Report on Muncipal Acquisition of Public Utilities -- Prepared by City Attorney, Madison, Wisconsin.

SUBJECT: Public acquisition of a municipal utility.

In General

This memo deals with several topics relating to municipal acquisition of a public utility, including the procedure for involuntary acquisition, the method of determining the basis of a utility's property for just compensation purposes, and some historical information on previous acquisition efforts by the City of Madison.

Historical Information

Madison Gas and Electric was incorporated under the laws of Wisconsin on April 8, 1896 as a wholly owned subsidiary of American Light and Traction Company. American Light was a subsidiary of United Light and Railways Col, which in turn was a subsidiary of United Light and Power Co. In 1934, an advisory election was held and the citizens voted 9,357 to 8,622 to purchase Madison Gas and Electric, but refused to sanction a $30,000 bond issue to finance an appraisal of the property by a vote of 9,077 to 8,196.

On August 5, 1941 the Securities and Exchange Commission issued an order pursuant to Section 11(b)(2) of the Public Utility Holding Company Act which required United Light and Power and United Light and Railways to eliminate from their holding company system their interests in many companies, including Madison Gas & Electric. As part of its findings and opinions, the SEC stated that an order must be entered in the future to direct American Light to dispose of its interests in properties located outside the area comprising Michigan and the adjoining states. Later the SEC issued a supplemental order requiring American Light to dispose of its interests in three particular companies. Amid speculation that the SEC might later require American Light to dispose of its interest in Madison Gas, Aldermen Leo Straus and Wesley Schwegler sponsored a resolution directing the City Attorney to open negotiations with American Light for the purchase of M G & E. These two aldermen were motivated by the idea that if the City wished to purchase, it would be much more easily accomplished while all the M G & E stock was in the hands of a single owner.

On April 16, 1943, the City Council agreed to contract with Stifel, Nicolaus & Co. of Chicago for its services as representative of the city in negotiations for the purchase of M G & E. Stifel was also required to provide legal assistance to the city attorney and secure engineering services to make necessary investigations. In the event of an agreement for purchase satisfactory to the city, Stifel was to receive a percentage of the purchase price and was to serve as the bonding company for the city for the sale of municipal bonds to purchase the utility at a specified commission. Stifel later hired Duff and Phelps of Chicago as engineers to appraise the value of M G & E property. Duff then issued a report stating the net book investment to be about $8.9 million and estimating that a purchase price of $10 to $12 million would be required. Duff also estimated that such a price could be paid from operating revenues within 25 years.

In early November of 1943 the City Council recommended that a referendum be held on making an offer to purchase M G & E for a maximum price of $11 million. Then on December 12, 1943 the Wisconsin State Journal printed a major story reporting that Stifel's agents had spent over $3,800 on meals, lodging, football tichets and other items for aldermen over a ten-month period beginning before Stifel was selected as negotiator even though its fee was the highest of all fees submitted in bids. Prior to this the two major newspapers had taken sides and had devoted much attention to the acquisition issue, and two sides took even stronger stances after the foul-play revelations, with the State Journal opposed to and the Capital Times in favor of the purchase. Also, in March of 1943, a Taxpayer's Committee was formed to oppose the purchase and it ran several adds in the local papers.

The referendum election was held on April 4, 1944, and the voters defeated the proposed offer to purchase by 12,972 to 7,071.

(This historical information was pieced together from materials contained in the City Clerk's file number 11,947 and a scrapbook containing newspaper clippings on the subject which is hled by the Municipal Reference Service).

Procedure for Involuntary Acquisition

It should first be noted that Wis. Stats. Section 32.03(1) precludes the ordinary exercise of eminent domain powers under Chapter 32 by a municipality to acquire a public utility:

> 32.03 When condemnation not to be exercised. (1) * * * This chapter does not apply to the acquisition by municipalities of the property of public utilities used and useful in their business, nor to any city of the first class, except that every such city may conduct any condemnation proceedings either under this chapter or, at its option, under other laws applicable to such city.

