ways adequate for heavier axle and gross weights and for features adequate for large vehicles in mixed traffic presents the states with concrete problems of design, cost allocation, and finance that must be solved. The true economy of modern trucks and combinations, and the controversy with the railroads, can never be solved until highway officials and legislatures know the specific costs being assumed to provide the highways demanded. For until user fees are adjusted to return the specific costs of each vehicle's use as closely as possible, the market cannot do its job of allocating traffic among alternative agencies. Nor can the States treat the different user groups equitably or feel assured that they are doing a wholly economic job of agricultural and industrial development.

PARKING FACILITIES AS PUBLIC UTILITIES

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SYNOPSIS

There are cities in the United States where no significant effort toward the provision of off-street parking facilities is being made, because of differences of opinion between the public enterprisers and private enterprisers as to which one should do the job. This study of the possible application of the public utility concept to off-street parking facilities has been made in an attempt to resolve this dilemma.

Proponents of municipal action seek reasonable user rates, high standards of service, responsible management, and permanent locations and capacity appropriately related to the generators of parking demand. Advocates of the private provision of parking facilities seek profits and freedom from municipal competition. The public utility approach may contain the essential elements of a compromise that would be acceptable to both disputants.

The most important legal elements of a public utility may be summarized as follows:

(1) The enterprise must be "affected with a public interest." Property becomes clothed with a public interest when used in a manner to make it of public consequence and when it affects the community at large.

(2) The enterprise must involve a "public use." The public utility concept is involved if private property is devoted to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or service shall be conducted with reasonable efficiency and for proper charges.

(3) The enterprise must involve "monopolistic characteristics." To qualify from this point of view, the activity must enjoy in a large measure an independence and freedom from business competition facilitated either by its acquirement of a monopolistic status or by the grant of a franchise or certificate from the State placing it in this position.

(4) Finally, the enterprise must bear an intimate connection with the processes of "transportation or distribution."

When measured in terms of these essential elements, it is amazing how easily off-street parking facilities seem to qualify as a public utility, assuming that it is appropriately identified by State legislative act. Yet public utility regulation

[1] Acknowledgment is made of assistance by George E. Long, formerly Administrative Assistant, Land Studies Section, Financial and Administrative Research Branch, Bureau of Public Roads.

does not meet the unqualified approval of all. With some measure of justification, some critics disparage the partisanship that has often characterized the conduct of some State regulatory agencies. Others may feel that such regulation, as far as off-street parking facilities are concerned, is only a temporizing measure; that ultimately the municipality must own and operate all parking facilities in the public interest.

Certainly the public utility concept constitutes no panacea for all urban parking difficulties. It would seem to provide the promise of compromise, however, between the extremes of public and private control of off-street parking facilities in those municipalities where no action is forthcoming today.

In some cities in the United States neither private enterprise nor public authority is making a significant effort toward the provision of off-street parking facilities because of a sharp difference of opinion as to which one should do the job. This conflict between the public enterprisers and the private enterprisers has stymied action, to the detriment of the public interest in a field of critical importance. This study of the possible application of the public utility concept to off-street parking facilities has been undertaken in an attempt to resolve this dilemma.[2]

The successful arbitrator must first determine the principal objectives of each disputant. Proponents of municipal action seek reasonable user rates, high standards of service, responsible management, and permanent locations and capacity appropriately related to the generators of parking demand. Advocates of the private provision of parking facilities seek profits and freedom from municipal competition. The public utility approach may contain the essential elements of a compromise that would be acceptable to both disputants, embodying the major objectives of each.

The plan of this monograph is this: First, an attempt will be made to isolate the legal elements of a public utility, insofar as they are discernible from the statutes and the court decisions. The nature of an enterprise "affected with a public interest" will be delineated. Such matters as certificates of public convenience and necessity, monopolistic characteristics, the elements of public use, and rate regulation will be explored. Existing public regulation of commercial parking facilities will be indicated. An appraisal will then be made concerning the qualification of off-street parking facilities as public utilities.

[2] Public utilities may be municipally owned and operated. This monograph is concerned only with public utilities that are owned and operated by private persons or corporations.

