2-20-73

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consumers Power Company	)	Docket Nos. 50-329A
	)	50-330A
(Midland Plant Units 1 and 2)	)	

SUPPLEMENTAL MOTION
TO QUASH SUBPOENAS ON
GROUNDS OF CONFIDENTIALITY

TO: Jerome Garfinkel, Chairman,
The Atomic Safety and Licensing Board

This memorandum is written on behalf of twenty-one municipalities in accord with Chairman Garfinkel's ruling at */ R. 293-294 of the pre-hearing conference held February 12, 1973. These municipalities appear specially and are not parties to this case.

I

As we stated on page 3 of our "Motion to Quash Subpoenas", giving Consumers Power Company the range of cost and competitive data that it requests could unduly benefit Consumers Power in competing for customers or ratemaking. These concerns are especially apparent with regard to Document Requests Nos. 4 and 5, and Interrogatory Requests

*/ Transcript record

8006160 440

Nos. 7, 8, 45, 46, 59 and 60. Document Request No. 4 and Interrogatories 7 and 8 have been largely denied. However, since they may be subject to modification or partial response we refer to them here. */

Taken together the above-mentioned Document Requests and Interrogatories ask for specific information about the non-party municipals' largest customers, broken down by township or incorporated area (Interrogatories 7-8), customer additions (Question 46) and customer losses (Question 45). Questions 59 and 60 inquire respectively into refusals by municipalities to serve or by customers to buy and the reasons therefor. Consumers Power apparently intends that documents be supplied concerning nearly all of the above items. There are cross references in document requests Nos. 4 and 5 and an additional document request incorporated as part of Interrogatory No. 46(e). Considering that the definition of "document" includes "all drafts of all writings of every kind . . ., including . . . correspondence, memoranda, reports, financial reports, vouchers

---

*/ In referring to these specific items, we do not waive similar objections to other document requests or interrogatories. For example, it is apparent that supplying the range of cost data sought and information concerning future planning could injure the non-party municipals.

and other accounting records, notes, letters, telegrams, messages . . ., studies . . ., analyses, comparisons, books, magazines, newspapers, booklets, circulars, bulletins, notices, instructions, minutes and other communications, ...",* the amount of information requested concerning the non-party customers or potential customers is virtually unlimited. Furthermore, the questions ask specific information pertaining to costs of building lines to serve the specific customers, sales and load characteristics as well as miscellaneous cost information. While the Board has limited some of the questions in time or in scope, apparently Consumers Power intends to re-submit Document Requests 4 and 5 and Interrogatories 45, 46 (including the Document Request). Interrogatories 59 and 60 (limited to commercial and industrial customers), were approved.** The focal point of competition is for large commercial and industrial loads. Since Michigan does not have franchised territories which would limit competition between municipalities

---

* / Compare In re Grand Jury Investigation, 174 F. Supp. 393 (SDNY, 1959).

** / On February 16, 1973, Consumers mailed a document request and attached subpoenas which largely adhered to its original usage for document requests 4 and 5. We respectfully request that the issuance of the subpoenas be stayed until we have an opportunity to further examine the reworded requests and until we determine whether we should appeal the Board's ruling.

and Consumers Power Company for these loads, giving the information requested to Consumers Power is tantamount to giving information to a direct business competitor.

Even where discovery rights have been broadly allowed, specific limitaticns have been established in the case of trade secrets. The desirability of this is illustrated by the situation here.

II

While "[n]o absolute privilege protects trade secrets from disclosure through the discovery process, ... the courts are loath to order disclosure of trade secrets absent a clear showing of immediate need for the information requested." Moore's Federal Practice, Section 26.60[4], pp. 26-242 - 26-245 (1972) (Emphasis added). Trade secrets have been held to include business records, and sales and customer information, e.g., U. S. v. Serta Associates, Inc., 29 F.R.D.136 (1961); Canister Co. v. National Can Corporation, 8 F.R.D. 408 (D. Del., 1948); Atlas Bedspread Co. v. Celanese Corporation of America, 16 Fed. Rules Serv. 26b.46 (S.D.N.Y., 1951); National Utility Service v. Wisconsin Centrifugal Foundry, 44 F.R.D. 539 (E.D. Wisc., 1968); Corbett v. Free Press Association, 50 F.R.D. 179 (1970). The

reasons behind not forcing a revelation of confidential business information have even been recognized in discovery against the Federal government. An exception to the Freedom of Information Act is made for "trade secrets and commercial and financial information obtained from a person [which] is privileged or confidential." 5 U.S.C. Section 552(b)(4); Accord, Continental Distilling Corporation v. Humphrey, 17 F.R.D. 237 (D. D.C., 1955).

A summation of the case law on rights of discovery is that usually as between parties one need not establish that the requested information will provide admissable evidence, but only that it is relevant to the subject matter of the case, e.g., IV Moore's Federal Practice, Sec. 26.56[1], pp. 26-115 - 26-156. However, when dealing with trade secrets, or other privileged matter, a more precise balancing is necessary. Thus, such information will not be required unless "upon a proper showing it is made to appear that such disclosure is relevant and necessary to the proper presentation of a plaintiff's or defendant's case."* Hartley Pen Co. v. U. S. District Court,

* In some situations discovery was disallowed, but the court stated it might later reconsider if there were proof of need. Remington Rand v. Control Instrument, 7 F.R.D. 18 (E.D.N.Y., 1947); United States v. Serta Associates, supra, 29 F.R.D. at p. 138; Corbett v. Free Press Association, 50 F.R.D. 179, 182 (1970).

Etc., 287 F.2d 324, 328, 330-331 (CA 9, 1961) (Emphasis supplied); Atlas Bedspread Co. v. Celanese Corporation, 16 F. R. Serv. 26b.46 (S.D.N.Y., 1951); Cf., Hickman v. Taylor, 329 U. S. 495, 507-508 (1947). This policy would be especially strong against non-parties. */ United States v. Serta Associates, 29 F.R.D. 136 (1961).

Applicant's apparent reason for wanting the subpoenaed information is stated at pp. 5-6 of "Applicant's Answer to Motion to Quash Subpoenas of Michigan Municipals" (January 19, 1973). It states:

> ". . . Applicant must secure the data about the systems necessary to establish such [competitive] viability . . . . Many of the requests deal with documents and data clearly required for an analysis of competition, e.g., comparative rates, customer data, bill analyses (document requests 1(c), (d) and (e), 2, 3(b) and 4(b); interrogatories 1 to 6, 45 and 46 . . . (See also TR 186-189)."

However, no party to this proceeding denies that there is presently competition between the Michigan Cooperatives, Cities and Consumers Power. Furthermore, the Department of

---

*/ Compare the action of the Postal Rate Commission limiting discovery even against parties who deserve limited participation. Appendix A.

Justice was willing to stipulate that except for the City of Lansing the competitive status of the intervenor cities for which information would be provided was typical of that of the non-party municipals (TR 324-325).* And Consumers Power will not even concede the jurisdiction of the Commission to order appropriate antitrust relief (TR 190-191). Even if we were to concede arguendo that against the parties Consumers Power is entitled to this information, or that Consumers Power is entitled to the less sensitive information against the non-parties, certainly it is not entitled to business secrets from competitors without making a showing that the data requested is necessary to its case. It is in this context, as a predicate to ordering the non-party municipals supplying this data that the Commission would have to determine that it does have jurisdiction to grant the relief requested by the Department of Justice and intervenors and, further, that

---

* The Department takes the position that the facts relating to the City of Lansing are probably different that both the intervenor cities and the other non-parties subpoenaed because of its difference in size.

the data requested is relevant to the proceeding. */ United States v. Serta Associates, 29 F.R.D. 1366 (N.D. Ill., E.D., 1961). Otherwise, it could not determine that the data requested "is relevant and necessary to the proper presentation of plaintiff's or defendant's case." Hartley Pen v. U. S. District Court, Etc., supra, 287 F.2d at p. 328.

---

*/ During the course of oral argument, Consumers Power referred to the status of parties as being "something substantially accidental." (TR. 189). While attempting to make a distinction, for practical purposes the Hearing Board appears to have largely accepted this characterization (E.g., TR. 215-216). However, the fact that the non-parties are represented by the same counsel is what is "substantially accidental." The intervening parties have fully cooperated with the other parties in supplying data, even though they do not believe that most of that data is relevant. However, the non-parties have not intervened and are not participating in this case. Eleven of them do not purchase from Consumers Power and many are not even within Consumers Power's service territory, but purchase from a completely separate utility. Furthermore, Consumers Power has not subpoenaed small privately owned, cooperatively owned, or even municipally owned utilities, except for Members of the MMEA and intervenors. Against this must be weighed the seriousness of its claim of the need for the subpoenaed information against all of these municipals. In this situation, a valid claim of privilege should be respected, especially when the only thing Consumers Power wants to prove is something on which everyone agrees -- there is competition for retail customers. Nor has Consumers Power ever explained why the right of other utilities to access to power from the Midland units (either through ownership or through purchase of electricity) and to transmission services depends upon the amount of present competition. This is neither a case to set rates before the FPC or an antitrust case, but a proceeding to determine the terms under which licenses to operate nuclear units will be granted, if such licenses are granted. The relief sought by intervenors is not a punishment for violating antitrust laws and a defense to the relief sought by them is not proved by establishing that there is presently competition in the retail market. Rather, the ultimate issue is whether the requested relief would further competition and whether failure to grant it would restrict it. Indeed, if there were presently no competition, there would be no municipals or cooperatives -- and (except for potential competition) there would be no case.