Because Madison does not have first class standing, it does not have the option of acquiring the utility by eminent domain procedures, and an involuntary proceeding must therefore be conform to the requirements of Chapter 197.

Chapter 197 Procedure

(1) The first step in the acquisition process is a municipal determination to acquire a utility, which is obtained by a vote of a majority of the electors. This vote can come about in either of two possible ways because Sec. 197.02 does not specify a definite procedure: (a) The Common Council may adopt a resolution in favor of acquisition and refer it to a vote of the municipal electors, or (b) under Wis. Stats. Sec. 9.20, 15 percent of the gubernatorial electors can petition the Common Council to adopt a proposed resolution, and the council must either adopt it or refer it to the electorate within 30 days or it becomes law.

(2) The second step depends upon the date when Madison Gas and Electric, or its predecessor in title, was granted the license, permit or franchise to operate within the municipality, for this date will in turn determine what type of indeterminate permit the utility now has. The importance of the date of the permit, license or franchise was recognized by the Wisconsin court in Wisconsin Public Service Corp. v. Public Service Commission, 231 Wis. 390, 284 N.W. 582, 584 (1939). The court stated that after the passage of ch. 596, Laws of 1911 (now Sec. 196.55), there were two kinds of indeterminate permits, (1) those without the right to a jury determination of the necessity of the acquisition, and (2) indeterminate permits conferred by ch.596 and carrying the right to a jury determination. Permits without the right to a jury verdict were obtained either by consent to future acquisition without such verdict when applying for a new permit or franchise after the law of 1907 (now Chapters 196 and 197) was enacted, or by surrendering an existing franchise in accordance with ch. 499, Laws of 1907, and ch. 180, Laws of 1909 (between July 11, 1907 and January 1, 1911). A third way of obtaining a permit was created by ch. 596, Laws of 1911 (Sec. 196.55), and by operation of law, utility franchises existing on July 11, 1907 were converted into indeterminate permits with the right of jury trial on the issue of necessity. See also Pardeeville Electric Light Company v. Public Service Commission, 219 Wis. 482, 263 N.W. 366 (1935). The Public Service Commission had also adopted the same analysis developed by the court above. 8 P.S.C. of W. 177, 179 (1935).

Madison Gas and Electric was organized in 1896 and no doubt began operations shortly thereafter. Although the city clerk's office claims to have no record of the original franchise or license granted M G & E allowing it to operate within the city, a Mr. McNamara of the M G & E legal staff indicated to me that the original franchise or license was granted at some time near the date of organization. Under these facts then, Wis. Stats. Sec. 197.02 applies because M G & E was operated under an indeterminate permit obtained by operation of law pursuant to Sec. 196.55, and if a majority of the electors vote in favor of acquisition, the City must bring an action in circuit court against M G & E for an adjudication on the necessity of the taking. The question of necessity must be submitted to a jury unless both parties waive a jury.

(3) As the third step, the municipality must give speedy notice to the PSC and to the public utility of the majority vote in favor of acquisition and notice of either the utility's consent to acquisition by virtue of operating under an indeterminate permit waiving the right to a jury finding, or (in the case of M G & E) of the jury determination of necessity for the taking. Wis. Stats. Sec. 197.03.

(4) After receiving this notice from the municipality, the PSC must set a time and place for a public hearing upon the matters of the just compensation to be paid for the property actually used and useful for the convenience of the public. The PSC must give the city and the utility not less than a 30 day advance notice of the hearing and the municipality must the publish a class 3 notice of the hearing. Wis. Stats. Sec. 197.05(1).

Wis. Adm. Code, P.S.C. Sec. 2.70 provides that during the first session of the acquisition hearing, the P.S.C. will receive evidence and arguments on "the validity of the municipality's determination to acquire and as to the property to be acquired." It is at this point in the PSC hearing that the City would present evidence certifying the election result and the jury finding, plus any evidence it wishes to offer on the matter of inclusion or exclusion of certain property from the order, or on the matter of the value of the property.