LEGAL ELEMENTS OF A PUBLIC UTILITY

Before a student of the problem can speculate as to whether off-street parking facilities would legally qualify as a public utility, he must be informed as to the characteristics which the judiciary has attached from time to time to the public utility concept. Sometimes, the courts have been evasive, perhaps purposefully. Moreover, it is difficult to devise a definition of a public utility which would fit every conceivable case. But as best I can deduce them, these are the legal elements of a public utility:

(1) The enterprise must be "affected with a public interest." Property becomes clothed with a public interest when used in a manner to make it of public consequence and when it affects the community at large.[3]

(2) The enterprise must involve a "public use." The public utility concept is involved if private property is devoted to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or service shall be conducted with reasonable efficiency and for proper charges.[4]

(3) The enterprise must involve "monopolistic characteristics." To qualify from this point of view, the activity must enjoy in a large measure an independence and freedom from business competition facilitated either by its acquirement of a monopolistic status

[3] Munn v. Illinois, 94 U. S. 113 (1876).

[4] Garkane Power Co. v. Public Serv. Commission, (1940) 98 Utah 466, 100 P (2d) 571, 132 ALR 1490, 18 ALR 764, 93 ALR 248, 132 ALR 1498, LRA 1918 C 855; and many other cases.

or by the grant of a franchise or certificate from the State placing it in this position.[5]

(4) Finally, the enterprise must bear an intimate connection with the processes of "transportation or distribution."[5]

These are the elements of a public utility which the present Chief Justice of the United States Supreme Court set forth when he was Chief Judge of the Emergency Court of Appeals. Chief Justice Vinson further indicated that the formula is:

". . . designed only to provide an absolute test or standard by which one may *affirmatively* determine that a particular business *is* a public utility. I do not wish to be misunderstood as indicating that a business possessed of or operating under less than the total of these features may not be considered a public utility . . . *any* business which *does* possess and practice and operate under each and all of these features, is by a preponderance of considered judicial opinion a business in the public utility class."[5]

In short, then, these are the most important elements that go to make up this legal creature known as a public utility. They may be summarized in terms of four key phrases:

affected with a public interest
involve a public use
have monopolistic characteristics
are related to transportation or distribution.

This array would not be complete, perhaps, without a reference to "certificates of public convenience and necessity"—a device frequently used to regulate public utilities. Whether a given enterprise may be deemed to be a public utility is a mixed question of law, economics, and sociology.

Before we can test the off-street parking enterprise in terms of these essential legal elements, we must know something more about each, so that our judgment of qualification or disqualification may be as precise as possible.

Perhaps it would be wise to indicate some of the types of enterprises that have been held to be public utilities. Among them are (1) transportation facilities, such as toll roads, canals, railroads, steamship lines, ferries, pipelines, express companies, and motor carriers of freight and passengers; (2) accommodations ancillary to transportation, such as terminal facilities including wharves and docks, bridges, sleeping-cars, and baggage transfer equipment; (3) marketing facilities, such as commodity exchanges, grain elevators, warehouses, stockyards and market ticker service; (4) communications, including telegraph, telephone, radio communication and broadasting; (5) local utilities, such as water supply, irrigation, gas, electric power, heating, sewerage, street railways, taxicabs, and others; (6) special facilities, traditionally regulated, such as innkeepers, grist mills, sawmills, hawkers and peddlers, pawnbrokers, and bakers; and (7) recently regulated enterprises, such as slaughterhouses, cotton gins, insurance companies and agents, housing, banking, milk, marketing and processing of farm products, butter substitutes, and coal mining.[6]

[5] Davies Warehouse Co. v. Brown, 137 F (2d) 201, 217 (1943).

AFFECTED WITH A PUBLIC INTEREST

One of the essential characteristics of a public utility, in years past, has been that the enterprise involved must be "affected with a public interest." It was early asserted that:

". . . when, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created."[7]

Changing economic and social conditions may make a business hitherto of little public concern of such importance to the welfare of the community that regulation becomes inevitable. The absence of regulation may force the direct performance of an increasing number of economic functions by the State or its political agencies.