In any event, the Federal rules do not provide for opening the files of a competitor -- or accomplishing the same thing by having such detailed interrogatories and document requests -- without a specific showing of relevancy. Hartley Pen Co. v. United States District Court, Etc., supra, 287 F.2d at 331-332; Floridin v. Attpulgus Clay Co., 26 F.Supp. 968, 972 (D.Del., 1939). And Consumers Power has never stated what it hopes to prove from this discovery that all parties do not admit. (TR. 185-190).

III

The question has been raised whether the information sought by Consumers Power Company would be available to them as public records, becuase of the status of special movants here as municipally run electric utilities. While we have not been able to exhaustively research Michigan law on the subject, it appears that information contained in annual and other reports would probably be available, but that work papers and underlying data that supports such reports could be maintained as confidential. Apparently, there has not been much litigation on the subject. An Attorney General's ruling or court litigation would be necessary to determine the precise extent of the public right to this information. However, it is clear that Consumers Power

Company could not get the kind of information it requests here by merely asking for it and that there would be a definite basis for the municipalities claiming privilege in State courts. I am informed by their attorney that Lansing makes a practice of not revealing customer lists and customer billing information in order to protect its customer's privacy.

The probable conclusion is that Michigan would apply the same type of standards that are here being considered, although because of a lack of Freedom of Information Act, the public's access to information may be more limited than it would be for information controlled by the U. S. Government.

Article IX, Section 23, of the Michigan Constitution provides:

> "All financial records, accountings, audit reports and other reports of public monies shall be public records and open to inspection. A statement of all revenues and expenditures of public monies shall be published and distributed annually, as provided by law."

There are also laws providing for certain municipalities maintaining public records. By statute municipally owned utilities are required to publish annual reports in accordance with the state's uniform system of accounts. However, otherwise these or other statutes do not specifically refer to municipal public

utility operations in a way that would define terms like public records or financial records. Legislation relied upon is in Appendix B. In Grayson v. Michigan State Board of Accountancy, 27 Mich. App. 26, 183 N.W.2d 424 (1970), the only case that we have found directly interpreting the constitutional provision quoted above, the Michigan Court of Appeals held that the State did not have to release the names of those taking a CPA exam, even though the receipt for payment arguably made the application a "financial record". The Court balanced the interests of privacy of the applicants against the interest in claimants for the information.

> ". . . the manifest purpose of Article 9 Section 23 is to allow the public to keep their finger on the pulse of government spending. The most expeditious way of doing so is to give the public access to summaries, balance sheets and other such compilations which map out and correlate a myriad of financial transactions into a meaningful account. It strains ones credulity to think that the framers of the Constitution meant to allow the public to inspect every receipt, every application for licensure and every writing evidencing a receipt or expenditure. It is totally unnecessary to give such authority to the public to achieve the purpose aforementioned and such authority could easily serve as a tool to harass governmental agencies by unreasonable demands for great volumes of individual documents. We hold that the public right to information given by Article 9, Section 23 is best promoted, and the smooth functioning of the government best protected, by construing the words "financial records" to require more than a receipt or document, such as the imprinted applications here."

Furthermore, the State of Michigan has analogized the operating of municipal electric utility service to the operating of private businesses and has stated that they have an equal right to compete. Andrews v. City of South Haven, 187 Mich. 294 (1915); see also Gas and Electric Co. v. the City of Dowagiac, 273 Mich. 153 (1935). This lends support that in interpreting its laws, Michigan would consider such factors as relevancy of the information requested, burden and competitive harm. But in any event, we have found no basis for the Atomic Energy Commission determining that it should release this information premised on a conclusion that Michigan law establishes a general right to the data. At most it can be stated that after litigation Michigan courts might order some of the data released.

IV

The question was raised about the possibility of granting some or all of the information, subject to a protective order (TR. 196-297). Of course, should the information be ordered to be provided, a protective order would be necessary. However, considering that in many instances Consumers Power and the cities involved are direct competitors and would have an awareness of each other's largest customers within the relevant service areas,

in most instances coding of the information would provide minimal protection. Moreover, unlike where information has been given to the Government or where the Government is seeking information, here Consumers Power (the competitor itself) rather than the AEC staff or the Justice Department seeks the information. Graber Manufacturing Co. v. Dixon, 223 F.Supp. 1020 (D.D.C., 1963). Therefore, while if the information is ordered and such order is sustained on appeal, we would seek a protective order, this would not solve the problem. See Corbett v. Free Press Association, 50 F.R.D. 179 (1970).

WHEREFORE, for the foregoing reasons the non-party municipals respectfully request that Document Requests 4 and 5 and Interrogatory Requests Nos. 7, 8, 45, 46, 59 and 60 be denied or limited, or in the alternative, that they be limited to exclude information pertaining to the acquisition, retention, refusal to serve or cost of serving large customers. This motion is filed without prejudice to our position that document requests and interrogatories should be quashed in their entirety.

Respectfully submitted,

Robert A. Jablon
One of the attorneys appearing specially
for the Cities of Bay City, Charlevoix, Chelsea,
Clinton, Croswell, Dowagiac, Hart, Hillsdale,
Lansing, Lowell, Marshall, Niles, Paw Paw,
Petoskey, Portland, St. Louis, Sebewaing,
South Haven, Sturgis, Union City and Wyandotte

February 20, 1973
Law Offices:
George Spiegel
Washington, D. C.

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

Robert A. Jablon, being first duly sworn, deposes and says that he is an attorney for the Cities of Bay City, Charlevoix, Chelsea, Clinton, Croswell, Dowagiac, Hart, Hillsdale, Lansing, Lowell, Marshall, Niles, Paw Paw, Petoskey, Portland, St. Louis, Sebewaing, South Haven, Sturgis, Union City and Wyandotte, all in Michigan, and that as such he has signed the foregoing Supplemental Motion to Quash Subpoenas On Grounds Of Confidentiality for and on behalf of said parties; that he is authorized so to do; that he has read said Motion and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

Robert A. Jablon

Subscribed and sworn to before
me this 20th day of February, 1973.

Notary Public, D. C.

My commission expires: September 30, 1974

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D. C. 20268

Mail Classification Case, 1973) Docket No. MC73-1

Notice Establishing Time for Filing
Requests for Limited Participation

(February 6, 1973)

On January 30, 1973, the Commission noticed this proceeding and provided that petitions for leave to intervene should be filed by February 26 (38 F.R. 2800). Thereafter, on February 5, the Commission adopted new rules providing a means for persons to participate in Commission proceedings without becoming full parties. These rules are published elsewhere in this issue of the Federal Register.

In the case of persons who wish to appear in Commission proceedings on a limited basis, the new rules can ease the expense of participation. Such "limited participators" may present evidence, cross-examine, and file briefs before the administrative law judge. They will not, however, be required to answer interrogatories, to produce documents, or otherwise be subject to discovery procedures.

The effects of the new "limited participator" rules are spelled out in the Preamble to those rules.

If any person desires to be heard in this proceeding as a "limited participator," that person should file a request to do so with the Secretary, Postal Rate Commission, Washington, D. C. 20268, on or before February 26, 1973. Any person who has filed or has taken steps to file a petition to intervene may signify by a letter that he wishes to be granted limited participation under the new rules, rather than full intervention. Such letters should be filed promptly with the Secretary.

By the Commission.

Joseph A. Fisher

Joseph A. Fisher
Secretary

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D. C. 20268

Before Commissioners: Chairman Crowley, Commissioners Baily and Ryan

Limited Participation in Commission Proceedings by Persons Not Parties) Docket No. RM73-2

ORDER PROMULGATING AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

(Issued February 6 , 1973)

In the Advance Notice of Rulemaking Regarding Proposed Revisions to Rules of Practice and Procedure, Docket No. RM73-2, published in the Federal Register on August 16, 1972 (37 F. R. 16554), the Commission invited interested parties to submit comments for revision of procedural provisions of the Commission's Rules of Practice and Procedure. Proposals were received for revising a number of Rules, and these are currently under consideration.

Expressly referred to in the Notice was a proposal to allow limited participation in Commission proceedings, permitting a person who did not choose to avail himself of the full hearing rights granted formal parties a means for placing before the Commission his position on any of the issues in the case. This proposal assumed special significance in light of the forthcoming classification case, notice of which was published in the Federal Register on January 30, 1973 (38 F. R. 2800). Accordingly, this aspect of Docket No. RM73-2 is being considered at this time independently of the other matters in the docket.

Filed 2-6-1973

GEORGE A. FITZ

Commenting in favor of a rule allowing limited participation were Second Class Mail Publications, Inc., American Retail Federation, Fairchild Publications, Inc. and Magazine Publishers Association. The Postal Service also supported the concept but argued that [illegible] such status must "accept the lesser rights which that status confers along with the lesser obligations it imposes."[1/] No comments opposing the adoption of such a rule were received. In essence what supporters of the rule seek is the opportunity to state their views on the record without incurring the burdens in effort and expense that full participation in lengthy and complex proceedings frequently entails. Their comments do not set forth with any specificity what the scope of such participation should be; but they cite as examples of what they seek 14 C.F.R. § 302.14(b) and 49 C.F.R. § 1100.73, rules of the CAB and ICC, respectively, which provide for limited intervention in the proceedings of those agencies.