It would probably be unwise for the City to finance its own independent survey and appraisal of the utility's property unless the cost would be slight because the PSC staff would no doubt perform that function for the city. The Wisconsin court approved of this PSC function in Lake Superior Dist. Power Co. v. Public Service Commission, 244 W. 587, 13 N.W. 2d 89, 91 (1944), stating:

> "Sec. 196.855 Stats., reads [and still does]: Expenses incurred by the commission in making any appraisal or investigation of public utility property under the provisions of Chapter 197 shall be charged directly to the municipality making the application. * * *
>
> There is every indication that the legislature intended such investigations to be made and it would appear that the best use that could be made of such investigations would be introduction as evidence before the Examiner so that the testimony can be subjected to investigation and the witnesses examined by counsel of both parties."

Thus an independent survey and appraisal by the City would quite likely be a duplication of the work of the PSC staff. The City might consider it wiser to forgo an independent study of the utility's property and instead concentrate its efforts on thorough examination of the utility's experts and PSC staff who testify at the public hearing on the property to be included and its value.

(5) After the public hearing, the PSC must then, by order, fix and determine the specific items of property which are used and useful for the convenience of the public, the just compensation to be paid for that property, and the other terms and conditions of purchase which it deems reasonable. Once completed, the PSC must certify its determination to the Common Council, the utility, and to any bondholder, mortgagee, lienor or any person having or claiming to have an interest in the utility appearing at the public hearing. Wis. Stats. Sec. 197.05. Most of the proceedings before the PSC upon rehearing and much of the litigation which relates to public acquisition centers around orders issued by the PSC pursuant to Sec. 197.05, with "just compensation" and "property used and useful being the main issues, and are discussed infra.

(6) After the PSC issues its original offer, several things may occur: (a) the PSC order might be appealed, (b) the municipality might discontinue acquisition proceedings, or (c) the City may purchase the utility by conforming to the terms and conditions fixed by the PSC in its acquisition order.

(a) Appeal of PSC Order. Wis. Stats. Sec. 197.06 allows appeal from the PSC order in the manner provided in chapter 227 (Administrative Procedure Act) and specifies that any bondholder, mortgagee, lien-holder or other creditor may take the appeal as a party aggrieved. Review under chapter 227 is available on administrative decisions which "directly affect the legal rights, duties or privileges of any person;" Wis. Stats. Sec. 227.15. A person so affected is considered a "person aggrieved" by an administrative decision, and if directly affected by the decision, Sec. 227.16 allows this person to appeal to the circuit court for Dane County for review by filing a petition within 30 days from the date of the PSC order. At this point mention must be made of the provisions detailing the administrative procedure within the PSC established in Chapter 196, which add further complications to the whole process of appeal. Sec. 196.405(1) provides that within 20 days of service of an order upon all parties to any proceeding, any such party or other person aggrieved and directly affected may apply to the PSC for a rehearing in respect to any matter determined in its decision.

Section 196.405(2) makes this application for rehearing within the 20 days a condition precedent to any proceeding for the judicial review of the original order under Chapter 227. The PSC may then either deny a rehearing expressly or by implication through not granting such rehearing within 20 days of the application, or it may grant a rehearing, receive new evidence, and reverse, modify or suspend the original decision by new order. When application for rehearing is made, no original order for which a rehearing is denied, nor any amended order, may take effect until 10 days after denial or amendment. At this point, the original or amended order becomes the final determination of the PSC on the matter from which an appeal can be taken under Chapter 227 (See Subsec. 196.405(3) and 227.15). If, however, neither party makes application for a rehearing, the original order becomes effective 20 days after it is filed and served, unless a different effective date is specified in the order.