[6] Adapted from THE ECONOMICS OF PUBLIC UTILITY REGULATION, by I. R. Barnes, 1942, p. 20. Perhaps as diversified as the above enumeration is the list of enterprises construed by the courts *not* to constitute public utilities: foundries, coal yards, mills, restaurants, apartment houses, parcel checking facilities, theater-ticket brokers, renting of automobiles, meat packing, ice manufacturing, and sale of gasoline.

[7] Munn v. Illinois, 94 U. S. 113 (1876).

The courts, of course, are the final arbiters as to whether or not a particular enterprise is affected with a public interest. Many years ago, Chief Justice Taft declared that:

". . . the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."[8]

In light of the judicial principles already enunciated by the courts, it should not be difficult to qualify off-street parking facilities as being "affected with a public interest."

TABLE 1

SUPPLY AND DEMAND FOR PARKING SPACE IN THE CORES OF CENTRAL BUSINESS DISTRICTS OF DESIGNATED CITIES

Population group	Number of cities	Space-hours		Ratio of demand to supply
		Demand	Supply	
Under 25,000	5	3,465	2,552	1.34
25,000- 49,999	3	4,230	3,043	1.38
50,000- 99,999	2	4,290	2,964	1.45
100,000-249,999	7	17,188	11,285	1 64
250,000-499,999	3	20,828	6,505	3.27
500,000 and over	2	28,590	6,649	4.67

Source: "Some Travel and Parking Habits Observed from Parking Studies" by S T. Hitchcock and R. H. Burrage, *Public Roads*, June 1950

The ownership and use of the motor vehicle is widespread in the United States, with approximately 48,000,000 motor vehicles generating over 450 billion vehicle-miles of travel annually. Approximately half of the motor vehicle travel takes place in urban areas. Thousands of urban motorists daily seek to penetrate the central business districts of each of our cities, and to park therein. Yet the available parking space, both curb and off-street, is far short of the actual demand, let alone the potential demand. How critical this problem is becoming in many municipalities is revealed by Table 1. In the largest cities, five motorists contend for each parking space available; four of them must seek accommodations elsewhere.

In certain cases, especially where rate regulation was involved, the U. S. Supreme Court seems to have abandoned the "affected with a public interest" concept in favor of a broader principle.[9] The guaranty of due process, the court asserted, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. A number of State courts have followed this same line of reasoning.[10] It should be noted, however, that only rate regulation was involved in these cases, and that the other concomitants of public utility control, such as certificates of convenience and necessity, were not involved. It seems wise, therefore, to assume in the case of off-street parking facilities, that the doctrine of "affected with a public interest" will continue to apply.

PARKING AS A PUBLIC USE

A legal characteristic of a public utility, closely related to the concept of being "affected with a public interest," is the doctrine of devotion to a public use, already referred to. Many years ago, the United States Supreme Court ruled that taxicabs could be regulated as a public utility,[11] on the theory that the taxicab company was "an agency for public use for the conveyance of persons," notwithstanding that a single cab conveys only one group of passengers in one vehicle. The cab company also had contracted with several hotels to furnish taxicab service to hotel guests at specified times. The Supreme Court asserted:

"We do not perceive that this limitation removes the public character of the service. . . . No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels it can afford to, as it is free to travel by rail, and through the hotel door to

[8] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923); Public Cleaners v. Florida Dry Cleaning and Laundry Board, 32 F. Supp. 31 (1940).

[9] Nebbia v. New York, 291 U. S. 502 (1934); Olsen v. Nebraska, 313 U. S. 263 (1941).

[10] Kelly-Sullivan v. Moss, 39 N. Y. S. 797 (1943); Smith Bros. Cleaners & Dyers, Inc. v. People, 119 Pac. (2d) 623 (1941); State v. Walgreen Drug Co., 113 Pac. (2d) 650 (1941).

[11] Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252 (1916).

call on the plaintiff for a taxicab. . . . The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The public does not mean everybody all the time."

The close parallel between parking facilities and taxicabs seems obvious. A commercial off-street parking facility is open to any motorist who desires to park in its particular location and pay the fee asked, as long as there is space available. Parking facilities today probably serve a larger segment of the public than did taxicabs 35 years ago when they were deemed to be public utilities.

