

OPINION
63-189

May 14, 1963 (OPINION)

PUBLIC SERVICE COMMISSION

RE: Municipalities - Street Lights

This is in reply to your letter of May 2, 1963, concerning section 40-05-05 of the North Dakota Century Code. You ask the following question:

"Does the commission under this statute, have jurisdiction over the rates at which utilities provide electricity to municipalities for street lighting purposes?"

Section 40-05-05 of the North Dakota Century Code provides:

"CITIES AND VILLAGES MAY CONTRACT FOR ELECTRICAL ENERGY OR GAS. The governing body of any city or village may enter into a contract with any person, partnership, association, corporation or the United States or any department or agency thereof to provide for:

1. The furnishing of electrical energy or gas to the inhabitants of the city or village and to the city or village for all purposes; or
2. The sale to and the purchase by the city or village, for a term of not to exceed ten years, of electrical energy or gas required for city or village purposes.

The making and execution of any such contract must be authorized by a resolution of the governing body adopted by a majority of the members thereof at a regularly assembled meeting of such body. Nothing contained in this section shall deprive the public service commission of any of its regulatory powers with reference to contract rates." (Emphasis ours).

It would appear that the Legislature by the enactment of this statute in 1929 indicated their intent that the Public Utilities Act of 1919 should include the power to regulate rates at which utilities provide electricity to municipalities for street light purposes. Thus section 49-02-03 of the North Dakota Century Code provides:

"POWER OF PUBLIC SERVICE COMMISSION TO ESTABLISH RATES. The commission shall supervise the rates of all public utilities. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities. Whenever the commission, after hearing, shall find any existing rates, tariffs, joint rates, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this title,

the commission by order shall fix reasonable rates, joint rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law."

An electric company supplying electricity is, of course, a public utility within the meaning of the above-quoted statute. It is, therefore, our opinion that section 49-02-03 of the North Dakota Century Code, when considered with the provisions of section 40-05-05 of the North Dakota Century Code, does clarify the power of the Public Service Commission to assume jurisdiction over rates at which utilities provide electricity to municipalities for street lighting purposes.

We would, however, be amiss if we did not note the decisions of the North Dakota Supreme Court in *Western Electric Co. v. City of Jamestown*, 47 N.D. 157, 181 N.W. 363 (1921) and *Chrysler Light and Power Co. v. Belfield*, 58 N.D. 33, 224 N.W. 871 (1929) in which our Supreme Court indicated that the Public Utilities Act granted no authority to the commission to interfere with the rates for electrical current furnished by a light company to a city, such rates having been fixed by contract in the franchise granted by the city to the electric light company. Thus on page 367 of the Northwest Report of the *Western Electric Co.* case the Court stated:

"This Public Utilities Act (chapter 192, Laws 1919) grants to the Board of Railroad Commissioners regulatory ratemaking powers over public utilities such as the plaintiff. It does not deprive a city of its powers and privileges in creating or enforcing a franchise granted for the use of its streets or highways by a public utility. It does not pretend to grant the Railroad Commissioners the power to determine what shall be the consideration to be paid for the use or exercise in a city of the privilege of a franchise. The defendant city had the authority to grant or permit a franchise to the plaintiff for the use of its streets and highways and to regulate the use of the same. It still has that authority. Section 3599 (13-24) C.L. 1913. It is specifically reserved to a city by the constitutional provision which provides that no law shall be passed by the Legislative Assembly granting the right to construct and operate an electric light plant within any city without requiring its consent. Section 139, North Dakota Constitution. This right of franchise granted to the plaintiff in 1902 was a right of value, a right of property, and validly, the subject of a legal contract."

It is to be noted, however, that both of the above cited cases were decided prior to the enactment of section 40-05-05, quoted above, in 1929. It appears the purpose of the enactment of section 40-05-05 was to specifically clarify the authority of the Public Service Commission to regulate rates in these situations. The rationale of these two cases is not, therefore, applicable to the present situation in view of the subsequent enactment of section 40-05-05 of the North Dakota Century Code in 1929.

Both the *Western Electric Company* case and the *Chrysler Light and*

Power Company case make reference to section 139 of the North Dakota Constitution which provides:

"No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having control of the street or highway proposed to be occupied for such purposes."

While the opinion of the Court in these cases indicate in a rather vague manner that this section might be of some importance in their decision, neither of the cases was decided on constitutional grounds. They were decided on the basis that the Legislature had not conferred upon the Public Service Commission the power to regulate the rates at which utilities provide electricity to municipalities for street lighting purposes. In fact, the Chrysler Light and Power Company case specifically states the Court did not decide the case on constitutional grounds since the Court had held the Public Utilities Act of 1919 had not conferred upon the Public Service Commission the authority to regulate rates for electric current for street lighting. In view of the fact we believe the Legislature did, in 1929, clarify such powers of the Public Service Commission by the enactment of what is now section 40-05-05 of the North Dakota Century Code, these cases are not controlling.

In summary, it is our conclusion that the Legislature did, by the enactment of what is now section 40-05-05 of the North Dakota Century Code, clarify the authority of the Public Service Commission to regulate the rates at which utilities provide electricity to municipalities for street lighting purposes.

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