after it passes his meter just as the hotel keeper controlled the telephone business from and after passing the "private branch exchange."

Chapter 271 of Laws of 1912, 2 Cum. Supp. to Comp. Stat. of N. J., 1911-1924, Sec. 136-3770M (3), regulating the use of electricity in cities for light, heat and power governing standards, approval of wiring, inspection, etc., provides that (Sec. 3):

"It shall be unlawful for any person, real or artificial, engaged in the business of furnishing electricity for light, heat or power purposes, to refuse to supply electrical current for such purposes upon the production of a written certificate of the inspector of electrical wires, etc. * * *"

Public Utility Act, Chap. 195, Laws of 1911, 2 Cum. Supp. to Comp. Stat. of N. J. 2883:

"Par. 17. The Board shall have power * * * to require every public utility * * * (b) to furnish safe, adequate and proper service * * *"

In the New Jersey Commission's rules, regulations and recommendations for electrical supply utilities, revised and promulgated December 8, 1927, a "customer" is defined as follows:

“Definitions:

“(b) The word ‘customer’ shall be taken to mean any person, firm, corporation, municipality, municipal, county or state institution, or agency receiving service from any such utility.”

The utility is required under the Commission’s Rule 16 to furnish each “customer” with current and a meter:

“XVI. The utility shall, without charge, furnish each customer supplied with energy on a measured basis, with an electric meter and such service appliances as are customarily furnished by the utility in order to connect the customer’s equipment with its mains.”

The New Jersey Commission also defined a “customer” in its proposed rules and regulations for water utilities promulgated February 13, 1917, and held by it, in the *Supervision Co. v. Public Service* case (X, P. U. R. 163) to apply to all classes of service:

“2. Service Connection.

A service line will be used to supply a single building or a single group of buildings such as a group of factory buildings, hospital buildings, or a single institution having a number of separate buildings. Not more than one service line shall be run into a building unless by special agreement between the utility and the applicant for such service line.

‘Customer’ as used herein shall be the party contracting for service to a property as hereinafter classified, i. e.,

* * * * *

(b) *A combination of buildings*, owned by one party in one common enclosure occupied by one family or business, or

* * * * *

(d) *A building owned by one party of more than one apartment and using in common one hall and one entrance, or*

(e) *A building owned by one party having a number of apartments or offices and using in common one hall and one or more means of entrance, or*

(f) *Each apartment of a multi-family dwelling or apartment house where service to individual families is desired."*

In *The Supervision Company v. Public Service Electric Co.*, X, P. U. R., p. 163, decided by the New Jersey Commission June 20th, 1922, there was an application to furnish current for re-sale to "separate and distinct stores" with nothing but a roof in common. The Commission there adopted, as applicable to all classes of service, its definition of a "customer" (with other definitions, not pertinent), as promulgated in its water utility rules, as follows:

"(d) A building owned by one party of more than one apartment and using in common one hall and one entrance, or

(e) A building owned by one party having a number of apartments or offices and using in common one hall and one or more means of entrance."

The premises of appellant are precisely within the Commission's definitions of a "customer" (d) and (e).

The conditions which justify the refusal of service are clearly indicated by the rules of the commission and by statute.

Rule XI of the Commission for electrical supply utilities provides that:

"A utility may refuse to connect with any customer's wiring when it is not in accordance with the provisions of the current edi-

tion of the National Electrical Code, or when the certificate of the Underwriters or of the local inspection bureau has not been issued or when the wiring is not in accordance with the rules of the utility (see Par. 1, Chapter 271, P. L. 1912). See also Section 3, Chapter 271, P. L. 1912, which provides that “* * * it shall be unlawful for any person, real or artificial, engaged in the business of furnishing electricity for light, heat or power purposes to refuse to supply electric current for such purposes upon the production of a written certificate of the inspector of electrical wires and appliances approving the construction thereof in any building * * *.”

In setting forth the usual practice of electric utilities the Commission, in *In re Minimum Monthly Charge for Lighting Service*, 1 P. U. C. 239, pointed out that

“Each customer is supplied through a meter, * * *.”

Also *Siegfried, et al. v. Washington Electric Co.*, 6 P. U. C. 551, the Commission held that it is the practice to furnish through one meter, electric current to be used for lighting corridors and the premises of several tenants in the same building where the current is to be paid for by the owner.

In *J. A. Souder vs. Paulsboro Water Company* (N. J. Commission), VII, P. U. C. Reports, p. 56, it was stated:

“* * * The building comprises two stores on the first floor, which are rented. The second floor contains an amusement hall, under the management of Mr. Souder. The basement contains a billiard parlor, also under the management of Mr. Souder. In addition, Mr. Souder has a small office partitioned off at the rear of one of the stores on the ground floor.