The enterprise which provided the greatest impetus, perhaps, to the expansion of the public utility concept is the grain elevator business. For years, the grain producing regions of the West and Northwest have sent their grain by water and rail to Chicago for reshipment to the East. The need for an intermediate terminal at Chicago created a demand for grain elevators where immense quantities of grain could be stored and reshipped by rail or water. Nine firms owned by 30 persons controlled all of the fourteen elevator and warehouse facilities and set uniform fees which the shippers labeled as exorbitant. Yet the shippers were compelled to pay the prices asked because no other facilities were available.

Pursuant to a State constitutional revision in 1870, legislation was enacted designating grain elevators as public utilities, licensing such facilities, and providing for the regulation of rates. In a leading case,[12] the U. S. Supreme Court upheld the regulation on the grounds that grain elevators were "affected with a public interest" and had been "devoted to a public use." The court was very much aware of the strategic position of the elevators with reference to grain movements, saying "they stand . . . in the very gateway of commerce," and take a toll from all who pass.

Here again, a striking comparison can be made between grain elevators and off-street parking facilities. Just as grain is shipped to Chicago from many different parts of the West and Northwest, motor vehicles from many different parts of a metropolitan area are driven into the heart of the city each day. These vehicles must be parked somewhere for short periods of time, like grain upon its arrival in Chicago. Just as grain must be stored while awaiting reshipment, the motor vehicle must be parked while its driver works or shops or performs some other errand. Just as Ira Munn and George Scott in the 1860's "embarked their capital and devoted their industry" to supplying storage space for grain, private individuals today supply commercial parking facilities for motor vehicles. Just as the owners and operators of elevators charged unreasonably high rates for grain storage, so may the owners of private parking accommodations be in a position to charge high rates for automobile storage, because of the great disparity between the supply of and the demand for such facilities.

Aside from these analogies to enterprises already judicially construed to be public utilities, off-street parking facilities have already been held to involve a public use by a number of high courts in the United States. A recent case adjudicated by the Pennsylvania Supreme Court upheld a legislative declaration that the provision of off-street parking facilities involves a public use.[13] The language of the high court is typical of the attitude of other jurisdictions on this matter:

"Not only is the declaration of legislative findings in the present Act impressive in pointing out the urgent need of legislation of this type, but the conditions it portrays are well known to all inhabitants of our larger cities. . . . The congestion caused by such misuse of the streets (for storage instead of for travel) and by the ever-increasing amount of motor vehicle traffic has become a major problem of municipal administration, . . . a problem particularly acute in a city like Pittsburgh where it is aggravated by the concentration of the downtown business section in a "Golden Triangle" of comparatively narrow streets and tall office and commercial buildings, many of the occupants of which use private automobiles to and from their offices and stores. Studies made by the Pittsburgh Regional Planning Association and the Allegheny Conference on Community Development reveal that parking facilities in that city are grossly inadequate and that

[12] Munn v. Illinois, 94 U. S. 113 (1876).

[13] McSorley v. Fitzgerald, 59 Atl. (2d) 142 (1948).

private enterprise has not been able to solve the problem because private parking lots are frequently temporary in nature and located without much regard for actual parking requirements, vacant land being utilized for parking purposes in more or less haphazard fashion merely for the purpose of earning taxes on the land pending profitable disposition of it for construction purposes. . . ."

Similar doctrine has been enunciated in California,[14] Kentucky,[15] Michigan,[16] New York,[17] Ohio,[18] and other States.

MONOPOLISTIC CHARACTERISTICS

The monopolistic characteristics of public utilities generally have already been indicated in preceding sections of this monograph. Off-street parking accommodations, of a type urgently needed in cities today, may also be monopolistic from several different points of view, though the monopolistic character of such facilities certainly is not as evident as are some of the other attributes of a public utility.

In a consideration of this particular aspect of the public utility concept, it seems necessary to consider monopolistic tendencies, first as they may apply to parking facilities now existing in downtown urban areas, and second as they may apply to parking facilities that are largely lacking today in such areas.

In a sense, present commercial off-street parking accommodations offer the motorist-parker somewhat of a choice in his selection of a particular facility, and competition does perhaps exist in some locations and under some circumstances. It should be noted, however, that such a choice, more often than not, is limited by the ultimate destination of the parker and by his reluctance to walk any great distance. The preferential location of many existing commercial facilities, therefore, contains at least to some extent the element of monopoly.