As indicated in the Notice, the Commission favors a relaxation of the rules to allow limited participation by those who do not desire to become full parties to our proceedings. At the same time we recognize, as do the proponents of the rule,[2/] the merits of the Postal Service view that such a rule should not be one-sided. Otherwise it could become a means for securing the advantages of full-party status while avoiding the obligations placed on such parties. We believe the rights and limitations being prescribed strike an appropriate balance.

Persons who choose to avail themselves of the status of limited participators will have an adequate opportunity to submit evidence and state their position on the issues without unduly delaying the progress of the hearing or imposing unwarranted burdens on formal parties. The Commission wishes to emphasize, however, that the rules establish significant differences between formal parties and limited participators, particularly in connection with discovery and the opportunity to be heard following issuance of an intermediate decision. Persons contemplating limited participation under the new rules should be mindful of the restrictions placed on their participation in the Commission proceeding and also of the effect their decision may have on [illegible] under 39 U.S.C. § 3624.

Pursuant to § 3603 of the Postal Reorganization Act, 39 U.S.C. § 3603, it is ordered that the Rules of Practice and Procedure are

---

1/ Reply Comments of USPS, p. 2

2/ See, e.g., Reply Comments of Fairchild Publications, Inc.

amended as set forth below. Since the amendments are procedural in nature, notice and public procedure thereon are not required, and it is therefore further ordered that they shall become effective on February 7, 1973. Accordingly, in light of the foregoing findings, and after careful consideration of the comments received, the Commission hereby amends Part 3001 of its regulations (39 C.F.R. Part 3001), as follows:

1. Amend the Table of Contents by adding a new section 3001.19a--Limited participation by persons not parties, as follows:

Subpart A--Rules of General Applicability

Sec.

* * * * *

3001.19a Limited participation by persons not parties

2. Revise section 3001.5(h) to read:

§ 3001.5 Definitions.

* * * * *

(h) "Participant" means any party and the officer of the Commission who is designated to represent the interests of the general public and, for purposes of §§ 3001.11(e), 12, 21, 23, 24, 30, 31 and 32 only, it also means persons granted limited participation.

3. Amend section 3001.7(a) as follows:

§ 3001.7 Ex parte communications.

(a) Prohibition. To avoid the possibility or appearance of impropriety or of prejudice to the public interest and persons involved in proceedings pending before the Commission, no person who is a party to any on-the-record proceeding or who is granted limited participation in accordance with § 3001.19a, or his counsel, agent, or other person acting on his behalf, nor any intervenor, shall volunteer or submit to any member of the Commission or member of his personal staff, to the presiding officer, or to any employee participating in the decision in such proceeding, any ex parte off-the-record communication regarding any matter at issue in the on-the-record proceeding, except as authorized by law; and no Commissioner, member of his personal staff, presiding officer, or employee participating in the decision in such proceeding, shall request or entertain any such communication. For the purposes of this section, the term "on-the-record

proceeding" means a proceeding noticed pursuant to § 3001.17. The prohibitions of this paragraph shall apply from the date of issuance of such notice.

4. Add a new section 3001.19a reading as follows:

§ 3001.19a Limited participation by persons not parties.

Notwithstanding the provisions of § 3001.20, any person may appear as a limited participator in any case that is noticed for a proceeding pursuant to § 3001.17, in accordance with the following provisions:

(a) Form of request. Requests for leave to be heard as a limited participator shall be in writing, shall set forth the nature and extent of the requestor's interest in the proceeding, shall include the name and full mailing address of the person or persons who are to receive service of documents by the Secretary, and, except where good cause for late filing is shown, shall be filed not later than the date fixed for the filing of petitions to intervene pursuant to § 3001.20(c).

(b) Action on requests. As soon as practicable the Commission shall act to grant or deny requests for limited participation. The grant of a request for limited participation shall not constitute a determination by the Commission that the grantee has such an interest in the proceeding that he would be aggrieved by an ultimate decision or order of the Commission.

(c) Scope of participation. Subject to the provisions of § 3001.30(f), limited participators may present evidence which is relevant to the issues involved in the proceeding and their testimony shall be subject to cross-examination on the same terms applicable to that of formal participants. Limited participators may file briefs or proposed findings pursuant to §§ 3001.34 and 3001.35, and within 15 days after the release of an intermediate decision, or such other time as may be fixed by the Commission, they may file a written statement of their position on the issues. The Commission or the presiding officer may require limited participators having substantially like interests and positions to join together for any or all of the above purposes. Sections 3001.25 through 3001.28 shall not be applicable to limited participators. However, limited participators, particularly those making contentions under 39 U.S.C. § 3622(b)(4),

are advised that failure to provide relevant and material information in support of their claims will be taken into account in determining the weight to be placed on their evidence and arguments.

5. Amend section 3001.55 to read:

§ 3001.55 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission under this subpart, the Postal Service shall serve copies of its formal request for a recommended decision and its prepared direct evidence upon such officer and the parties permitted to intervene as provided in § 3001.12. Such service shall also be made on persons who have been granted limited participation.

6. Amend section 3001.65 to read:

§ 3001.65 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission under this subpart, the Postal Service shall serve copies of its formal request for a recommended decision and its prepared direct evidence upon such officer and the parties permitted to intervene as provided in § 3001.12. Such service shall also be made on persons who have been granted limited participation.

7. Amend section 3001.75 to read:

§ 3001.75 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission under this subpart, the Postal Service shall serve copies of its formal request for an advisory opinion and its prepared direct evidence upon such officer and the parties permitted to intervene as provided by § 3001.12. Such service shall

also be made on persons who have been granted limited participation.

(Sections 3603, 3622-3624, 3661, 3662 of the Postal Reorganization Act; 84 Stat. 760-762, 764; 39 U.S.C. §§ 3603, 3622-3624, 3661, 3662; 5 U.S.C. § 553, 80 Stat. 383-384.)

By the Commission.

Joseph A. Fisher
Secretary

cient amount to support herself. It is admitted on the part of defendant that he struck plaintiff when they were together in the garage and in our opinion there was no justification for this attack upon plaintiff. There were other acts of violence which plaintiff testified defendant committed upon her person, and while we do not approve of the actions of plaintiff in going for a moonlight ride with a man other than her husband even though another couple was present, yet we cannot find that there was anything of an immoral nature occurring upon this occasion.

In this cause there was testimony produced by plaintiff which, if believed, would justify the court in granting her a divorce. We are not able to say that she is unworthy of belief, rather we are of the opinion that the acts of violence complained of justified the trial court in granting a decree of divorce. Moreover, this conclusion is fortified by the action of the trial court who, as we have often times said, had the advantage of having seen and heard the witnesses testify and who was in a better position to determine which of the witnesses was giving a more correct version of the acts which caused the institution of the divorce proceedings.

Decree affirmed, with costs to plaintiff.

Potter, C. J., and Nelson Sharpe, North, Fead, Wiest, Butzel, and Bushnell, JJ., concurred.

MICHIGAN GAS & ELECTRIC CO. v. CITY OF DOWAGIAC.

1. Municipal Corporations—Electricity—Constitutional Law.

Fourth class city had right prior to Constitution of 1908, and still has, to acquire by purchase or to construct, operate and maintain works to supply electricity to city and its inhabitants and as an incident to furnishing same to inhabitants to do necessary wiring in connection with its distribution system (Const. 1908, art. 8, § 23, 1 Comp. Laws 1929, § 2180).

2. Same—Franchises—Electricity.

Power of fourth class city to sell and furnish electricity to private individuals in connection with operation of its plant and install and maintain a distribution system therefor vested in it by Constitution and charter may not be abdicated by any franchise (Const. 1908, art. 8, § 23, 1 Comp. Laws 1929, § 2180).

3. Courts—Jurisdiction—Municipal Corporations—Electricity.

A court has no jurisdiction to make a decree in violation of a Constitution and statute relative to ownership and operation of works for sale and distribution of electrical energy.

4. Injunction—Municipal Corporations—Electricity—Scope.

On assumption that decree enjoining fourth class city from generating and distributing electrical energy for sale to the public and from extending its electric lines for such purpose until proper proceedings had been taken therefor, that of which plaintiff, a private corporation furnishing electricity in same locality, had a right to complain was the irregular or improper exercise of that power.

5. Municipal Corporations—Electricity—Injunction—Officers—Contempt.

Petition for contempt which sets forth decree to enjoin fourth class city from sale and distribution and extension of facilities for consumption of electricity by its inhabitants, that city and its officials had since made certain extension of lines and claiming that such was done wantonly and wilfully to prejudice rights of petitioner but which failed to set forth manner in which defendants violated the injunction issued *held*, insufficient.

6. CONTEMPT—PETITION—AFFIDAVITS—SUFFICIENCY.

Valid order adjudging party in contempt cannot be made unless petition or affidavits upon which order is based set forth the nature and cause of accusations against alleged violators by setting up facts sufficient to constitute contempt as a matter of law.

7. EVIDENCE—PRESUMPTIONS—OFFICERS—ELECTRICITY.

Officials of fourth class city who extended system for distributing electricity are presumed to have acted regularly and within the scope of their power.

Appeal from Cass; Simpson (John), J., presiding. Submitted June 14, 1935. (Docket No. 95, Calendar No. 38,450.) Decided October 11, 1935.

Bill by Michigan Gas & Electric Company, a Michigan corporation, against City of Dowagiac, a municipal corporation, and others to restrain defendants from extending electrical system of City of Dowagiac. On petition charging Clint Voorhees, superintendent of the Board of Public Works, and others with contempt. From decree finding defendants guilty of contempt, they appeal. Reversed.

Carl D. Mosier (*Sherman T. Handy*, of counsel), for plaintiff.