On subsequent judicial appeal, if the circuit court determines that the compensation fixed in the PSC order is unlawful or that some of the terms or conditions are unreasonable, the court will remand the order with findings of fact and conclusions of law which show the reasons for the judgment and the specific particulars in which the order is considered to be unlawful or unreasonable (Wis. Stats. Sec. 197.08). If the circuit court finds the compensation fixed in the PSC order to be unlawful, Wis. Stats. Sec. 197.09(1) requires the PSC to forthwith set a rehearing for the redetermination of compensation, which is to be conducted as if it were the initial hearing. If the court has found other terms and conditions unreasonable, the PSC must revise these terms to conform, but it is within the discretion of the PSC as to whether it will hold a rehearing on these matters other than compensation; Wis. Stats. Sec. 227.21, the circuit court's judgment may be appealed to the Supreme Court within 30 days from notice of judgment.

(b) Discontinuance of Acquisition by the City. Wis. Stats. Sec. 197.04 allows the city to discontinue the acquisition proceedings within 90 days after the "final determination of compensation by the PSC, and provides two methods for such discontinuance ("final determination of compensation" means the award made which has not been set aside, either upon appeal or from which the right to appeal has expired under the law, Wisconsin Power & Light v. Public Service Commission, 231 Wis. 390, 405, 284 N.W. 586, 593 (1939)). The first method of discontinuance is initiated by the Common Council's passage of a resolution proposing such action, and this resolution must be adopted within 90 days of the PSC order. After adoption of the resolution, 90 days must pass before the discontinuance may take effect. The second method of discontinuance may be initiated by the electors either within 90 days of the PSC order when the Common Council fails to adopt a resolution, or within the 90 day waiting period in effect if the Common Council has taken such action. This second method requires filing with the City Clerk a petition signed by 10 per cent of the electors (5 per cent in a first class city) requesting that the question of discontinuance be submitted to the electors. If this petition is filed, the question must be submitted at any general or regular election that is possible to be held within the six-day period between 30 and 35 days from the date of filing. If no such election is permitted by law within that period, the Common Council must order a special election to be held within that same six-day period. The council must also give notice of the election once a week for three weeks and must handle the election details. If a majority favors discontinuance of acquisition, the municipality cannot initiate new acquisition proceedings for the same utility for two years.

In the Wisconsin Power & Light case, supra, the court noted that Sec. 197.04 requires the city to make some formal effort to discontinue acquisition within 90 days of the PSC's making the "final determination of compensation." However, an order does not have the full legal status as a "final determination" until it has been affirmed at all stages of appeal or until the right to appeal from it has expired by lapse of time. This is because, as the court stated:

> " * * * If, however, an award is set aside on the ground that if is unlawful or unreasonable, then a new award must be made upon the remand of the record to the Commission. When that award is made unless set aside it will be the final award and the municipality may have the statutory time for discontinuance of the proceeding.

The problem this creates for the city is that when a PSC award is made and the process of appeal is begun, the city does not at that time know whether or not the order will be ultimately upheld. If the award is unfavorable to the city it can take two courses of action: (1) It can assume that the award will be upheld on appeal and initiate discontinuance proceeding within 90 days, but the price of this is giving up the right to acquire the utility for another two years when that award might have been reversed and remanded anyway and the PSC would have had to issue a new order. (2) On the other hand, the city can assume that it can get the unfavorable award ultimately reversed on appeal, in which case the PSC will have to make a new award and the city would retain the right to discontinue within 90 days of that new award. But, if the city is wrong and the appellate process which ultimately affirms the order takes longer than 90 days, the city will have lost the right to discontinue the award, and will have to pay the compensation specified even if unfavorable.

The court recognized this dilemma, stating further:

> "It is true that the making of the award which eventually is determined to be the final award subjects the municipality to the hazard of having its right of posession postponed and in the interval the value of the property might diminish and it would be bound to proceed, having failed to proceed, having failed to commence discontinuance proceedings within ninety days of the making, not filing of the award. The statute is imperfectly drawn and does not adequately safeguard the rights of either party in certain contingencies."