Parking surveys in a large number of cities reveal that, to be effective, off-street parking facilities must be established within a prescribed walking distance from the parking generators, especially in the central core area. While the indicated locations of needed parking facilities may not be absolutely rigid, it may be said that the desirable locations are relatively fixed in character. Parking facilities cannot be established just anywhere—witness, the fact that many parking facilities are never filled to capacity because of inappropriate locations in relation to parking demand.

Monopolistic tendencies may also be evident in any concerted effort on the part of commercial operators of parking facilities to fix the schedule of rates charged. The same result may obtain in cities where a substantial number of parking facilities are owned or operated by a single entrepreneur.

Aside from location and rates, off-street parking facilities may tend to be monopolistic because of the relatively large amount of capital required to establish accommodations of modern design. Involved also is the concentration of its investment in fixed plant and equipment. In fact, a trend toward the use of the parking authority and the issuance of revenue bonds for parking facilities has become evident during the last decade—the result, in part at least, of some of the characteristics of a monopoly, namely, the limitations on ability to obtain desirable locations and to finance.

Though the qualification of parking facilities as public utilities solely from the standpoint of their monopolistic characteristics may be far from conclusive, it should be observed that this attribute may not be an indispensable element in the chain of qualification. In any event, it seems desirable in the public interest to restrict the number of off-street parking facilities in any particular location to those indicated by present or potential demand, consistent with an over-all traffic plan of the city and with traffic facilities that can accommodate the entry and discharge of vehicles.

[14] Whittier v. Dixon (1944) 24 Cal. (2d) 664, 151 Pac. (2d) 5, 153 ALR 956.

[15] Miller v. Georgetown (1945) 301 Ky. 241, 191 S. W. (2d) 403.

[16] Wayne Village President v. Wayne Village Clerk (Parr v. Ladd) (1949) 323 Mich. 592, 36 N. W. (2d) 157, 8 ALR (2d) 357; Cleveland v. Detroit (1949) 324 Mich. 527, 37 N. W. (2d) 625.

[17] Pansmith v. Island Park (1947) 72 N. Y. S. (2d) 575, app. dismd., 73 N. Y. S. (2d) 636.

[18] Blakemore v. Cincinnati Metropolitan Housing Authority (1943) 74 Ohio App. 5, 57 N. E. (2d) 397.

ASSOCIATION WITH TRANSPORTATION OR DISTRIBUTION

Examination of the types of enterprises which in years past have been construed to be public utilities indicates that by far the bulk of them have been related to transportation or distribution. In fact, transportation companies and warehouses were the first public utilities to be recognized. Terminal facilities generally, including wharves and docks, are now public utilities.

The intimate relationship between highway transportation and terminal facilities for motor vehicles is obvious. In fact, highway transportation involves not only the movement of vehicles, but the larger function of getting from one place to another. So conceived, complete highway transporation accommodations must include an over-all service from origin to destination, in order to facilitate a full realization of the speed, economy, and convenience of an efficient highway plant.

A recent decision involving Kansas City, upholds this doctrine.[19] In a unanimous decision of the Missouri Supreme Court, Judge Dalton asserted:

"The use of the streets for parking purposes has materially interfered with their use for the movement of traffic and the discharge of passengers and property from such vehicles. Traffic congestion has become an acute problem in many of the cities and towns in this state. The problem of parking or the temporary disposition of these vehicles during business hours when such vehicles are not in active operation is directly connected with the problem of transportation. The parking of such vehicles cannot be separated from their use in transportation and their operation upon streets and highways."

CERTIFICATES OF CONVENIENCE AND NECESSITY

In recent years, courts have tended to leave it to the legislature to declare an enterprise to be a public utility before passing upon the question judicially. The result of this policy has been to make the determination of the public utility status of an activity a matter for the joint legislative and judicial process.

Most State laws make some provision for the use of the certificate of convenience and necessity as an instrument of public utility regulation. The certificate is a revocable permit to serve the public by operating as a public utility. The recipient of a certificate thereby acquires no property right. Legislatures have granted monopolistic privileges through this vehicle on the basis of public needs and only to persons who are in a position to adequately serve these needs.

