2142.

PUBLIC UTILITIES—MUST BE IN EXISTENCE DURING YEAR ASSESSMENT IS MADE UNDER SECTION 606 G. C.—WHEN UTILITY SELLS OUT TO ANOTHER OPERATING UTILITY—HOW ASSESSMENT APPORTIONED.

In order to be subject to assessment for the support of the public utilities commission under section 606 of the General Code, a public utility or railroad must be in existence during the year in which the assessment is made.

If the utility discontinues at the end of the year preceding that in which the assessment is made, though within that year, by selling out to another operating utility, the receipts of the first utility cannot enter into the basis of apportionment of the assessment to be made in the succeeding year.

COLUMBUS, OHIO, June 6, 1921.

Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department as follows:

"Section 606 of the General Code as amended in 108 O. L., Part II, p. 1151, reads as follows:

'Section 606. For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing, rent, light, heat, water, telephones and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding two hundred thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intra-state gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.

On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment appropriated by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public utilities commission.'

The auditing department of this commission is now engaged in spreading these assessments against the various railroads and public utilities of this state, for what the department calls the 1921 assessment, and we are confronted by certain conditions upon which we desire your official opinion.

First Case: We have the case of a public utility which ceased to operate as such within this state at midnight on December 31, 1920, by selling all of its property and business to another utility, which has been continuing and is now engaged in the business of the former company; this purchasing company had, prior to this time, also been operating as a public utility in this state. The period fixed by this commission for the annual reports of public utilities is the calendar year, and the report of the selling or discontinuing utility

showed intra-state gross earnings or receipts for the calendar year of 1920, of more than seven million dollars.

Second Case: We also have before us the case of a public utility which ceased to do business at the same time, by transferring its property and business to a municipality, whereby the property became municipally owned and not subject to supervision or assessment by this commission.

Third Case: We also have the case of a public utility operating within the state for the period from January 1 to August 1, 1920, at which time it permanently ceased to operate.

QUESTION NO. 1: Against what utility, if any, shall the assessment for 1921 be made in each of the above instances

QUESTION NO. 2: In the first above mentioned case, upon what gross earnings shall the assessment be levied?

QUESTION NO. 3: Frequently, utilities have inquired for what period of time these assessments are levied? Whether they are for the year preceding or the year succeeding the one in which the assessments are levied and collected? We desire an answer to this question also."

The following sections of the law relating to public utilities are *in pari materia* and may be considered in connection with the question submitted:

"Section 614-2a. The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as 'railroads' in sections 501 and 502 of the General Code and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act."

"Section 501. The term 'railroad' as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls any cars or other equipment used thereon, or which owns, operates, manages or controls any bridges, terminals, union depots, side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. * * *."

In the commission's letter section 606 G. C. is quoted in full, and this quotation need not be repeated.

The following points deserve mention:

A "public utility" and a "railroad" are respectively defined with reference, as it were, to the person and not to the thing. In other words, there is lacking in these sections a provision similar to that found in section 5415 of the General Code, relating to taxation, viz.,

"and such term 'public utility' shall include any plant or property

owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

Consequently, when section 606 speaks of an assessment "in proportion to the intra-state gross earnings or receipts of such railroads and public utilities," the reference must be to the gross earnings or receipts of the companies or persons, etc., defined as "railroads" and "public utilities," and not to the gross earnings or receipts derived from the use of a railroad or public utility by a company which or person who is not liable for the assessment, though within "the year next preceding that in which the assessments are made."

This proposition is sufficient partially to answer the first question submitted by the commission. The only receipts or earnings of the purchasing company which can be used in apportioning the assessment are those which were its own, and not those derived by another from the use or operation of the public utility property which it acquired during the year. This is further demonstrable by supposing that the selling utility did not entirely cease to operate, but merely sold a branch or a part of its plant to the purchasing company on the date named. It would in that event be the selling company which would have to bear the assessment apportioned according to its entire receipts or earnings, though it had parted with a part of the property, through the operation of which those receipts or earnings have been derived, at the end of the calendar year.

The question remaining in the first question is that squarely raised in the second question, namely, as to whether, in view of the fact that in both cases the selling utilities had gone out of business at the end of the reporting year, any assessment can be made against them. This question requires further consideration of section 606 G. C. That section authorizes an annual apportionment among and assessment upon

> "the railroads and public utilities within the state, * * * in proportion to the intra-state gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made."

In the opinion of this department, a utility in order to be "within the state" and subject to assessment must be in existence, i. e., engaged in business at the time the assessment is made. When what is now section 606 of the General Code first went into effect it authorized an assessment upon the then public utilities on the basis of the gross receipts or earnings of the preceding year. The original sections, being sections 250-1, 250-2 and 251 of the revised statutes, are not entirely clear, but it is reasonably certain that the report required by section 251 was originally the predicate of the assessment required to be made by section 250-2. At any rate, it is obvious under these original sections that the assessment was to be made upon

> "the several corporations owning and operating railroads within this state * * * in proportion to its gross earnings from operations for the next year preceding that in which the assessment was made";

so that the assessment was made then, and in the opinion of this department is still to be made, upon existing railroads, i. e., those doing business at the time the assessment is made, and the receipts for the preceding year are used merely as the basis of apportionment.

It is therefore the opinion of this department that liability for assessment depends upon the existence of the public utility at the time the assessment is made. Therefore, on the facts stated in the commission's first question the utility which ceased to operate as such within this state prior to the time the assessment was made is not liable to be assessed at all; and inasmuch as it has been held that the utility to which it sold out is not liable to be assessed on the basis of the receipts or earnings derived by the seller, it follows that those receipts or earnings cannot enter into the basis of the apportionment at all.

It also follows that in the second instance mentioned by the commission, the gross earnings of the utility which sold out to a municipality at the end of the reporting year, and before the time when the assessment was made, are not to be considered in making the apportionment.

The same principles require that your question as to the third case cited by you be answered by stating that the utility mentioned is not subject to assessment for the year 1921, and that its earnings do not enter into the apportionment to be made in the year 1921.

It is believed that these obseravtions cover your questions numbered one and two.

As to your third question, it is difficult to avoid ambiguity of expression in dealing with it, or even, it may be remarked, in stating it. It is believed that the most accurate way to put the answer is to say that the assessments are not levied for any period of time whatsoever; they are simply levied. In respect of the uses to which the revenue is to be applied it may be said, of course, that the assessments are "for the year" succeeding their collection, inasmuch as that is the year in which they will be applied to the support of the commission. From the point of view of the basis of apportionment, they are, of course, levied for the year for which report is made as prescribed by the commission, which, as stated in the commission's letter, is the calendar year. But the levy and payment of such assessment does not represent the conferring of a privilege, as would be arguable if the exaction were an excise tax for which a basis of privilege might have to be found. The fact that the assessment is levied is predicated upon the mere existence of the utility at the time it becomes subject to assessment, which is a day certain, no earlier at least than the beginning of the calendar year.

The commission does not put the question as to the liability to assessment of a utility going out of business early in the year in which the assessment is made. That question is accordingly not considered herein. It is sufficient to observe that in all the cases stated in the commission's letter the discontinued public utility is not subject to assessment at all, because of the fact that the discontinuance took place prior to the beginning of the year in which the assessment was made.

Analogous holdings under the excise tax law will be found in the Annual Report of the Attorney-General for the year 1914, Vol. II, p. 1697; same report for 1916, Vol. II, p. 1915.

Respectfully,
JOHN G. PRICE,
Attorney-General.