It is this writer's opinion that if the PSC should make an award deemed unfavorable to the city, it should initiate discontinuance proceedings by either of the two methods unless it is certain that either the full appellate process could be conducted within 90 days or the order could be reversed in its favor upon appeal. If the appeal took longer than 90 days or the order was affirmed, the city would be bound to acquire the utility on unfavorable terms.

(c) Purchase Pursuant to the Terms of Order. Until the PSC order is successfully appealed from by the utility or until the city discontinues the proceedings, the PSC's filing of the certification of its order fixing compensation and other terms with the City Clerk vests absolute title in the city, and the circuit court is empowered to force conveyance under Wis. Stats. Sec. 197.05(3). However, as noted by the supreme court in Wisconsin Power & Light, supra, 284 N.W. at 593, the PSC order usually allows the city 4 months after final judgments in all possible judicial proceedings

have been entered, within which to make up the necessary funds and pay over the compensation. Then upon payment and full compliance with the other terms and conditions stated in the order, the PSC will file the certification of the order with the city clerk, and the city may take possession with full title.

It should be noted that the supreme court has recognized wide discretionary powers that may be exercised by the PSC in fixing the terms and conditions of purchase; Wisconsin Power & Light, supra. Also, Wis. Stats. Sec. 196.39 allows the PSC to at any time, on its own motion, or motion of an interested party, rescind, alter or amend any order, and reopen any case for any reason. But this provision for amending or reopening was held to be inapplicable when the matter involved is an involuntary acquisition under Chapter 197 in Superior Water, Light & Power Co. v. Public Service Commission, 288 N.W. 243 (1940). In that case the court did hold that provisions allowing the PSC to grant a rehearing in Sec. 196.405 were applicable to involuntary acquisition procedures though.

In concluding this discussion of the procedure for public acquisition, it should be noted that the minute procedural details for rehearings of PSC orders and for judicial appeals from such orders are set forth in Chapter 227 and Wis. Administrative Code PSC CH. 2 Sec. 227.20 sets the scope of judicial review, and as will be discussed more fully, places a heavy presumption of validity on any action taken by an administrative agency.

Basis for Just Compensation

The statutes governing an exercise of eminent domain in Chapter 32 set forth requirements of an appraisal, detailed standards by which to determine just compensation, and the types of evidence which can be required by the body making the determination. As noted above, however, Sec. 32.03(1) makes the chapter dealing with eminent domain wholly inapplicable to public acquisitions of utilities by cities not of the first class. Yet Chapter 197 fails to provide any similar guidelines for the PSC or reviewing courts in determining just compensation, but the PSC and the courts have developed some general standards on their own for that purpose in acquisition proceedings.

(1) General formula. The general formula for determining just compensation which is used by the PSC and accepted by the supreme court is:

Cost of reproduction new less depreciation plus going value
(all taken at the time of the original PSC order)

Add: net of value of additions to and retirements from utility property from date of initial order, plus value of materials and supplies.

Deduct: additional depreciation accrued since date of initial award.

See 50 P.S.C.W. 364, 368; 23 P.S.C.W. 431, 434-38 (1941); 5 P.S.C.W. 510, 517-20 (1934); Lake Superior District Power Co. v. P.S.C., 244 Wis. 543, 550, 13 N.W. 2d 89 (1944).

(a) Cost of reproduction new (CRN) is an estimate of the cost of reproducing each item of property subject to acquisition, and this may be derived from material costs based on the purchase records of the utility plus labor costs based on the utility's work order records: 23 P.S.C.W. at 435. In that acquisition proceeding, the PSC accepted the estimate of CRN given by its staff which added to the material costs an additional item of 10% as overhead costs covering engineering, supervision, interest and taxes, omissions, and other general overheads experienced during construction.