The requirement of a certificate may enable the public regulatory agency to prevent the needless multiplication of companies serving the same territory and thereby, to avoid a wasteful duplication of capital facilities, keeping the investment at the lowest figure consonant with satisfactory service. By protecting the utility from unnecessary competition, risks inherent in utility investments are reduced and the cost of capital is thereby kept relatively low.

The certificate of convenience and necessity has long been upheld as a constitutional regulatory device where the enterprise to which it is incident is affected with a public interest.[20]

Incidentally, public convenience refers to the accommodation which the entire community will derive from the operation of the utility. In general, the requisite showing with respect to convenience has been made when the regulatory body is convinced that there is a reasonable public demand for the service and that the utility will accommodate the public.

The applicant for a certificate of convenience and necessity is required to file with the appropriate commission full data with respect to the service to be rendered, the facilities to be used, the rates and charges to be made, the financial status of the applicant, and related matters. The commission holds public hearings and provides an opportunity for all affected by the application to appear and be heard.

RATE REGULATION

It is now well established that a public utility, in return for the service it furnishes,

[19] Bowman v. Kansas City (1950) 233 S. W. (2d) 26.

[20] Barbour v. Walker (1927) 126 Okla. 227, 259 Pac. 552; Willis v. Buck (1928) 281 Mont. 472, 263 Pac. 982; in re Stanley (1934) 133 Me. 91, 174 Atl. 93.

is entitled to a reasonable compensation, in accordance with the service provided. This matter of rate determination offers perhaps the greatest challenge in the application of the public utility concept to off-street parking facilities.

Rates for public utility service may be classified as (a) contract or administrative rates voluntarily fixed or agreed upon between the public utility and the consumer, or as (b) legislative rates fixed by the legislature or the public utilities commission as a governmental function with the consent of the parties.[21] A State may, under its police power but within constitutional limitations, regulate and prescribe reasonable rates which may be made by public utilities for their services to the public. This function of ratemaking has been construed by the courts to be legislative in character, whether the power is exercised by the legislature itself or by a subordinate administrative or municipal body to whom the authority has been delegated.[22] However, in appropriate instances, the judiciary may restrain the imposition of grossly excessive or confiscatory rates.

Once a municipality, under an appropriate delegation of power, has fixed the rates for a public utility, some courts have held that it must protect the utility against unfair competition by reason of such regulation.[23] When a governmental body has the authority to regulate rates for public utility services to consumers, that authority includes the power to fix any maximum rate which is fair and just to the consumer if it will also result in a fair return to the public utility.[24] In the absence of a legislative prescription of rates, the legal obligation of a public utility to serve all members of the public to whom its public use and scope of operation extend carries with it the duty to render such service at reasonable rates. This obligation is implied from the acceptance of the franchise and privilege to serve the public. Yet a public utility is entitled to a just compensation, i.e., a fair return upon the reasonable valuation of the property.

A long line of decisions has established the principle that rates fixed by public authority which are not sufficient to yield a fair or reasonable return on the value of the property are unjust, unreasonable, and confiscatory; and that their enforcement deprives the public utility enterprise of its property in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.[25]

This, then, poses the question: What factors are to be considered in fixing or regulating rates? At least three fundamental bases of valuation of public utility property for ratemaking purposes were advanced in the earlier days of public utility regulation:

(1) The original cost or prudent investment base

(2) The present value base

(3) The cost-to-reproduce base

Today, however, public utility property valuation is not resolved by formula as such, but depends upon many variables characteristic of particular circumstances.[26] A determination of public utility rates must be based upon a resolution of the right of the public to be served at a reasonable charge and the right of the utility to a fair return on value of its property.

In a number of public utility cases, it seems that commission-fixed rates do not violate the "due process" clause of the Constitution if they are calculated to produce earnings high enough to support the utility's financial structure even though they are not high enough to provide a fair return upon the reproduction cost of the utility's property. It seems to be acceptable legally if the commission bases its rate level findings upon the prudent investment valuation of the utility property.[27]

[21] Lenawee County Gas & E. Co. v. Adrian, 209 Mich. 52, 176 N. W. 590, 10 ALR 1328 (1920).