Lewis W. James, City Attorney, and *Jack L. Pollock* (*Harold Goodman*, of counsel), for defendants.

POTTER, C. J. Petition by plaintiff for an order adjudging defendants guilty of contempt for violating a final decree of the trial court.

The city of Dowagiac is organized as a city of the fourth class. Const. 1908, art. 8, § 23, provides:

"Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof," etc.

The city of Dowagiac, under its charter, had, prior to the Constitution of 1908, and still has, the right to acquire by purchase or to construct, operate and maintain, either within or without the city, works to supply gas, electric and other lights to the city and to the inhabitants thereof. 1 Comp. Laws 1929, § 2169. Incident to its right to furnish electricity to its inhabitants, it has a right to do the necessary wiring in connection with its distribution system.

In pursuance of the power vested in it, the city of Dowagiac owns and operates a municipal electric light plant and has the constitutional and statutory authority to sell and furnish electricity to private individuals in connection with the operation of its plant, to install and maintain a distribution system so to do. This power and authority vested in it by its constitution and charter may not be abdicated by any franchise.

The Michigan Gas & Electric Company filed a bill and obtained a decree against the city of Dowagiac, enjoining the defendant from enlarging or extending its electric lines for the sale and distribution of electrical energy until proper proceedings had been taken therefor, and from generating and distributing electrical energy for sale to the public until proper proceedings had been taken therefor.

Just what these proper proceedings were is left wholly indefinite by the decree. The court was wholly without jurisdiction to make any decree in violation of the Constitution and laws of the State covering the ownership and operation of works for the sale and distribution of electrical energy, and

we cannot find it assumed to do so. Assuming, as seems to be conceded, this decree was valid, defendants sought to extend their lines or distribution system so as to furnish electricity to some private individuals. This they clearly had the general power and authority to do. The thing of which plaintiff had a right to complain was the irregular or improper exercise of that power.

A petition was filed against the defendants for contempt in making these extensions. The petition sets up the terms and provisions of the decree, and that the defendants had made certain extensions of their lines to private individuals. It claims in its petition that this was done wantonly and wilfully and for the purposes of prejudicing the rights of petitioner, and constitutes a contempt of the order and decree of the court, which should be punished.

There is nothing in this petition which sets forth the manner in which the defendants violated the injunction issued, and no valid order adjudging defendants guilty of contempt can be made unless the petition or affidavits made the basis of the order set forth the nature and cause of the accusations against them by setting up facts sufficient to constitute contempt as a matter of law. 13 C. J. p. 65.

It is presumed the defendants, in making the extensions of their distribution system, acted regularly and within the scope of their power.

The petition wholly fails to set forth the manner in which the defendants violated the injunction and decree and are guilty of contempt, and the conviction is, therefore, reversed, with costs.

NELSON SHARPE, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PHILLIPS v. COUNTY OF IRON.

1. WORKMEN'S COMPENSATION — DEPARTMENT OF LABOR AND INDUSTRY.

   The department of labor and industry is administrative in character.

2. SAME — INSURANCE — RECORDS.

   First insurer under policy in which date of termination was fixed in December which did not file notice of proposed termination of risk until following April after accident which occurred in intervening February *held*, liable therefor, where subsequent insurer had not filed insurer's certificate until March, the first insurer being the only one on the risk at the time of the accident according to the records of the department of labor and industry which is charged with the administration of the workmen's compensation act (2 Comp. Laws 1929, § 8460 [f]).

Appeal from Department of Labor and Industry. Submitted June 11, 1935. (Docket No. 98, Calendar No. 38,412.) Decided October 11, 1935.

Edwin Phillips presented his claim against County of Iron, employer, and United States Fidelity & Guaranty Company, insurer, for compensation for an accidental injury sustained while in defendant's employ. From award to plaintiff, defendants appeal. Affirmed.

Denis McGinn, for defendants.

POTTER, C. J. August 7, 1933, defendant United States Fidelity & Guaranty Company insured the employees of Iron county under the workmen's compensation act. This policy was canceled by the defendant company December 11, 1933. October 2,

given him credit had he not made the false statement."

In *Ferris* v. *McQueen*, 91 Mich. 367 (51 N. W. 161), this court said:

"The rule is that fraud may be proved, like any other fact, by facts and circumstances which satisfy the mind of its existence, and it is a question for the jury when there is any evidence to warrant the finding. As was held in *Freedman* v. *Campfield*, 92 Mich. 118 [52 N. W. 630], when there is a *scintilla* of evidence, the verdict will not be disturbed."

There was more than a scintilla of evidence in this case for the jury to consider on the question of fraud. We conclude that the issue was fairly submitted to the jury under proper instructions, and discover no error committed in the progress of the trial requiring the verdict to be disturbed.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

ANDREWS *v.* CITY OF SOUTH HAVEN.

1. MUNICIPAL CORPORATIONS—ELECTRICITY—TRADE.

Art. 8, sec. 23, of the Constitution authorizes cities to operate electric light plants and to supply the inhabitants with light, heat and power.[1] See, also, 1 Comp. Laws, § 3258 *et seq.*

[1] As to power of municipality to engage in private enterprise, see notes in 31 L. R. A. (N. S.) 117, 119; 51 L. R. A. (N. S.) 1143.

2. SAME—COMPETITION—INJUNCTION.

In the exercise of proprietary and business powers of a municipal corporation, it is governed by the same rules which control a private individual or a business corporation. In such case the fact that a city engaging in a commercial line of activity competes with and damages one of its inhabitants in his trade or business does not entitle him to relief against municipal action for the city owes him no immunity from competition.

3. SAME—EQUITY.

Nor is a taxpayer who sells electrical appliances entitled to restrain a municipal corporation from competing with him in the selling of electric light fixtures, in which branch of business it engages as an incidental part of its power and light business, in the absence of any showing that taxation was thereby increased or that damage accrued to him as a taxpayer by reason of such commercial enterprise.

Appeal from Van Buren: Des Voignes, J. Submitted April 16, 1915. (Docket No. 131.) Decided July 23, 1915.

Bill by Albert E. Andrews against the city of South Haven for an injunction and other relief. From an order sustaining a demurrer to the bill, complainant appeals. Affirmed.

Thomas J. Cavanaugh, for appellant.

Fred C. Cogshall, for appellee.

STEERE, J. This is an appeal to review a decree sustaining defendant's demurrer to complainant's bill, filed to restrain alleged *ultra vires* municipal trading, and dismissing the same.

In outline, the material facts disclosed by said bill are as follows: Complainant, who is a resident property owner and taxpayer of the city of South Haven, where he maintains a regular place of business, and is engaged in selling and installing electrical fixtures, bulbs, supplies, wiring, etc., and equips buildings to

use electrical current for lighting and other purposes, charges that defendant is engaged in like business in excess of its corporate authority, in competition with him, unlawfully using public funds for that purpose. Defendant is a city of the fourth class, organized, existing, and "doing business supposedly" under the Constitution of this State and Act No. 215, Pub. Acts 1895. There is in said city a private gas plant which supplies the community with gas for lighting purposes. The city owns and, through its board of public works, operates, a municipal lighting plant from which it supplies itself and inhabitants with electric lights. It keeps on hand, purchased with public money raised by taxation and transferred to a fund for that purpose, a stock of electrical fixtures and accessories similar to those dealt in by complainant, which it sells to its inhabitants, also furnishing to them, for hire, its regularly employed electricians to install wiring and electrical equipment in their private residences and places of business, advertising that it will perform such work, furnish and install fixtures, supply attachments, light bulbs, and all electrical accessories, for private individuals on their premises, in their private residences or places of business, substantially at cost. The bill further alleges that, as a result of the city thus engaging in competition with complainant, he is suffering, and will continue to suffer, irreparable loss and damage; charges that it is not essential or necessary for the city to engage in such business in order to supply its inhabitants with light, and that under the charter it has no authority to do so; therefore prays for an injunction restraining said municipality from "engaging in and carrying on the business aforesaid in the manner aforesaid, and from using the funds of the city raised by taxation for other purposes to buy supplies and keep them for sale and to pay the electricians for the purpose of disposing of their time to

private individuals for hire in the manner aforesaid, and from keeping and selling to private individuals wire, fixtures, bulbs, electrical supplies, or accessories in any amount or of any kind whatsoever."

The direct and only question raised by this bill and the demurrer to it is the right of the city, while operating its electric plant and supplying its inhabitants with current, to also in that connection do electrical wiring on their private premises and furnish fixtures and other accessories essential and convenient in using electricity.

The corporate power of a city to own and operate a municipal electric plant and supply its inhabitants at prescribed rates light, heat, and power is conferred by statute and the Constitution. In the act under which defendant was incorporated, authority to supply light is conferred, and by the Constitution, adopted later, heat and power are included as follows (section 23, art. 8):

"Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof."

The general act providing for incorporation of cities of the fourth class (chapter 88, 1 Comp. Laws), under which defendant was organized, contains various provisions upon the subject of municipal lighting. Section 3258 (2 How. Stat. [2d Ed.] § 5784) confers the power as follows:

"It shall be lawful for any city incorporated or reincorporated under the provisions of this act to acquire by purchase or to construct, operate and maintain, either independently or in connection with the water works of such city, either within or without the city, works for the purpose of supplying such city and the inhabitants thereof, or either, with gas, electric or

other lights at such times and on such terms and conditions as hereinafter provided."