“ * * * Mr. Souder told the company that he desired to be placed on a meter basis and was willing to pay the minimum charge which he understood would be \$11.00 per year. The company objected to supplying this building through one meter on a minimum charge of \$11.00, claiming that the building should properly be classed as an apartment, and would require three meters, this involving a minimum charge of \$33.00.

“ * * * The building owned by Mr. Souder falls within the class of buildings ordinarily supplied through meters, and, under the suggested rules proposed by the Board under the head of five, flat rate contracts, this building is a single ‘customer’ under the paragraph (c). THIS BOARD, THEREFORE, IS OF THE OPINION THAT SERVICE TO THIS BUILDING SHOULD BE FURNISHED THROUGH ONE METER * * * ”

And in *Allen C. Middleton vs. Cumberland County Gas Co.* (N. J. Commission), VII, P. U. C. Reports, p. 484, the Commission said:

“ * * * The service of gas is essentially a monopoly in all but one or two political subdivisions of this State. By reason of the fact that it is a monopoly, a customer deprived of the right to take gas cannot obtain gas from any other available public supply. The furnishing of gas being a monopoly of the gas utility, and as such protected when it furnishes safe, proper and adequate service, the utility is bound to furnish gas to all consumers along its lines who will assure the payment of undisputed bills * * * nor may the company deprive the customer of the right to take gas so long as the company is assured that it will receive its revenue from such gas sales. * * * ”

VII.

A landlord may resell current. There is no reasonable basis for a classification between landlords who furnish electric current through meters and those who furnish it where the charge is hidden in the rent. Classification based upon difference in benefits to customers is improper.

The right of a landlord to resell current has been recognized.

We have already referred to those cases holding that corporations which devote their property to a public use may not pick and choose—such as *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. Ed. 337.

In *Interstate Commerce Com. v. Delaware, L. & W. R. Co.*, 220 U. S. p. 235, 55 L. Ed. 448, it appeared that the American Forwarding Company, for a consideration, received goods in less-than-carload lots from shippers and transshipped same in carload lots, receiving compensation from the shipper at the less-than-carload rate, *making its profit in the difference between the two rates*. The Supreme Court of the United States held that this was lawful and that the refusal of the railroad company to accept such goods for shipment amounted to an unjust discrimination.

And Mr. Justice White, delivering the opinion of the Court, said (at p. 457):

“In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. *But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates, it has the right to discriminate as to those who shall be entitled to avail of them.*”

And in Pond on Public Utilities, Third Edition, sec. 282:

“Nor is there any justification for making a greater charge for municipal public utility service to a particular customer on account of the greater value to him of such service or the greater profit that would probably accrue to him than to some other customer. The public service corporation is not permitted to discriminate against a competitor in its service because, having undertaken to render such service to the public generally, it cannot refuse to serve all, even including its competitors, without discrimination * * * *Postal Cable Tel. Co. v. Cumberland Tel. & T. Co.*, 177 Fed. 726, decided in 1910 * * *.”

In *Hydrox Company v. Commonwealth Edison Co.* (1924), Commonwealth Public Utility Reports, page 324, it was held that where the public utility has itself established different rates and has furnished like service to other customers at the wholesale rate in order to prevent discrimination the Commission should compel it to furnish similar service and rates to the applicants.

In *Jonas v. The Swetland Co.*, Court of Appeals, Ohio, 162 N. E. 755, affirmed by the Supreme Court, May 31, 1928, 162 N. E. 45, the contention was that the Swetland Company, not being a public utility, could not sell light and power to its tenants which it had purchased from a utility company. The Court said:

“We cannot agree with counsel. It surely cannot be possible that a Utility Company furnishing light, power and heat must make a separate contract with every tenant in a big office building. A thing of that sort would lead to such confusion and trouble as would surely warrant the Utility Company in making a contract with the owners of the building at a wholesale price, who in turn

may retail it out to the various customers and tenants. Whether or not the price which they get is a proper price is not for the court to say. We do not think that the Building Company is prohibited from furnishing light, power and heat to its tenants. On the contrary, we think that it might be their duty to do so. * * *

We think in this case that the Swetland Company has a right to sell light, power and heat to its tenants, *and that it is a matter of contract between the tenant and the owners of the building as to the price they pay for it; that it is not ultra vires, and it is not against public policy that such a contract should be made.*"

In *Stadtlander et al. v. New York Edison Company*, decided on March 9th, 1915, by the Public Service Commission for the First District of New York, VI. P. S. C. R., 1st Dist. N. Y. 48, 1916B, P. U. R. 685, it was contended by the complainants, *inter alia*, that the difference between the wholesale and retail rate unjustly discriminated against the small consumers. Commissioner Williams delivered the opinion of the Commission and in discussing this feature of the case at pages 691-3 (P. U. R. 1916B) stated:

"Another feature of the rate schedules at present in force seems to me works a discrimination against many of the users of electricity in the city. Owners or agents of *apartment houses and loft buildings* secure current at the wholesale rate (5¢) and retail it to their tenants at 10¢ per K. W. hour. The electric light company installs separate meters for each tenant and reads the meters. All the agent and owner has to do for his 5¢ K. W. profit or more is to make out and collect the bills. *As the arrangement between the landlord and his tenants is a matter which is in the form of a contract (this generally in*

the lease) I think it is clear that we have no right to interfere. The tenants may pay the landlord anything he wishes but I think that if the landlord wants to take advantage of the wholesale rate and retail it out to his tenants he should furnish the meters and read them as well as collect the bills. In other words, that but one meter should be furnished or read for each wholesale customer of this class."

In determining whether it would be reasonable to prevent the purchase of electric current by landlords at wholesale rates for resale to tenants, through sub-meters, the law regarding part time or breakdown service is important.

In *People ex rel. Percival v. Public Service Commission*, 163 App. Div. 705, 148 N. Y. Sup. 583, it appeared that the New York Edison Company had refused to supply electricity to a consumer unless that consumer agreed to take all of its electricity from the Company. The consumer had arranged for service from a private electrical plant during the day time and wished to receive electricity from the New York Edison Company during the night and upon special occasions only. The Appellate Division set aside a ruling of the Public Service Commission upholding the Company, and held as follows:

"It is, of course, the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the requirement that a consumer must take all of its electricity from one company or receive none at all is not in any proper sense a regulation respecting the use of the service but is purely an arbitrary attempt on the part of the company to assure to itself a monopoly of furnishing electric current."

Thereafter the question arose in *People ex rel. New York Edison Company v. Public Service Commission*, 191 App. Div. 237 (N. Y.), 181 N. Y. Sup. 259. It appeared that: the applicant owned a building and occupied part of the same for a grocery store, leasing the rest of the building to tenants; the applicant had a private plant which generated electricity for its own use and which it sold to the tenants in this building and to other customers in the same block. Upon making application for "break down" service from the New York Edison Company, the Public Service Commission ruled that it was entitled to such service. The Appellate Division held that the New York Edison Company might be required to give "break down" service to the applicant and to the applicant's tenants but that it was not required to give "break down" service which might be sold by the applicant to *other customers in the same block*. This case distinctly holds that a landlord is entitled to "break down" service for his own use and for the use of his tenants although not so entitled for sale to other parties.

In the course of the argument it was contended by the New York Edison Company that the applicant was in competition with it and was acting in the capacity of a public utility. The Court held that the applicant was not competing with the New York Edison Company, *as it sold electricity only to its tenants*, and cited as an example the situation at Best & Co., where the landlord purchased electricity through a master meter from the New York Edison Company for its own use and for resale to its tenants. The Court said: "Best & Co. has no private plant of its own. It is not, as in the case of Acker, Merrill & Condit (the applicant) underselling the relator and is not in competition with the relator *because all the elec-*

tricity sold by Best & Co. is purchased from the relator."

The Court further held that a customer who purchases electricity and sells the same to his own tenants is not an electrical corporation subject to the supervision of the Public Service Commission. The Court said, at page 265 of 181 N. Y. S.:

"It is perfectly clear that the statute intended to make a distinction between those corporations which are manufacturing gas or electricity for their own use and for the purposes of their tenants and those who went further and assumed to sell their gas or electricity to outsiders."

It has long been settled in New York and in other jurisdictions that a landlord has the right to purchase electric current at wholesale rates and retail it to his tenants.

In the case at bar, the owner (purchasing all its current from the power company) is demanding meter service for itself and its tenants and not for resale to third parties.

In referring to the *Stadlander* decision (considered on page 35 of this brief) in the matter of Rate Schedules of New York Edison and United Electric Light & Power Companies, VI P. S. C. R., 1st Dist. N. Y. 289, the New York Commission stated (at p. 296):

"It appeared during the hearing and it was stated to be the policy of the companies that they furnished service to customers who resold electric current to owners or tenants of adjacent buildings, thus entitling the consumer to a lower quantity rate. *Undoubtedly the customer could compel the Public Service Corporations to sell him the current whether he used it himself or resold it.* The only thing the commission is interested in is to see that this customer gets nothing by way

of service or facilities that another customer consuming a like amount of current does not get. If the Public Service corporations furnished submeters or read them or performed any other extra service for this class of customers, it would be discrimination."

Of course, the utility may make reasonable regulations as a condition precedent to the furnishing of its commodity, but when the consumer has complied therewith the *obligation of the utility is imperative*. The regulations which the electric company may make are restricted to such as are for the purpose of securing payment for the energy supplied and to insure the sufficiency and safety of the consumer's equipment.