(b) Cost of reproduction new less depreciation (CRN-D) is arrived at by using the "age and life basis" of depreciation. The amount of depreciation of the property is reflected in a figure called "condition percent." Condition percent is a "comparison or ratio of the elapsed age of each item of property with an estimate (based on experience and data in the files of the Commission) of the total expected life or period of use of any such item of property." 10 P.S.C.W. 414, 421 (1935); 12 P.S.C.W. 335, 339 (1936). CRN is then multiplied by condition percent to yield CRN-D.

(c) The supreme court has recognized that a PSC award of just compensation must include the "going value" of the utility. Wis. Power & Light, supra, 231 Wis. 390, and Lake Superior District Power, supra. As is true in general, the court allows the PSC broad discretion in determining going value and all that seems necessary to withstand a challange is that it appear to be clear that "going value" was given consideration in determining the figure for just compensation, 284 N.W. at 595. In some of its reports, the PSC has indicated some of the general principles by which it operates in determining going value. In a case reported at 12 P.S.C.W. 233, 243 (1936) the PSC stated:

> "Our Supreme Court has clearly pointed out that in fixing just compensation * * * no allowance can be made either for the value of the exclusive privilege under which the utility operates, or of the utility's goodwill.
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> * * * It seems to us that the only way to determine the value of any business arising solely from the fact that that business is in operation, is by the exercise of intelligent judgment in light of the relevant facts and circumstances which surround the particular business involved. Certainly, as it seems to us, the "going value of a utility" cannot be measured or estimated in an acquisition case either upon past losses or past deficits, which the business had incurred, even though those losses and deficits may have resulted from attempts of the management to build up the business."

In 10 P.S.C.W. 414, 417 (1935), the PSC cited Jiorini v. City of Kenosha, 208 Wis. 496, as authority for its statement that "loss of profits arising from the taking of property cannot be allowed in the determination of the just compensation to be made to the owner of that property, and there is no allowance for good will - only going value."

In 5 P.S.C.W. 510 (1934), the PSC report describes in detail 3 mathematical formulas for determining going value urged upon it by consulting engineers for Wisconsin Power & Light. The PSC rejected the complex formula under the theory that going value is only a reasonable estimate in light of all the facts and circumstances. In that case the PSC engineers presented testimony that CRN-D was $8,645 and the PSC award was $10,000. Assuming adoption of the staff's estimate, going value was about 16 percent of CRN-D.

In 23 P.S.C.W. 428, 436 (1941) the P.S.C. stated:

> "We do not believe that going value should be determined hard-and-fast percentage. We have not used such a percentage to reach our determination. However, if the going value of the Edgerton property considered by us were stated in a separate amount and were reduced mathematically to a percentage basis, the amount thereof would fall between 7 and 8 percent of the physical property including overheads."

This should present some general idea of how the PSC would establish going value in an MG & E acquisition, but whatever it sets as going value would probably be upheld on appeal unless very clearly unreasonable.

(d) The PSC's initial order fixing just compensation will include an amount to be ascertained later for the value of materials and supplies (if not already valued and included), for net additions to or retirements from the property subject to acquisition between the date of the initial award and time of payment, and for additional depreciation since the date of the award. The PSC's order will usually include a provision that the city and the utility can negotiate and reach an agreement on these items prior to payment, but if they fail to agree, the PSC will step in and ascertain the amounts; see 23 P.S.C.W. at 437. The PSC will generally require the making of an ongoing accounting for additions and retirements from the date of the initial order; Wisconsin Power & Light Co. v. P.S.C., 231 Wis. 390, 408, 284 N.W. 586, 594 (1939).