By section 3266 (2 How. Stat. [2d Ed.] § 5792) authority is given the common council to enact such ordinances and adopt such resolutions as may be necessary to carry that object into effect, and to protect and control the property owned and used for that purpose. The act also provides for a board of public works with authority to fix rates, subject to direction of the council, charged, amongst other things, with the following "duty, power and responsibility" (section 3269 [2 How. Stat. (2d Ed.) § 5795]):

"*Second.* The construction, management, supervision and control of such electric or other lighting plants as are or shall be owned by the city."

Section 3270 (2 How. Stat. [2d Ed.] § 5796) provides:

"The said board shall have power to make and adopt all such by-laws, rules and regulations as they may deem necessary and expedient for the transaction of their business, not inconsistent with the ordinances of the city or the provisions of this act."

In this inquiry the governmental powers of a city, by which it regulates and controls its citizens in a sovereign capacity, are not involved. The question raised here relates only to the proprietary or business powers of the city, by means of which it may act and contract for its own private advantage and that of its inhabitants combined. In the exercise of the latter powers, the municipality, acting through its officers, is governed by the same rules which control a private individual or business corporation under like circumstances. *Omaha Water Power Co.* v. *City of Omaha*, 147 Fed. 1 (77 C. C. A. 267, 12 L. R. A. [N. S.] 736, 8 Am. & Eng. Ann. Cas. 614). In such case the fact that a city engaging in a certain line of activity, commercial in its nature, competes with and thereby damages one of its inhabitants in his business, does not entitle him to relief, for the city gives him no immunity from competition.

The electric light plant which defendant owned and operated, although a municipal public utility, was a business concern or enterprise. In its operation and business management the city had the right and power to do those things naturally connected with and belonging to the running of such a business which a private corporation would have in the same connection. Pond on Public Utilities, § 8. The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. As to details and methods of conducting such authorized business, involving exercise of special knowledge and business judgment, there must be many implied powers. A strict, illiberal, or narrow construction which might hamper the exercise of a reasonable discretion by the municipal authorities in such matters, because the power is given in few words, is not, with perhaps a few exceptions, the tendency of decisions in most jurisdictions. The courts as a rule are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest, or the vested power with its implied discretion has been clearly exceeded or grossly abused. In *Torrent* v. *City of Muskegon*, 47 Mich. 115 (10 N. W. 132, 41 Am. Rep. 715), Justice CAMPBELL, in writing the opinion, foreshadowed the rule which, by the great weight of authority, is applied in construing general powers to a municipality to engage in certain modern business activities for the public welfare, saying in part:

"If cities were new inventions, it might with some plausibility be claimed that the terms of their charters, as expressed, must be the literal and precise limits of their powers. * * * There are many flourishing cities whose charters are very short and simple documents. Our verbose charters, except in the limitations they impose upon municipal action, are not as judiciously framed as they might be, and create mischief by their prolixity. But if we should assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible."

In *City of Henderson* v. *Young*, 119 Ky. 224 (83 S. W. 583), where the issue was the right of the city to furnish electricity for light and other purposes to customers beyond the city limits, it is said:

"In the management and operation of its electric plant, a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."

Little direct authority is to be found upon the exact question raised by the facts disclosed in complainant's bill. The two cases cited by counsel for complainant most favorable to his contention are *Attorney General* v. *Leicester Corporation*, 74 J. P. Rep. 385, and *Keen* v. *City of Waycross*, 101 Ga. 588 (29 S. E. 42). The first-named involved the right of the "undertakers," representing the municipal corporation which was authorized to supply electrical current only at the consumer's terminals, to deal in and furnish wiring, electrical fittings, lamps, and other accessories. The court held they could not, basing its decision upon limitations found in the legislation and provisional order in connection therewith having the force of law, saying in part:

"I also think that there is nothing in the sections of

the act of 1847 inconsistent with the construction of 'supply' in the act of 1882 contended for by the plaintiff —namely, that it means the supply of energy to the consumer at his terminals. * * * When we turn to the provisional order, the interpretation, in my opinion, becomes still plainer, 'consumer's terminals' is there stated to mean 'the ends of the electric lines situate upon any consumer's premises and belonging to him at which the supply of energy is delivered from the service lines.' The undertakers have power to charge for supply of energy and for meters and fittings, but for furnishing and laying lines they have no power to charge except in special cases. By clause 21 of the provisional order, however, they are bound to give a supply of energy on demand, and, if the wiring of the house and provision of fittings is part of the supply, they would be compellable to do it without remuneration, and I think there is force in the plaintiff's argument that this cannot have been intended by the legislature. In my opinion, 'supply,' within the meaning of the act and order, is completed at the consumer's terminals."

While that opinion is upon the same subject as the instant case, the controlling reason for the decision has little application here. In that case distinct restrictions were placed upon the authority given the undertakers, or borough officials, by the wording of the act and provisional order, which defined and limited the scope of their action in express terms, the exact meaning of which was declared, to exclusion, as the court found, of the implied power claimed.

In *Keen* v. *City of Waycross*, *supra*, it was held that the city of Waycross did not have implied authority under its charter, which authorized the erection and maintenance of a system of waterworks and connecting the city's mains with pipes of water consumers, to engage in a general plumbing business, sell plumbing supplies and material to private citizens, and do contract work in placing the same upon their premises. By analogy, it can be said that certain of the reasons

stated in that opinion tend to support the construction contended for by complainant in this case. That opinion followed the rule of strict construction; it being said, in part:

"Unless the city of Waycross can show express legislative authority to engage in the business in which it has embarked, the acts of its officials of which the plaintiff complains are clearly *ultra vires*. We have no doubt that, under the act of 1889, upon which the city rests its defense, its board of commissioners have ample power to take such steps as are needful in order to render the waterworks system of the city efficient and beneficial to the public. (See Acts of 1889, p. 829.) But the position of the city that, to bring this result, it was necessary to engage in the plumbing business, is utterly untenable, because obviously not well founded in fact. It might as reasonably be urged that, in order to satisfy its patrons, it was necessary for the city to embark in the ice business, as an incident to its right to supply good drinking water to its citizens."

Subsequently, however, that court recognized embarking in the ice business as an incident to the right of a city to supply good drinking water to its citizens, in *Holton* v. *City of Camilla*, 134 Ga. 560 (68 S. E. 472, 31 L. R. A. [N. S.] 116, 20 Ann. & Eng. Ann. Cas. 199), where it was contended that the city had "no right to embark in a purely private and commercial business of manufacturing or dealing in a common commodity of commerce, such as ice; and therefore the use of public funds raised by taxation for that purpose will be illegal." While other questions not material here were involved in that case and discussed, the court in disposing of the above objection said, amongst other things:

"The object in bringing, by means of a waterworks system, water in pipes from a distance for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. * * * Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition. * * * Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason."

Water sent through pipes to a customer's residence or place of business is water delivered to him ready for use in its then condition. He may heat or cool it, drink or bathe in it, and make whatever use of it he desires. But electric current delivered to him at his residence or place of business as it is transmitted over the wires, in its then condition, neither affords him heat, power, or light without further mediums and appliances. The statute and Constitution do not in terms limit the service to supplying the energy, but authorize the city to supply its inhabitants with water, light, heat, power, and transportation. It may well be contended that furnishing to customers taking electricity the necessary devices or equipment to produce heat, power, or light from the current is naturally incidental to and an implied power connected with the business of operating an electric light plant. It does not appear that the municipality in so doing is conducting the business by different methods or under other rules

than those which are observed by and control private business corporations or private individuals in the operation of an electric plant.

The old law of municipal trading, involving the propriety and expediency of authorizing a municipality to engage in general business in competition with its citizens conducting a private business of like kind, has little bearing here; but the rule remains that taxation can only be for public purposes and municipalities have no express or implied power to engage generally in private business. We are past the general question of the validity of legislation authorizing municipal ownership and operation of plants and their necessary equipment to furnish the concentrated population of cities with certain general needs and conveniences, like water, light, heat, transportation, telephone service, etc.; and it is held that the court will not interfere with any reasonable exercise of the implied powers to operate such plants in a business way, and as any private corporation could or would.

The bill does not show that complainant has sustained or will suffer any loss or damage as a taxpayer by reason of what is charged. No increase of taxation for that purpose is shown. He does allege an improper use, in that connection, of money raised by taxation for that purpose, to buy the electrical appliances furnished customers at, approximately, cost. Whether this was as a whole profitable in operating the plant by reason of increased sale of electricity, or otherwise, is not shown. To entitle him to equitable relief as a taxpayer, present or prospective damages must be shown. *Baker* v. *City of Grand Rapids*, 142 Mich. 687 (106 N. W. 208).

We conclude that the learned chancellor who first passed upon this demurrer correctly determined complainant's bill did not show that the defendant exceeded its implied discretionary power in the operation of this plant, nor state a case which entitled him to equitable relief by injunction.

The decree sustaining said demurrer and dismissing complainant's bill is affirmed, but without costs.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

LAKE v. TOWNSHIP OF SPRINGVILLE.

1. MUNICIPAL CORPORATIONS—NEGLIGENCE—HIGHWAYS AND STREETS.
Where a driver of a horse and vehicle in which plaintiff was a passenger, traveling a little out of the prepared track in order to avoid a quantity of new gravel, saw that he was about to hit a stake that was placed in the road to define it, and, notwithstanding that his horse could have been guided so as to avoid the obstacle, permitted a wheel to pass over the stake throwing plaintiff to the ground, the driver was guilty of contributory negligence, imputable to plaintiff, a voluntary passenger.[1]

2. SAME—NEGLIGENCE—IMPUTED CONTRIBUTORY NEGLIGENCE.
The want of care of a driver of a private vehicle is imputable to a gratuitous passenger of mature years.