Chairman Hubbell of the Public Service Commission of New York, in *Bronx Gas & Electric Company*, IX P. S. C. R., 1st Dist. N. Y. 963 (at pp. 975-6), stated:

"It would thus seem that the Legislature itself has undertaken to regulate and prescribe in great detail the conditions precedent to the right of a person to receive electric service and the obligation of the utility to furnish service. These conditions cannot be increased by the utility any more than they can be diminished by the consumer and *when a consumer has complied with the statutory regulations he becomes entitled to have service furnished to him*, the only recognized qualifications being that the company may make reasonable rules and regulations *as to the sufficiency and safety of the equipment of the person applying for gas or electricity*. *Tisner v. The New York Edison Company*, 170 App. Div. 647. Once a consumer has complied with the prerequisites of the statute, he may not lawfully be denied service by the company. *People ex rel. Perceval v. Public Service Commission*, 163 App. Div. 704."

In *Aldis and Company v. Commonwealth Edison Company*, P. U. R., 1925, E. 363, decided April

29th, 1925, the Illinois Commerce Commission clearly stated the rule laid down by many cases in respect to the combined service permitted on one meter, on page 384, as follows:

“It has been frequently held by various commissions, including the Illinois Commerce Commission, that it is a discrimination to add together the reading of several meters each installed at a separate and distinct location even though the business conducted at all the locations is conducted by one firm, BUT THAT THE COMBINING ON ONE METER OF SUCH INSTALLATION, WHERE THEY ARE CONTIGUOUSLY LOCATED IS PERMISSIBLE. RE: Produce Terminal Corporation (Ill.), P. U. R. 1923 C, 247; Re: Commonwealth Edison Manor Water Co. (N. J.), P. U. R. 1918 A, 178; School District of St. Joseph *v.* St. Joseph R. Light, Heat and Power Co. (Mo.), P. U. R. 1920 A, 559; Re: Oregon Power Co. (Ore.), P. U. R. 1915 C, 694; Moffat *v.* Manila Electric R. and L. Co. (Manila P. U. C. 1914), 7 Rate Research 278.”

The Maysville Water Company supplied water to dwelling house inhabitants at annual meter rates as provided by ordinance. One Kirk built an apartment house and arranged with the President of the Water Company to have all water supplied through a single meter and charged at meter rates to be paid by Kirk as a single consumer. Later a new President of the Water Company refused to supply water at meter rates, asserting that an apartment house was a dwelling house within the meaning of the ordinance, and must pay dwelling house rates. The Circuit Court decided against the Water Company, and the judgment was affirmed, the Court holding that the owner of an apartment house containing 8 apartments with access to the street through common halls and with common hot water service was entitled to a continuance of meter rates where the ordi-

nance providing annual water rates, though referring to dwelling houses, did not include apartment buildings.

Maysville Water Co. v. Stockton, 299 S. W. 582 (Ky.).

In *Survel Realty Corp'n. v. Brooklyn Edison Co.*, N. Y. Supreme Court, June 13, 1928, reported in N. Y. Law Journal, issue of June 14, 1928, page 1321 (not officially reported), we find the same situation as presented in the case at bar. The Court said:

"Plaintiff, the owner of an apartment house, seeks to restrain the defendant *pendente lite* from discontinuing electric service to its building. Notwithstanding the various collateral issues sought to be raised, *the main issue is the right of the defendant to adopt a regulation whereby owners of apartment houses are denied the right to supply electricity through a master meter furnished by the landlord, instead of through individual meters supplied by the company.* Plaintiff claims that the privilege is *not withheld from office buildings, apartment hotels and hotels; that it is unjust and discriminatory and deprives it of the privilege of profiting from the installation of its expensive equipment * * ** the temporary injunction will be granted."

The position of respondents comes to this, that: metering his tenant's consumption of current by an owner who generates his own electric energy is lawful; the purchase of an owner from the electric company and resale to his tenants upon an unmeasured basis is lawful; the *supposed unlawfulness consists solely of measuring current furnished by the owner to his tenants, where such current has been purchased from the power company.*

We are back to an attempt to arrive at a reasonable distinction applicable in the instant case between the resale of current by the purchaser without measuring and the resale with measuring. We reiterate that, while there is a distinction in the physical facts, there is *no distinction in principle as applied to the present situation*. The effect upon the revenues of the utility is precisely the same. The witnesses for the Electric Company in the testimony before the Board could not imagine a reasonable distinction. No court or commission (save New Jersey's) has found any reasonable distinction, so far as we know. The last case on the subject is one decided in the Supreme Court of the District of Columbia.

The situation in *Lewis v. Potomac Electric Power Company*, in the Supreme Court of the District of Columbia, opinion rendered January 27th, 1930, a copy of which is annexed to this brief, is analogous to the situation at bar.