(2) Lump-sum Nature of Award. In the Wisconsin Power & Light and Lake Superior District Power cases cited above the supreme court gave specific approval to the PSC's practice of stating the just compensation to be paid in one lump sum without presenting the figures for each element involved in that figure such as CRN, condition percent, and going value. In Wisconsin Power & Light the court stated, 284 N.W. at 596:

> "A fair hearing does not require that the findings be split up so as to make the determination of the Commission more readily subject to attack.
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> * * * Unless upon the whole case it is made to appear that the Public Service Commission has proceeded contrary to law or has arrived at an unreasonable result, the Court must approve its determination.
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> * * * If the procedure followed by the Commission amounts to due process it must be approved. It is not the province of the court to prescribe rules of procedure for an administrative body."

Thus, the crucial role in a municipal acquisition is played by the PSC. I might note that there appear to be no cases in which the supreme court found the amount of compensation determined by the PSC to be so unreasonable as to require reversal.

(3) Role of the PSC Staff. In examining the municipal acquisition cases in the PSC Reports it became quite apparant that in determining just compensation, the evidence and testimony presented by staff engineers is heavily relied on. As noted in 23 P.S.C.W. 428, its engineering department will conduct an appraisal of the property and charge the expense to the municipality. The legal staff may also assist in the preparation of the engineering staff's testimony and in the cross examination of other witnesses.

Under Wis. Stats. Sec. 196.13 the PSC is required to publish biennial reports and subsection (2) requires the PSC to publish in its reports the value of all the property and of the physical property actually used and useful for the convenience of the public for "every public utility as to whose rates, charges, service or regulations any hearing has been held by the commission on the value of whose property has been ascertained by it." The PSC's biennial report for 1973-1975 presents very general information not of the type that seems to be required by this statute. I will be attempting to obtain information from the PSC from which a general estimate of the amount likely to be awarded as just compensation can be drawn.

The Property Actually Used and Useful for the Convenience of the Public.

A municipality's power to acquire is limited to the property actually used and useful for the convenience of the public (Sec. 197.01(3)). Some indication of the meaning ascribed to this phrase by the PSC appears in several cases and PSC reports.

If the municipality considers acquiring property of the utility located outside its boundaries, "the question submitted to the people must expressly or by general language, * * *, include such property, else the commission has no power to include it." Wis. P. & L. v. PSC, 231 Wis. 390, 284 N.W. 586, 591 (1939).

Once the municipality has voted in favor of acquisition, it cannot agree with the utility upon the specific property to be taken unless the PSC has given its consent and approval. Wis. P. & L., supra.

Section 196.57 states that a utility's operation under an indeterminate permit is deemed to be consent to a purchase of the used and useful property by the municipality in which the major part of it is situated. In Wis. P. & L. v. PSC, 224 Wis. 59, 286 N.W. 555 (1939), and in Wis. P. & L. v. PSC, 224 Wis. 586, 272 N.W. 50 (1937), the court relied on this statute in holding that under certain circumstances, the PSC must include property located outside the city and property inside the city used to serve other areas. The court looked at factors such as (1) the extent to which rural customers now served would be left without power, (2) the advantage to the city in continuing to sell power to rural customers, (3) whether there is any other utility in the vicinity, and (4) whether the property is an integral part of the whole power system which only incidentally happens to serve others. In conclusion, the court stated in both cases that if a municipality takes over a utility "it should step in the shoes of the public utility owning the property and continue to furnish service not merely to the inhabitants within the city limits, but also to the people living near by but outside the city limits."

However, in Wis. Power & Light v. PSC, 232 Wis. 43, 286 N.W. 581 (1939) the court, in an entirely different case, limited the scope of the "entity theory" of the property used and useful. The court stated that Sec. 196.57 "was intended to apply to the ordinary and then existing public utility which served a given municipality and in addition some customer consumers beyond the limits of the municipality," and that is the extent of the property the municipality must acquire. The fact that a public utility has operations in other municipalities which with the municipality seeking acquisition are operated as a single unit, does not require the latter to acquire the utility's property located within other municipalities.