Error to Wexford; Lamb, J. Submitted April 13, 1915. (Docket No. 65.) Decided July 23, 1915.

Case by George A. Lake against the township of

[1] As to imputed negligence of driver to passenger, see notes in 8 L. R. A. (N. S.) 597; L. R. A. 1915 A. 761.

which may tend to contradict, weaken, modify, or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness."

If the "fragmentary jottings" differ from the complaining witness's formal statement, this may be either because the jottings are an incomplete or inaccurate reflection of what the witness told the officer or because the statement is incomplete or inaccurate. While it may be the jottings that are incomplete or inaccurate, we should not preclude the defendant from showing that it is the statement which is incomplete or inaccurate, that something reflected in the jottings was intentionally or unintentionally omitted in the preparation of the statement.

The officer and the witness are at liberty to explain that it is the jottings which are incomplete and that the statement as written is true; that the inclusion of something in the statement that was not included in the jottings or the mention in the jottings of something omitted in the statement does not negate the truth of the statement and of the witness's at-trial testimony.[16] There is no need to shield from scrutiny "fragmentary jottings." The interest in full disclosure requires that they be made available for examination at the trial by the defendant and his attorney.

I agree with the majority that the refusal to allow Marra's lawyer to see the notes at the time of trial does not necessarily require a new trial. But it seems to me the inquiry on remand is whether there is anything in the notes which might have enabled Marra's lawyer to impeach the credibility or the testimony of the complaining witness, not whether there is "prejudicial conflict" between the officer's notes and her testimony.

[16]. An officer's notes are not a statement of a witness. But upon examination of such notes the witness might properly be asked whether he made a statement there reflected. If he denies having made the statement, the officer could be asked whether the statement was made. If it appears that the witness made such a statement either from his testimony or the officer's, that statement, if inconsistent with the witness's written statement or trial testimony, would be of probative value.

27 Mich.App. 26

Stanford J. GRAYSON, d/b/a C. P. A. Exam Coach Review, Plaintiff-Appellant,

v.

MICHIGAN STATE BOARD OF ACCOUNTANCY and Michigan Department of Licensing and Regulation, Defendants-Appellees.

Docket No. 7855.

Court of Appeals of Michigan, Div. 1.

Oct. 1, 1970.

Released for Publication Feb. 12, 1971.

Action to compel disclosure of names of applicants for CPA licenses. The Wayne County Circuit Court, Joseph G. Rashid, J., denied relief and plaintiff appealed. The Court of Appeals, V. J. Brennan, J., held that statute prohibiting disclosure was not unconstitutional.

Affirmed.

1. Licenses ⇐5

It is within legislature's police power to regulate methods and procedures in certification of a CPA. M.C.L.A. § 338.503.

2. Licenses ⇐7(1)

Loss of reputation and prejudicial effect on job opportunities which would flow from disclosure that CPA applicant failed examination are detrimental enough to general welfare to justify statute prohibiting disclosure of names of applicants. M.C.L.A. § 338.503.

3. Licenses ⇐7(1)

Fact that statute prohibiting disclosure of names of applicants for CPA licenses

did not benefit all c
fatal to statute. M.C

4. Constitutional Law ⇐
Licenses ⇐7(1)

Statute prohibitin
of applicants for CP
exercise of state's p
not, on theory that it
deprive party who ra
CPA examination of
L.A. § 338.503; M.C
1, § 17; U.S.C.A.Const

5. Constitutional Law ⇐

Mere fact that sta
tion does not in and
person has been denie
of law. M.C.L.A.Cons
U.S.C.A.Const. Amend

6. Constitutional Law ⇐
Licenses ⇐7(2)

Where close to 120
for CPA licenses failed
ute prohibiting disclosu
plicants for license did
who offered review cour
of equal protection of
338.503; M.C.L.A.Const
U.S.C.A.Const. Amend.

7. Records ⇐14

Fact that applications
required payment of fe
were stamped with nota
ment did not render
"financial records" within
that all financial records
money shall be public re
§ 338.503; M.C.L.A.Const

See publication Words
for other judicial cons
definitions.

8. Licenses ⇐22

Where statute prohib
Board of Accountancy

* JAMES J. KELLEY, Jr.,
for the County of Monro
the Supreme Court for the
183 N.W.2d—23

did not benefit all of the public was not fatal to statute. M.C.L.A. § 338.503.

4. Constitutional Law ⇐278(1)
Licenses ⇐7(1)

Statute prohibiting disclosure of names of applicants for CPA licenses was valid exercise of state's police power and did not, on theory that his business is property, deprive party who ran review course for CPA examination of due process. M.C.L.A. § 338.503; M.C.L.A.Const.1963, art. 1, § 17; U.S.C.A.Const. Amends. 5, 14.

5. Constitutional Law ⇐211

Mere fact that state makes classification does not in and of itself mean that person has been denied equal protection of law. M.C.L.A.Const.1963, art. 1, § 2; U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⇐211
Licenses ⇐7(2)

Where close to 1200 of 1500 applicants for CPA licenses failed examination, statute prohibiting disclosure of names of applicants for license did not deprive party who offered review course for examination of equal protection of law. M.C.L.A. § 338.503; M.C.L.A.Const.1963, art. 1, § 2; U.S.C.A.Const. Amend. 14.

7. Records ⇐14

Fact that applications for CPA licenses required payment of fee and applications were stamped with notation of such payment did not render application forms "financial records" within statute providing that all financial records relating to public money shall be public records. M.C.L.A. § 338.503; M.C.L.A.Const.1963, art. 9, § 23.

See publication Words and Phrases for other judicial constructions and definitions.

8. Licenses ⇐22

Where statute prohibited disclosure by Board of Accountancy of names of applicants for CPA licenses, provision against disclosure included Department of Licensing and Regulation, the supervising department for the board, which had microfilm copies of applications. M.C.L.A. §§ 16.103, 338.503.

Coleman E. Klein, Shere & Klein, Detroit, for plaintiff-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Franklin J. Rauner, Asst. Atty. Gen., for defendants-appellees.

Before DANHOF, P. J., and V. J. BRENNAN and KELLEY,* JJ.

V. J. BRENNAN, Judge.

Plaintiff is engaged in the business of providing a review course for candidates for the C.P.A. exam. He has on a number of occasions attempted to secure from the defendants the names and addresses of candidates for the C.P.A. exam in order that he might send them promotional materials. Defendants have denied the plaintiff the requested names and addresses relying upon P.A.1967, No. 306, § 1 which amends C.L.1948, § 338.503 (Stat.Ann.1970 Cum.Supp. § 18.3); the statute provides:

"Any application, document or other information filed by or concerning an applicant shall not be disclosed by the board to anyone without the prior permission of the applicant to do so, except that nothing herein shall prevent the board from making public announcement of the names of persons receiving certificates under this act."

Plaintiff brought a complaint in Wayne County Circuit Court requesting that the defendants be made to disclose the names and addresses of the candidates. This was denied by the Wayne County Circuit Court and the complaint was dismissed.

* JAMES J. KELLEY, Jr., Circuit Judge for the County of Monroe, appointed by the Supreme Court for the hearing month of June, 1970, pursuant to § 3(6) P.A. 1964, No. 281.

Upon [illegible] defendants' motion for summary judgment was granted. From th[illegible] judgment plaintiff appeals.

Plaintiff raises four issues worthy of discussion.

1. Due process

Plaintiff's first contention is that P.A. 19[illegible] No. [illegible], § [illegible] [illegible] due process of law in contravention of the Fifth and Fourteenth Amendments of the Federal Constitution and of article 1, § 17, of the Michigan Constitution of 1963. He contends that his business is "property" and cannot be taken without due process of law. He further contends that the nondisclosure provision is not a valid exercise of the police power because it has no substantial relation to the public safety, health, morals or general welfare. We do not agree.

[1, 2] In People v. [illegible] (19[illegible]), [illegible] Mich.App. [illegible], [illegible] N.W.2d [illegible], [illegible], this Court said:

"It is fundamental that where the exercise of the police power is applicable the provision of the constitution declaring that property shall not be taken without due process of law is inapplicable. Wyant v. Director of Agriculture (1954), 34[illegible] Mich. [illegible], [illegible], [illegible] N.W.2d 2[illegible], 2[illegible]."

Since there can be little question that it is within the legislature's police power to regulate the methods and procedures of the certification of a C.P.A., the problem resolves itself into the question of whether this statute does in fact protect health, safety, morals or general welfare. Evidence was introduced that P.A.19[illegible] No. [illegible], § [illegible] was passed at the instigation of the Board of Accountancy for the purpose of saving applicants from the embarrassment of having their failures made public. The loss of reputation and the prejudicial effect on job opportunities for the applicant which would flow from such exposure are detrimental enough to the general welfare to justify the regulation in question.

[3, 4] The fact that this statute does not benefit all of the public is not fatal. An exercise of the police power is sustainable if it protects "any substantial part of the public." Cady v. City of Detroit (19[illegible]), [illegible] Mich. [illegible], [illegible], [illegible] N.W. [illegible], [illegible]. In this case the evidence shows that approximately [illegible] people apply for the C.P.A. exam each year. When this number becomes multiplied over the years, the result is that the benefits of the statute will accrue to a substantial portion of society. This was a valid exercise of the police power.