The Court there had under consideration a construction of the statute with respect to public utilities operative in the District of Columbia. That statute, in defining utilities, included "electrical corporations," but excepted "where electricity is made, generated, produced, or transmitted by a private person or private corporation on or through private property solely for its own use or the use of tenants of its building and not for sale to or for the use of others." Our statute in defining public utilities as applied to electrical corporations confines them to companies which exercise a privilege of the State or a political subdivision thereof. The effect of the two statutes is precisely the same. One eliminates corporations not using a privilege or franchise of the State by express elimination as in the statute operative in the District of Columbia and the other by limi-

tation of companies to which the act is made applicable, as in this State. In the case in the District of Columbia a bill was filed to enjoin an electrical company from shutting off the service to an apartment house unless the owner would agree that "he will not charge his tenants for such electricity transmitted to them by him on the basis of the amount used by the tenants as ascertained by a meter." This is precisely the situation here. There was a motion to dismiss the bill. The Court denied the motion, and, in denying it, said:

"The sole question would seem to be whether in thus charging the tenants for the electricity bought by the apartment house owner and by him transmitted to them the amount of such charge may be ascertained by the use of a meter so that each tenant may be charged for what he actually uses instead of being charged *a lump sum by way of increased rent* or without any reference to the amount used by the particular tenant. *The Court is unable to see any reason or legal basis for such a distinction*, nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition."

That case is direct authority in that at bar.

If it be permitted that private companies may be established to furnish electric current free from any regulation, so long as they do not use the public streets or a privilege granted by the Legislature, etc., to such customers as may take from them at such prices as may be fixed by contract—how can it be said that a landlord cannot furnish measured electric current to his tenants which he purchases from a Utility? The effect upon the revenues of the Utility is greater in the first instance than in the second.

It cannot be urged that if a landlord is permitted to resell current to his tenants measuring the current on the resale, he may resort to a sub-metering concern as his agent and that this business of sub-metering may be built up which is against public policy for the right to employ agents is a constitutional right and the employment of such agents and the establishment of such a business is *not* against any public policy announced by the Legislature, and it is the function of the Legislature and not that of the Board to enunciate principles of public policy.

Both the decision of the Board and the opinion of the Supreme Court are based upon a *supposed* public policy which has not been enunciated by the Legislature. The powers of the Board have been extended beyond the limits of the statute.

The Supreme Court, on pages 214, 215, expresses its opinion that sub-metering ought not to be permitted because the sub-metering concern is not subject to the jurisdiction of the Board and because tenants ought not to be at the mercy of their landlords, and it, in effect, recognizes the right of the tenant to deal directly with the utility.

It says in its opinion that "the Meter Company, or some like concern, could become a very real competitor", and that the distributing agent might be dishonest and irresponsible, and the consumer's meters inaccurate; the service faulty and the rates unfair, and "No matter what the abuse neither the individual consumer nor the general public could obtain redress from the Board". All this, we submit, is, under the cases, aside from the issue. It may be argument to address to a Legislature to extend the powers of the Board. The Legislature has not presumed to confer upon tenants the right to obtain electricity directly from the utility. We doubt if it could confer any such right. To do so would mean that it would be

within the power of the State to forbid landlords and tenants from contracting otherwise—an unlawful interference with the right to contract both of the landlord and of the tenant, but, however that may be, the Legislature has *not* assumed to do that thing. It may be that the Legislature *should* extend the right of the Board of Public Utility Commissioners to regulate the service by landlords to tenants of electric current so that it would have control over the rates and the service. We deny power to do any such thing, but, again, however that may be, the Legislature has *not* assumed to so interfere.

It may be advisable that public utilities furnishing electricity should have a monopoly and that competition should not be permitted or at least should be restricted. But here, again, if it is within the power of the State to grant any such monopoly as against the right of a private individual to carry on a lawful business and to make contracts, it is for the Legislature to say so, and it has *not*.

The crux of the opinion of the Supreme Court is found in the words, oft-repeated, in this brief (p. 216): "*In the one instance the service to the consumer is by a controlled utility. In the other it is not,*" which being paraphrased means that the service *should be* by a controlled utility, and both the Utility Company and the Board are permitted to take any steps necessary to effectuate that object.

In the decision of the Board we find the language, after quoting the statute: "This, it seems to us, expresses a *principle* which *underlies* a *privilege* to make a special use of public highways * * * (p. 199). * * * It seems to us to be in the *public interest* that a company, which has developed an efficient organization for doing this,

so long as it properly serves the convenience of those wanting electric current, *should supply* the meters required to measure it and *be responsible* for their accuracy and the records of registration" (p. 202). The Board then speaks of the distribution of costs and of the decisions from other states: "The decisions of the courts of other states should be given the serious consideration they merit, but this should be with due regard to the law and *public policy* of New Jersey, and the application of such law and *public policy* to the case before us." It speaks (p. 197) of "equitable relief", and it says that "a decision of the case should be based on something *broader* than a construction of the rule defining a customer".