The PSC has indicated that a lease of property used by the utility in its operations is not subject to its authority to determine what property is used and useful. 12 P.S.C. W. 233, 246 (1936)

The PSC has also approved of the principle that once a municipality votes in favor of acquiring a municipality, a sale by the utility of any of its useful property is, in effect, a violation of the utility's agreement under the indeterminate permit, and "constitutes an act in derogation of the municipality's right to acquire all of the property subject to acquisition. If the ~~municipality~~ utility makes such a sale, the value of it will be subtracted from the amount of just compensation awarded.

In general the supreme court has allowed the exercise of much discretion by the PSC in determining what property is used and useful for the convenience of the public. Typical is the Lake Superior District Power case, supra, in which the court held that this matter is a question of fact to be found by the PSC. Its fact finding can only be set aside on grounds that it is unreasonable and will not be disturbed unless the court finds that the character of the order is clearly unreasonable.

Election Requirement for Bonds to Finance Involuntary Acquisition.

The question may arise as to whether a municipality which has voted to acquire a utility involuntarily under Chapter 197 is required approval in another election the issuance of bonds for making the payment of the just compensation fixed by the PSC. After much searching for authority in the court reports and the PSC reports it appears that the issue has arisen only on one occasion back in the years when the Railroad Commission was responsible for fixing just compensation in utility acquisition proceedings rather than the PSC. The decision in James v. City of Racine, 155 Wis. 1, 25, 143 N.W. 707 (1913) contains the following broad statement:

> " * * * And if, in view of the terms and conditions of sale imposed by the railroad commission, it becomes necessary to issue bonds to procure the purchase price, it can do so without any further vote of the electors. Their vote to purchase the plant must be held to include a vote to raise money by the issuance of bonds if that method be deemed necessary or expedient by the city council."

Althouth Chapter 197 mentions no additional election requirement for the method of financing the acquisition, it might be a good idea to tie a provision authorizing the issuance of bonds in with the general question of whether or not the municipality should acquire the utility.

Municipal Indebtedness? Article XI, Section 3 of the Wisconsin Constitution clearly provides that "An indebtedness created for the purpose of purchasing, acquiring, * * * , controlling, operating or managing a public utility of a town, village, city or special district, and secured solely by the property or income of such public utility, and whereby no municipal liability is created, shall not be considered an indebtedness * * * , and shall not be included in arriving at such debt limitation."

Voluntary Purchase of a Utility

Wis. Stats. Sec. 66.065 confers upon municipalities the power to acquire property located within or without its boundaries for furnishing water, light, heat or power to itself or its inhabitants. The same statute also allows the acquisition of a controlling portion of the stock of any corporation owning private waterworks or lighting plant and equipment located within the municipality. The statute also allows the municipality to purchase the equity of redemtion in a mortgaged or bonded waterworks or lighting system. (Equity of redemption is defined generally as the equitable title to property left in the mortgagor representing his remaining interest and his right to pay the amount of the debt and have full title restored by discharging the liens on it). Sec. 66.065 governs the situation in which the acquisition of either of the above three items is by voluntary negotiated purchase. The distinction between acquisitions under Sec. 66.065 and Chapter 197 was made in Pardeeville Electric Light Co. v. PSC, 238 Wis. 97, 297 N.W. 394 (1941).

Subsection (2) of 66.065 requires the adoption of a resolution by the Common Council specifying the method of payment to be used in any voluntary purchase and submitting the question to a referendum. The resolution must be adopted at a regular meeting of the council one week prior to which notice that the matter would be considered must be published.

Section 66.066 provides that the city may, by action of the governing body, finance the voluntary purchase of either of the three items from the general fund or from the proceeds of municipal bonds or mortgage bonds or mortgage certificates. Subsection (4) provides that in lieu of a tax levy or issuance of bonds or certificates as a method of financing the purchase, the municipality can provide for or secure payment of the cost by pledging, assigning or otherwise hypothecating shares of stock evidencing a controlling interest in the utility, or by pledging the net profits to be derived from the operation of the utility. The minute details governing each method of financing a voluntary purchase are also contained in Sec. 66.066.

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