[22] Houston v. Southwestern Bell Telephone Co., 259 U. S. 318 (1921), 66 L. Ed. 961, 42 S. Ct. 486; Owensboro v. Owensboro Waterworks Co., 191 U. S. 358 (1903), 48 L. Ed. 217, 24 S. Ct. 82, and many other cases.

[23] Mapleton v. Iowa Pub. Serv. Co., 209 Iowa 400, 223 N. W. 476, 68 ALR 993 (1929).

[24] Lone Star Gas Co. v. Texas, 304 U. S. 224, 1937, 82 L. Ed. 1304, 58 S. Ct. 883, and many other cases.

[25] Denver Union Stock Yard Co. v. United States, 304 U. S. 470, 1937, 82 L. Ed. 1469, 58 S. Ct. 990; West v. Chesapeake & P. Telephone Co., 295 U. S. 662, 1934, 79 L. Ed. 1640, 55 S. Ct. 894, and many other cases.

[26] 20 ALR 556.

[27] "Recent Developments in Public Utility Regulation," by Ben W. Lewis, p. 384, AMERICAN ECONOMIC REVIEW, Papers and Proceedings, May 1946, 58th annual meeting.

Over the years, some courts have revealed what elements they take into consideration in a determination of the reasonableness of public utility rates. For example, it has been indicated that the very lowest rate of return a public utility should receive is one that will induce investment when the enterprise is prudently operated.[28] Other courts have held that a reasonable rate of return is one that approximates the profits received upon capital invested in other enterprises where the risk involved and other conditions are similar.[29] A fair return to which a public utility is entitled must be determined by present-day conditions, rather than by what has happened in the past.[30] High rates, of course, in themselves may not guarantee a fair return. A lower rate may have a tendency to increase the use of a public utility service, and thus result in a greater net return. These are only a few of the many principles which have been enunciated by the courts in public utility rate cases.

You may well inquire at this point: "What has all this to do with parking facilities?" Simply this: One of the apparent needs of our time is an adequate amount of off-street parking facilities that are attractive in their user-costs. If the public utility concept is to be helpful in attaining this objective, as proposed herein, it must make possible rates which are more reasonable than now exist with respect to most commercial off-street parking accommodations. Yet, one of the important legal bases of the public utility concept requires that while rates must be reasonable, they must result in a fair return on the public utility properties.

Without a bona fide trial on the merits, it is difficult to know whether a dilemma is here involved. Perhaps this is the weakest link in the chain of qualification of parking facilities as public utilities. It may be, however, that the present rate structure of commercial parking facilities is too much a function of inappropriate usage by motorist-parkers, of parking facilities outmoded in design, of locations that are not close enough to parking generators, and other factors that probably would not exist if parking facilities were regulated as a quasi-public enterprise. If this is not true, then it would seem that the public utility concept may not be helpful, and that the last vestiges of private ownership of parking facilities must crumble, to give way to the public establishment of such accommodations as public facilities.

[28] Petersburg Gas Co. v. Petersburg, 132 Va. 82, 1922; 110 S. E. 533, 20 ALR 542, LRA 1915 A 30.

[29] Bluefield Waterworks & Improvement Co. v. Public Serv. Commission, 262 U. S. 679, 1922, 67 L. Ed. 1176, 43 S. Ct. 675, LRA 1915 A 32.

[30] United R. & Electric Co. v. West, 280 U. S. 234, 1929, 74 L. Ed. 390, 50 S. Ct. 123.

PUBLIC REGULATION OF COMMERCIAL PARKING FACILITIES

Private enterprise, addressing itself to the provision of off-street parking facilities, has supplied at least some of the accommodations so urgently needed in urban areas today. Such effort to supply a needed service, though sincere in its conception, has not been free of abuses in its execution.

Motor vehicles stored in parking facilities have often been damaged by the negligent conduct of some operators of such facilities. Legal redress for such acts is usually expensive and ineffective. Personal property is frequently stolen from parked vehicles because of a lack of adequate protection from trespassers. The free circulation of pedestrian and motor traffic is often obstructed by the unlawful practices of some operators of parking facilities. Price gouging has not been an uncommon occurrence.