In other words, the Board claims the right, and it has been sustained in its claim by the Supreme Court, to administer *equity* and *law* with reference to a *public policy* which it has announced. Nowhere in the statute do we find any evidence of any such public policy and the Commissioners' powers are limited by the statute.

*Passaic Consolidated Water Company v.
Board of Public Utility Commissioners,
5 N. J. Misc. Rep. p. 1078, at p. 1082,*

relying upon *Hackensack Water Company v. Board of Public Utility Commissioners*, 96 N. J. L. 184, 115 Atl. 528.

In the Passaic Consolidated Water Company case, the Court said:

"It is well settled that when the bodies are created for the regulation of utility companies the presumption is that the *power of regulation conferred does not extend beyond the express terms of the grant.*"

The power granted by the statutes of this State to the Public Utilities Commissioners is to regulate,

not the furnishing of electricity, but its furnishing by a public utility defined to be a corporation, etc., operating an electric plant, etc. "for public use under the privileges granted or hereafter to be granted by the State of New Jersey or by any political sub-division thereof," and upon the Board is imposed the duty to compel such a utility to comply with the provisions of the act, and one of those provisions is, in reiteration of the common law, that electric current should be furnished to all comers without discrimination either in service or in rate, unless there is a reasonable basis for a distinction. Such a basis must be found in a *difference of circumstances and conditions of service*. *People ex rel. New York Steam Co. v. Strauss*, 186 App. Div. 787, 174 N. Y., Sup. 868, affirmed, 226 N. Y. 704, 123 N. E. 884.

It cannot be found in a *supposed* public policy not announced by the Legislature. The common law rights of those who desire to purchase electric current from a public utility remain unaffected save only as expressly dealt with by the statute. If the Legislature had thought that public policy required that public utilities should furnish electric current to the *ultimate* consumer and that discriminations to bring this about were proper, it would have said so, if it had the power. If it had intended that the relations of *all* persons who furnish electric current to *ultimate* consumers as between themselves and the consumers should be subject to regulation it would have said so.

The Commission complains and says: "But where the electric energy is sold to the landlord to be in turn sold and distributed by him as a separate commodity, in quantities measured by the installation of meters at rates to be fixed and determined by him or his agent, it removes from the field of regulation an element of public utility activities which, *under the policy of the State*,

should be subject to regulation” (p. 206). It may be the idea of the Board that these relations should be subject to regulation but the Legislature has not said they should be and it is *not for the Board to act as if the Legislature had so ordained*. It is not for the Board, in disregard of the legislative fiat, to attempt to do indirectly what it cannot do directly, and its attempt to bring the subject matter of such relations under the jurisdiction of the Board by preventing such relations from arising is, we submit, a clear usurpation of power.

It concedes its lack of authority to directly interfere with the contractual relations between the landlord and his tenants and the landlord and the sub-metering company or to regulate the “sub-metering concern and its business,” but it claims the right to do indirectly what it cannot do directly by shutting off the supply of electricity to the landlord from a utility although, under the statute, a utility must furnish service without undue discrimination to all customers.

The Board said “It seems to us a decision of the case should be based upon something *broad*er than a construction of the rule defining a customer” (p. 197). It did much more than to determine the case upon something broader than a construction of its own rule; it determined the case upon something broader than the statute and upon a broader, or rather a different, concept of public policy, than the Legislature indicated by the statute.

That there might be no question as to its feeling upon the subject it added (p. 205)—“*Any* plan or method which takes from the State the power to fully regulate and control rates and service between the public and the company cannot be regarded with favor by this Board.”

By this language it puts itself in the position of the State. It is *not* the State. No plan or method which can be devised could take from the State "the power to fully regulate and control the service" if the *State* desired to exercise that power, if it exists. That the plan or method takes away from the "*board*" the power to regulate and supervise *is of no concern unless the Legislature has conferred that power upon the Board.*

VIII.

Not only does the denial by the Board of the relief asked by appellant, affirmed by the Supreme Court, create a distinction between landlords based solely upon the matter as to whether they resell measured or unmeasured electricity but a practical discrimination was accomplished between appellant and those landlords who were, in fact, reselling measured electricity.

Contrary to what was claimed by respondent, Electric Company, to be its established policy, it developed upon the hearing that it was then furnishing some forty-nine landlords with electric current through master meters, which current those landlords resold through sub-meters (pp. 168, 176 to 189). It is conceded that there are many instances in which electric current is furnished to a landlord who resells it unmeasured to his tenants, the charge being hidden in the rent.