2. Equal Protection

Plaintiff contends that the statute in question violates the equal protection clauses of the Fourteenth Amendment to the Federal Constitution and article 1, § 2 of the Michigan Constitution of 1963. Plaintiff says that the statute makes an invidious discrimination against him because no other nondisclosure statutes exist in Michigan with respect to any other regulated professions or occupations.

[5, 6] The mere fact that a state makes a classification does not in and of itself mean that a person has been denied the equal protection of the law. The case of Lindsley v. Natural Carbonic Gas Co. (1911), 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 sets forth the standards for classification:

"1. The equal-protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or

because in prac[illegible] inequality. 3. [illegible] in such a law is [illegible] any state of facts [illegible] ceived that would [illegible] of that state of [illegible] law was enacted [illegible] One who assails [illegible] such a law must [illegible] showing that it d[illegible] reasonable basis, [illegible] bitrary."

In this case the fac[illegible] average of over 80 p[illegible] dates fail the C.P.A. [illegible] number of "flunks" [illegible] apart from examinati[illegible] ulated professions in [illegible] the special protection [illegible] close to 1200 of the [illegible] unsucc[illegible], the amou[illegible] and loss of reputatio[illegible] permits of different [illegible] accorded other professi[illegible] broad scope of discre[illegible] lature has when mal[illegible] this statute cannot be [illegible] ly arbitrary."

3. Financial Records

[7] The third assignm[illegible] on article 9, § 23 of the [illegible] tion of 1963, which provi[illegible]

"All financial recor[illegible] audit reports and other [illegible] moneys shall be public r[illegible] to inspection. A state[illegible] enues and expenditures [illegible] shall be published and dis[illegible] ly, as provided by law."

Plaintiff says that the ap[illegible] become financial records [illegible] stamped with the amount [illegible] date. If this is true, P.A.19[illegible] is unconstitutional.

In order to resolve this [illegible] look to the mechanical [illegible] tendant to applying for a [illegible]

because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In this case the facts show that on the average of over 80 per cent of the candidates fail the C.P.A. exam. Such a large number of "flunks" set the C.P.A. exam apart from examinations of the other regulated professions in the state and call for the special protection of the statute. Where close to 1200 of the 1500 applicants are unsuccessful, the amount of embarrassment and loss of reputation generated thereby permits of different treatment than is accorded other professions. In light of the broad scope of discretion that the legislature has when making classifications, this statute cannot be said to be "essentially arbitrary."

3. Financial Records

[7] The third assignment of error rests on article 9, § 23 of the Michigan constitution of 1963, which provides:

> "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law."

Plaintiff says that the application forms become financial records when they are stamped with the amount paid and the date. If this is true, P.A.1967, No. 306, § 18 is unconstitutional.

In order to resolve this issue, one must look to the mechanical procedures attendant to applying for a C.P.A. exam. When an application, together with the application fee of $25, is received by the Department of Licensing and Regulation, a cashier counts the money and inserts each individual application into a machine which prints the amount of money received and the date of receipt upon it in the space provided thereon. The applications are then sorted and a "validation recap sheet" is prepared. The names and addresses do not appear on the "recap sheet," which is placed in a receipt journal by an accountant. Finally, the applications are microfilmed by the Department of Licensing and Regulation before they are turned over to the Board of Accountancy.

It should be noted at the outset that the state legislature is the repository of all legislative power, subject only to limitations and restrictions imposed by the state and federal constitutions. The constitutionality of a statute will be supported by all possible presumptions not clearly inconsistent with the language and subject matter. Oakland County Taxpayers' League v. Oakland County Supervisors (1959), 355 Mich. 305, 94 N.W.2d 875.

The plaintiff would have this Court believe that the mere imprinting on the application by the cashier is sufficient to convert the application into a "financial record" within the purview of article 9, § 23 of the Michigan Constitution. Although there has been no judicial pronouncement as to the precise meaning of the words "financial records," we are aided by the construction given to those words by the accounting division of Michigan's department of administration. The chief of the accounting division, D. L. Powers, stated:

> "* * * financial records are those records from which the above statements and reports [audit reports, financial reports, and statements] are made up and include general and subsidiary ledgers within which summary and detail entries are made from documents, listings, and recapitulations. That documents such as payrolls, expense vouchers, purchase or-

ders, receipts vouchers, warrants, applications for licensure and the like are not financial records and are not available to the public."

Likewise, the deputy chief, Mr. McDaniels, stated that no financial record exists until the recap sheet is validated. Such recap sheet does not contain the names and addresses of the applicants. The interpretation of these words by the department of administration is entitled to much weight. In Magreta v. Ambassador Steel Co. (1968), 380 Mich. 513, 519, 158 N.W.2d 473, 475, the Court laid down the following proposition:

"'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.'"

In view of the fact that there has been no construction of this phrase other than the administrative construction, this Court feels constrained to hold that the imprinted applications are documents and not financial records.

But there is a further reason which compels this conclusion. The manifest purpose of article 9, § 23 is to allow the public to keep their finger on the pulse of government spending. The most expeditious way of so doing is to give the public access to summaries, balance sheets, and other such compilations which map out and correlate a myriad of financial transactions into a meaningful account. It strains one's credulity to think that the framers of the Constitution meant to allow the public to inspect every receipt, every application for licensure and every writing evidencing a receipt or expenditure. It is totally unnecessary to give such authority to the public to achieve the purpose aforementioned and such authority could easily serve as a tool to harass governmental agencies by unreasonable demands for great volumes of individual documents. We hold that the public right to information given by article 9, § 23 is best promoted, and the smo[illegible] functioning of the government best protected, by construing the words "financial records" to require more than a receipt or document, such as the imprinted applications here.

4. Application of P.A.1967, No. 306, § 1, to Department of Licensing and Regulation

[8] The final argument posed by the plaintiff is that the statute in question provides for non-disclosure only "by the board" and that it does not apply to the Department of Licensing and Regulation, which has a microfilm copy of all receipted applications. The defendants answer by saying that the Board of Accountancy was transferred to the Department of Licensing and Regulation by a type I transfer under the Executive Organization Act, M.C.L.A. § 16.103 (Stat. Ann.1969 Rev. § 3.29[3]), and thus the Department of Licensing and Regulation, the supervising department for the Board, should be required to abide by the non-disclosure provision.

Although there have been no cases which have discussed the effect of a type I transfer upon the applicability of prohibitions directed toward a board on the principal department, the only way that the non-disclosure provisions can be implemented is by construing the language of P.A.1967, No. 306, § 1 as also applying to the parent department. If the information which the legislature has determined should not be disclosed is made available by the mere fact that it is in the hands of the parent department, the legislative purpose would be thwarted. The Court held in Benjamin v. Huntington Woods (1957), 349 Mich. 545, 555, 84 N.W.2d 789, 794, that:

"We seek a reasonable construction of statutes in the light of the purpose sought to be accomplished."

The only way to accomplish the legislative purpose of protecting the candidate's privacy is to hold that the prohibition of

the statute applies
of Licensing and

For the foregoing
none of plaintiff's
versal and the jud
court is therefore a

Affirmed.

27 Mich.

PEOPLE of the S
Plaintiff-

v.

Robert (Bob) BA
Appe

Docket N

Court of Appeal
Div.

Oct. 26,

Released for Publica

The Berrien Cou
Karl F. Zick, J., ente
victing defendant of ut
ing a forged instrumen
The Court of Appeals
court properly refused
dorsement of two pers
witnesses, where there w
evidence that the crime
by a single person and w
clear evidence that woul
the two alleged res gest
near the scene of the crim

Affirmed.

1. Criminal Law ⇐628(4)

While statute states
es" known to prosecutor

* JAMES J. KELLEY, Jr.,
for the County of Monro
the Supreme Court for th

the statute applies also to the Department of Licensing and Regulation.

For the foregoing reasons we find that none of plaintiff's contentions require reversal and the judgment of the circuit court is therefore affirmed.

Affirmed.

27 Mich.App. 331

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Robert (Bob) BANKS, Defendant-Appellant.

Docket No. 7691.

Court of Appeals of Michigan, Div. 3.

Oct. 26, 1970.

Released for Publication Feb. 16, 1971.

The Berrien County Circuit Court, Earl F. Zick, J., entered judgment convicting defendant of uttering and publishing a forged instrument, and he appealed. The Court of Appeals held that the trial court properly refused to require the endorsement of two persons as res gestae witnesses, where there was uncontroverted evidence that the crime was accomplished by a single person and where there was no clear evidence that would place either of the two alleged res gestae witnesses even near the scene of the crime.

Affirmed.

1. Criminal Law ⇐628(4)

While statute states that "all witnesses" known to prosecutor at time of filing must be endorsed by him on the information, the actual scope of prosecutor's duty requires endorsement only as to res gestae witnesses. M.C.L.A. § 767.40.

2. Criminal Law ⇐628(4)

Trial court, in prosecution for uttering and publishing a forged instrument, properly refused to require the endorsement of two persons as res gestae witnesses, where there was uncontroverted evidence that the crime was accomplished by a single person and where there was no clear evidence that would place either of the two alleged res gestae witnesses even near the scene of the crime. M.C.L.A. §§ 750.249, 767.40.

3. Criminal Law ⇐1039(1)

Not having made a timely objection, defendant was precluded on appeal from claiming error in trial court's instructions. GCR 1963, 516.2.

Henry W. Gleiss, Gray, Gray, Globersky & Gleiss, Benton Harbor, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Ronald J. Taylor, Pros. Atty., for plaintiff-appellee.