These and other abuses and the widespread lack of minimum standards of performance by operators of off-street parking facilities have caused at least 43 cities in the United States to enact appropriate local ordinances authorizing the licensing of off-street parking facilities operated for profit and prescribing minimum standards of design, maintenance and operation. In 19 additional cities, a business license is required, but design and operation are left unregulated,[31] except as controlled by building codes.

The regulatory and enforcement functions authorized in the ordinances are lodged in a great variety of municipal agencies. In San

[31] Based upon unpublished studies of the Bureau of Public Roads and MUNICIPAL REGULATION OF PARKING LOTS, by Charles S. LeCraw, Jr., and Wilbur S. Smith, 1949, Eno Foundation for Highway Traffic Control.

Francisco, for example, various aspects of regulation are made the responsibility of the Chief of Police, the Fire Department, the Director of Public Health, and the Department of Public Works.

Generally, these regulatory ordinances do not apply to parking facilities with a very small capacity, such as less than 8 or 9 or 10 vehicle-spaces, depending upon the city involved. The removal and use of parked vehicles without the knowledge and consent of their owners is prohibited in a few cities. The possible range of license fees may be $1.00 per facility, as in Cleveland, to $100 for a facility having a capacity of more than 100 vehicles, as in New York City. Many cities require that all licensees post prominently the rates charged, closing hour of the facility, etc. Claim check practices are prescribed. A few ordinances attempt to protect the motorist-parker against disclaimers of damage liability in case of accident or theft and to assist in the enforcement and collection of judgments by requirements that bonds in designated amounts be posted by licensees, or by some other appropriate regulations. With respect to rate regulation, ordinance provisions merely endeavor to guard against fraudulent extortion of fees and misrepresentation involving the advertised schedule of rates. No attempt is made to determine an economic or equitable rate structure. Design, operation, and maintenance standards are frequently prescribed.[32]

One may conclude that the public control of commercial off-street parking facilities authorized under these laws may well be the forerunner of fullfledged public utility regulation of such facilities. As now constituted, of course, such regulation falls far short of effective public control of commercial parking facilities in a number of respects. The rate structure is frequently not designed to encourage short-term parking and discourage all-day storage, for example. Locations for new facilities, making parking space available where needed in relation to the principal generators of parking demand, are not prescribed. Certificates of public convenience and necessity are not required. Competition is not controlled in the public interest. Facilities are not necessarily integrated with the over-all needs of the community. Other identifying characteristics of a public utility are largely absent.

[32] Two model laws are available involving the public regulation of commercial off-street parking facilities by cities, issued by the American Automobile Association. One is a State enabling statute and the other is a local ordinance that might be enacted pursuant to the statute: PROPOSED STATUTE TO DEFINE THE LEGAL OBLIGATIONS OF PROPRIETORS OF GARAGES AND MOTOR VEHICLE PARKING FACILITIES, and PROPOSED ORDINANCE REGULATING OFF-STREET PARKING FACILITIES.

CONCLUSION

The chief objectives to be attained in the governmental regulation of a public utility are adequate service and reasonable rates for the consuming public. Since public utilities are inherently monopolistic the consumer is without the usual alternative of patronizing some other dealer or producer rendering the same service. His best guarantee of adequate service and fair prices may be found in effective regulation by government authority.

The outstanding legal characteristics of a public utility are that it (1) is "affected with a public interest," (2) involves a public use, (3) has monopolistic attributes, and (4) is related to transportation or distribution. When measured in terms of these essential elements, it is amazing how easily off-street parking facilities seem to qualify as a public utility, assuming that it is appropriately identified by State legislative act.

It is true that the public regulation of designated public utilities is today an accepted fact. Yet it does not meet the unqualified approval of all. With some measure of justification, some critics disparage the partisanship that has often characterized the conduct of State regulatory agencies. Others may feel that such regulation, as far as off-street parking facilities are concerned, is only a temporizing measure; that ultimately the municipality must own and operate all parking facilities in the public interest.

Certainly the public utility concept constitutes no panacea for all urban parking difficulties. It would seem to provide the promise of compromise, however, between extremes of public and private control of off-street parking facilities in those municipalities where no action is forthcoming today. The qualification of parking facilities as public utilities seems so feasible legally that it warrants serious consideration by both public and private enterprisers. It may yet serve as the catalyst that will constrain these seemingly incompatible disputants to work together as a team in the public interest.