IX.

Appellant is the real party in interest in this case. It is immaterial if it were not so. If the sub-metering corporation is conducting a lawful business, it is entitled to have its rights protected.

On the argument in the Supreme Court, it was urged by respondent, Electric Company, that appellant, landlord, is not the real party in interest and that the relations between the landlord and the sub-metering company and the tenants evidenced by writings were but window dressing.

It is true that appellant, in its relations with its tenants, deals through the sub-metering company as an agent, but it is appellant which purchases the electric current from the Public Service Electric Company, and, if it has the right to purchase that current and supply it to its tenants, it has the right to do so through an agent and to make such arrangements with respect to the compensation of that agent as it sees fit. *Allgeyer v. Louisiana*, 165 U. S. 578; 41 L. Ed. 832.

The contract for the furnishing of the electricity to the landlord is between the landlord and the Public Service Electric Company, and the contracts as to the furnishing by the landlord of electricity to its tenants are between the landlord and its tenants. Respondent, Electric Company, cannot, by the *assertion* that the contract between the landlord and the sub-metering company, creating the relationship of agency, is "window dressing", make it so. Relationship evidenced by written documents cannot be destroyed by bare assertions.

But what difference does it make if the relationship between the landlord and the sub-metering concern, as evidenced by the written documents,

is "window dressing"? Assuming, for the moment, that the sub-metering concern is a party to the record, it has the right to be heard on review of an order of the Board of Public Utilities Commission which would destroy its business built up under the express sanction of the Board of this State, for the Board, not only by its rules, but by its decision in *The Supervision Co. v. Public Service Electric Co.*, X, P. U. R., p. 163, decided June 30, 1922, defined "customer" as, *inter alia*, a building owned by one party having a number of apartments or offices, but using in common one hall and one or more means of entrance, and in its decision in *J. A. Souder v. Paulsboro Water Company*, VII, P. U. C. Reports, p. 56, it said:

"The building owned by Mr. Souder falls within the class of buildings ordinarily supplied through meters, and, under the suggested rules proposed by the Board under the head of five, flat rate contracts, this building is a single 'customer' under the paragraph (c). The Board, therefore, is of the opinion that service to this building should be furnished through one meter * * *."

A business which has been built up under an established practice and with the sanction of the Board in this State and of the decisions of courts in other states cannot, we submit, be destroyed over night by the announcement "of a new policy" by the Public Utility and by a ruling of the Board unless it is clear that, under the legislation applicable to the situation the utility is permitted to overturn its established policy and the Board is permitted to sanction that act. The right to change a policy which will have the effect of destroying an established business will not be permitted upon any implication.

X.

Even assuming that there may be some question as to the reasonableness of the classification which would put it within the power of the Board to determine, by the express terms of the Statute the burden of proof is on the electric company to show the reasonableness and it has not sustained this burden.

The Public Utility Act, chap. 195, Laws of 1911, 2 Cum. Supp. to C. S. of N. J., 1911-1924, p. 2884, Sec. 167-17H, provides:

“When any public utility as herein defined shall * * * *change or alter any existing classification*, the Board shall have power either upon written complaint or upon its own initiative to hear and determine whether the said increase, change or alteration is just and reasonable. *The burden of proof to show that the said increase, change or alteration is just and reasonable shall be upon the public utility making the same.*” Public Utility Act, Chap. 195 Laws of 1911, Section 17 (h).

It has been held that where a lighting corporation seeks to cut off an existing supply of electricity to a consumer, the burden is upon the lighting corporation to justify its act.

Levine v. Brooklyn Union Gas Co., 146 App. Div. 464; 131 N. Y. Sup. 255;
Hollander v. Westchester Lighting Co., 79 Misc. 646; 140 N. Y. Sup. 544;
Schmitt v. Edison Electric Ill. Co., 58 Misc. 19, 110 N. Y. S. 44; aff'd 125 App. Div. 909.

The testimony showed that the Electric Company has for years had knowledge of the practice of the resale of electric current by owners to their

tenants upon a metered basis. It now pretends to have found obstacles, not in the law, but by *virtue of its new "policy", to the continuance of that practice. We submit that, under the circumstances, the burden is upon the Company to justify, if it can, a complete reversal of its former position and previous course of dealing with its consumers.*

In Curtis on the Law of Electricity, on page 70, it is said:

"In a proceeding to compel an electric company to supply electricity to an applicant, *the burden is upon the company* to establish a defense predicated upon its inability, through physical, legal, financial, or other obstacles, to furnish the service demanded."