Before HOLBROOK, P. J., and R. B. BURNS and KELLEY,* JJ.

PER CURIAM.

Defendant was convicted by a jury of uttering and publishing a forged instrument. (M.C.L.A. § 750.249 [Stat.Ann. 1962 Rev. § 28.146].) He appeals, claiming three errors.

[1,2] The first error alleged is the failure of the trial court to require the

*JAMES J. KELLEY, Jr., Circuit Judge for the County of Monroe, appointed by the Supreme Court for the hearing month of October 1970, pursuant to § 386 P.A. 1961, No. 281.

MUNICIPAL UTILITIES, ACCOUNTS

Transfer of Functions

The Michigan public utilities commission was abolished and its functions were transferred to the Michigan public service commission by section 460.4 (P.A.1939, No. 3, § 4). The public service commission, in turn, was transferred intact to the department of commerce by section 16.331 (P.A. 1965, No. 380, § 331).

P.A.1925, No. 28, Eff. Aug. 27

AN ACT to require municipalities owning or operating public utilities to adopt and keep a uniform system of accounts, and to make and publish annual reports relating to the operation of each such utility, and to require the Michigan public utilities commission to prescribe the forms thereof.

The People of the State of Michigan enact:

460.451 Municipal public utilities; system of accounts; annual report, publication; forms

Sec. 1. Every municipality owning or operating a public utility shall, beginning with the first day of January, 1926, or should its fiscal year not coincide with the calendar year, then beginning with its first fiscal year thereafter, adopt, install, and thereafter keep a uniform system of accounts relating to its operation of each utility owned or operated by it. Every such municipality shall, thereafter, within 60 days after the close of each fiscal year, make and publish in some newspaper published and circulating in such municipality, or, if no newspaper is published in such municipality, then in some newspaper published and circulating in the same or in an adjoining county, a report in detail of its operation of each such utility. It is hereby made the duty of the Michigan public utilities commission to prescribe the form of accounts and of the annual reports required by this act, which shall, so far as applicable, conform to the system of accounts required to be kept, and reports to be made by privately owned utilities.

Historical Note

Source:

P.A.1925, No. 28, § 1, Eff. Aug. 27.
C.L.1929, § 11086.

Michigan Administrative Code

For Rules and Regulations under numbered designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Power lodged by statute in a city council to make reasonable regulations in regard to the use of poles erected in the city for electric lighting cannot be delegated to a committee. Citizens' Elec. Light & Power Co. v. Sands, 95 Mich. 551.

Committee of outsiders.
A common council of a city may choose its own method for collecting information, and may conduct investigations through a committee of outsiders or through the mayor, provided the investigation is made in its behalf, in accordance with its directions, and subject to its control, and the results reported to it for its action. Attorney General v. Wayne Circuit Judge, 137 Mich. 615.

§ 5.1711] Records; filing, public inspection; penalty for defacing records. Sec. 14. The council shall cause all the records of the corporation, and of all proceedings of the council, and all books, documents, reports, contracts, receipts, vouchers and papers relating to the finances and affairs of the city, or to the official acts of any officer of the corporation (unless required by this act to be kept elsewhere), to be deposited and kept in the office of the city clerk, and to be so arranged, filed and kept, as to be convenient of access and inspection and all such records, books and papers shall be subject to inspection by any inhabitant of the city or other person interested therein, at all reasonable times, except such parts thereof as, in the opinion of the council, it may be necessary for the furtherance of justice to withhold for the time being. Any person who shall secrete, injure, deface, alter or destroy any such books, records, documents or papers, or expose the same to loss or destruction, with intent to prevent the contents or true meaning or import of the same from being known, shall on conviction thereof be punished by imprisonment in the state prison not longer than one [1] year, or by fine not exceeding one thousand [1,000] dollars, or by both such fine and imprisonment in the discretion of the court. (C. L. '29, § 1915; C. L. '15, § 2291; C. L. '97, § 3075.)

What constitutes public records.
The mere filing with the city clerk of a book entitled the "building code" of the city does not give such book the character of a "public record." Thompson Ferule Ry. Co. v. McCabe, 211 Mich. 133.

Conclusiveness of record.
In matters involving the discretion or judgment of the city council where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show want of knowledge or good judgment. Davies v. City of Saginaw, 87 Mich. 439.

Digest reference.
See Callaghan's Mich. Digest, Municipal Corporations, § 126.

§ 5.1712] Compensation. Sec. 15. No member of the council shall receive any compensation for his services, either as alderman, committeeman or otherwise, except as herein provided. (C. L. '29, § 1916; C. L. '15, § 2292; C. L. '97, § 3076.)

Digest reference.
See Callaghan's Mich. Digest, Municipal Corporations, §§ 81, 84.

§ 5.1713] Council members, officers, barred from interest in transactions with city; penalty; exception.] Sec. 16. No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work or service (other than official services), to be performed for the corporation, and any member of the council, or officer of any city, herein specified, offending against the provisions of this section, shall, upon

Franchises.

A city of the fourth class which, under its special charter, had no power to grant an exclusive waterworks franchise, did not, by adopting a resolution declaring it expedient for waterworks to be constructed but inexpedient for the city to construct them, preclude itself from subsequently constructing its own waterworks and make it necessary, in case it decided to operate its own system, to purchase the works of the company that, under franchise, had been supplying it with water, even conceding that by the adoption of the resolution the Waterworks Act (Pub. Acts 1897, No. 113), under which the water company was incorporated but which gave the company no exclusive rights in express terms, became a part of the city charter. North Michigan Water Co. v. City of Escanaba, 169 Mich. 256, certiorari denied 218 U. S. 661, 63 L. Ed. 422, 39 Sup. Ct. 7.

A. L. R. notes.

Power to make contract as to rates not subject to increase by state, 3 A. L. R. 731; contract for water supply extending beyond term of officers making it, 70 A. L. R. 795; measure and amount of damages for breach of duty to furnish water, gas, light, or power service, 103 A. L. R. 1174; requirement that municipal contracts be awarded on competitive bidding as applicable to contracts for public utility (gas, electricity and water), 103 A. L. R. 168.

Digest and textbook references.

See Callaghan's Mich. Digest, Municipal Corporations, §§ 197, 207, 285; Waters, §§ 94, 97, 99, 103; McQuillin Mun. Corp. (2nd Ed.) §§ 1269, 1742, 1749, 1750, 1760, 1781, 1821, 1826, 1838-1866, 1991, 2302.

CHAPTER XXVII

LIGHTING

§ 5.1805] City lighting plant. SECTION 1. It shall be lawful for any city incorporated or re-incorporated under the provisions of this act to acquire by purchase or to construct, operate and maintain, either independently or in connection with the water-works of such city, either within or without the city, works for the purpose of supplying such city and the inhabitants thereof, or either, with gas, electric or other lights at such times and on such terms and conditions as hereinafter provided. (C. L. '29, § 2100; C. L. '15, § 3170; C. L. '97, § 3258.)

Comparable provisions.

Ill. Rev. Stat. 1947, ch. 24, par. 23-1; Jones Ill. Stats. Ann. 21.1006; Mass. Laws Ann. ch. 164, § 34; McKinney's N. Y. Con. of Laws, ch. 24, § 20 (2); Wis. Stats. 1947, § 197.01 (1, 2).

Cross-references.

Power of city to own and operate utilities, see Const. 1908, art. VIII, § 25; financing acquisition, etc., by means of revenue bonds, Const. 1908, art. VIII, § 24; sale or other disposition of municipal light plants, §§ 5.2161-5.2162, infra; lighting of streets and public places, §§ 5.2171-5.2173, infra; electricity for inhabitants where city owns plant for street lighting, § 5.2701, infra.

Analysis of Note.

Purpose and construction of provision generally.

Lands subject to taxation for improvement.

Contracts.

Power of city operating electric business.

Extending service into territory of private utility.

Abrogation of power by granting franchise.

Court interference with municipal powers.

Decisions from other jurisdictions.

A. L. R. notes.

Digest and textbook references.

Purpose and construction of provision generally.

The corporate power of a city to own and operate a municipal electric plant and supply its inhabitants at prescribed rates, light, heat and power is conferred by Const. 1908, art. VIII, § 25, and by this section. Andrews v. City of South Haven, 187 Mich. 294.

Under this section a city of the fourth class had, prior to the Constitution of 1908, and still has the right to purchase or construct and to

operate and maintain, or outside the city, w gas, electric or other city and its inhabitant to such right, to do wiring in connection w tion system. Michigan Co. v. City of Bowng 153.

Lands subject to tax provement.

Vacant lands includ corporate limits of a remote as to receive a the installation of a pl lighting, are nevertheless taxation for the improv legislature, in the exer erationary authority to establish taxing distri discrimination in their elt v. City of Negaun 359.

Contracts.

Contracts entered int lic lighting commissio under Local Acts 1893 for the purchase of lan and appliances necessar tric lighting plant, must to the common council. The provision of De 1909, § 199, that no co public work shall be l contract therefor has proved and confirmed b council," applied, since was itself a part of the especially since that templated by express w council "shall" or "m commissioners to enter contracts respecting li nion Council of Detro Lighting Commission o Mich. 302.

Resolution and ordin by majority of all me men in compliance with thorizing mayor and c enter into contract fo material and equipment electric plant, did not c fect binding contract b mayor and clerk, in view in resolution and ordi contract subject to app council. City of Crosw 251 Mich. 491.

As to contracts for § 5.1002, and note, infra.

Power of city operating ness.

A city, in its operati ness management of an