In *State ex rel. Mason v. Consumers' Power Company*, 199 Minn. 225, 137 N. W. 1104, where the Power Company was the respondent in a mandamus suit to compel the furnishing of a public service, the Court said that if the Power Company "fails to establish its affirmative defense, the relator, if he has made out a *prima facie* case, is entitled to the writ."

It is important that this principle be recognized and applied where the change, which has been sanctioned by the Board and by the Supreme Court destroys, as here, valuable property rights which have grown up under a practice heretofore acquiesced in by the Electric Company.

Does the Electric Company sustain that burden when the only justification for the classification which the Board or the Supreme Court has indicated is that *public policy* requires that the relations between the Electric Company and all *ultimate consumers should be direct* and where the change can only be justified as a means to accomplish *that end*.

XI.

The application of Chapter 271 of the Laws of 1912, 2 Cumm. Supp. to C. S. of N. J. 1911-1924, p. 2353, sec. 136-3770 M (1).

We submit that this statute which provides that it shall be "*unlawful* for any person, real or artificial, engaged in the business of furnishing electricity for light, heat or power purposes to refuse to supply electric current for such purposes upon the production of a written certificate of the inspector for electrical wires and appliances approving the construction thereof in any building * * *", taken in connection with the provisions of the Public Utility Act which forbids unreasonable discriminations is a complete answer to the theory of public policy announced by the Board and confirmed by the Supreme Court. *The legislation is mandatory. It does not permit the Electric Company to refuse to furnish the service because the electricity is to be resold or for any other reason connected with its use.*

The utility *must furnish* the electric current if the applicant has complied with the provisions of the statute, and appellant has so complied in the case at bar.

The utility refuses to furnish the electric current in direct violation of the provisions of the statute.

It may make no distinction or discrimination in price except those distinctions which are based upon a consideration of the amounts used and of the service rendered. The Legislature has not permitted a discrimination based upon the *use* to which the purchaser puts the electric current after he receives it. This statute is not referred to either in the decision of the Board or in the opinion of the Supreme Court.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and the record remitted to that Court with instructions to enter a judgment setting aside the order of the Board and directing the Board to enter an order granting the relief prayed for by appellant in its complaint.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,
MERRITT LANE,
Of Counsel with Appellant.

IN THE
SUPREME COURT OF THE DISTRICT
OF COLUMBIA.

MYRON P. LEWIS, *et al.*,
Plaintiffs,

vs.

POTOMAC ELECTRIC POWER
COMPANY.

In Equity.
No. 50417.

WASHINGTON CONVENTION
HALL Co.,
Plaintiff,

vs.

POTOMAC ELECTRIC POWER
COMPANY.

No. 50419.

JAMES L. KARRICK,
Plaintiff,

vs.

POTOMAC ELECTRIC POWER
COMPANY.

No. 50421.

CRANDALL REALTY COMPANY,
Plaintiff,

vs.

POTOMAC ELECTRIC POWER
COMPANY.

No. 50422.

JOSEPH J. MOEBS,
Plaintiff,

vs.

POTOMAC ELECTRIC POWER
COMPANY.

No. 50423.

**Memorandum in Disposing of the Motion to
Dismiss the Bills.**

The question here involved is whether the defendant has a right to refuse to furnish electricity to an apartment house owner unless the latter will engage that he will not charge his tenants for such electricity transmitted to them by him on the basis of the amount used by the tenants as ascertained by a meter, or else that the apartment house owner will engage not to resell the electricity to his tenants. Four of the same plaintiffs brought suits in this Court in which they claimed that the Commission's approval of this condition made the order of the Commission void. Those suits were treated as brought under the statute and not as an appeal to the general equity power of the Court. There was a motion to dismiss the bills and the motion was sustained upon the ground that the order of the Commission was not necessarily void by reason of its approval of said condition; that such condition might be legal or illegal but that in any case the Commission had no jurisdiction over the matter of sub-metering by apartment house owners inasmuch as the statute in question took out of their jurisdiction the situation here presented in its definition of the term "electrical corporation". The section reads in part:

" * * * except where electricity is made, generated, produced, or transmitted by a private person or private corporation on or through private property solely for its own use or the use of tenants of its building and not for sale to or for the use of others."

The decision was that this language showed a plain legislative intent to allow apartment house owners to receive electricity from the power com-

pany and transmit it for the use of its tenants and to charge its tenants therefor. This question having been determined by the prior decision the sole question would seem to be whether in thus charging the tenants for the electricity bought by the apartment house owner and by him transmitted to them the amount of such charge may be ascertained by the use of a meter so that each tenant may be charged for what he actually uses instead of being charged a lump sum by way of increased rent or without any reference to the amount used by the particular tenant. The Court is unable to see any reason or legal basis for such a distinction, nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition. For these reasons the motion to dismiss will be overruled.

WENDELL P. STAFFORD,
Associate Justice.

Rend.,
January 27/30.

