

Mell C. Gabriel, the grantor, the same should be submitted to this department for approval.

I am herewith returning to you said abstract of title, deed form, encumbrance estimate and controlling board certificate.

Respectfully,
GILBERT BETTMAN,
Attorney General.

234.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN BELMONT COUNTY.

COLUMBUS, OHIO, March 23, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

235.

APPROVAL, BONDS OF CLARIDON TOWNSHIP, MARION COUNTY—
\$11,096.86.

COLUMBUS, OHIO, March 23, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

236.

HOUSE BILL NO. 383—AMENDING SECTION 499-9, GENERAL CODE—
PUBLIC UTILITIES—BILL CONSTITUTIONAL.

SYLLABUS:

House Bill No. 383, if enacted into law, would not be unconstitutional.

COLUMBUS, OHIO, March 25, 1929.

HON. GILBERT MORGAN, *Chairman, Reference Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date, asking my opinion as to the constitutionality of House Bill No. 383—Mr. Jackson—to amend Section 499-9, General Code, in view of the decision of the court in the case of *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400. If the bill be enacted into law, Section 499-9, General Code, will read as follows:

"The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, and the original cost of each so far as ascertainable, owned by each public utility or railroad, used and useful for the service and convenience of the public and the amount of capital actually expended. In ascertaining the value and original cost of the various kinds and classes of property of each public utility or railroad and the capital actually expended the commission shall report in such detail as it may be necessary.

If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

A duplicate copy of the record of every physical valuation of a public utility or railroad shall be furnished to the Ohio Tax Commission, on request, for its use in ascertaining the value of the property of such utility or railroad for purposes of taxation, and upon demand any person or corporation owning or operating a public utility or railroad shall be furnished with a copy of the valuation of his or its property.

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the Governor and the General Assembly."

This section, at present, provides :

"The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts :

A. The original cost, if any, of each parcel of land owned and used by such public utility or railroad, and a statement of the conditions of acquisition; whether by direct purchase, by donation, by exercise of the power of eminent domain or otherwise.

B. The value as of a date certain, of each parcel or land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

C. If there shall be any additional value to such utility or railroad by reason of the ownership by it of one or more parcels of land and its use as a continuous right of way for transportation purposes, or for other purpose, such additional value shall be separately and specifically set forth for each parcel.

D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

G. If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

H. A duplicate copy of the record of every physical valuation of a public utility or railroad shall be furnished to the Ohio Tax Commission, on request, for its use in ascertaining the value of the property of such utility or railroad for purposes of taxation, and upon demand any person or corporation owning or operating a public utility or railroad shall be furnished with a copy of the valuation of his or its property.

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the Governor and the General Assembly."

Comparing the two, it is evident that the proposed bill will add to the section the requirement that the inventory of all utilities shall show the original cost of all property of the utility, so far as ascertainable, and also the amount of capital actually expended. It also removes the requirements enumerated in paragraphs A, B, C, D, E and F in the section as it now is in effect. It may, accordingly, be stated that, while this section still requires the value of all property to be set forth in the inventory, a substantial change is made as to the other details which must be included therein.

In considering Section 499-9, it is advisable to study its history and it is also necessary to consider Sections 499-8 and 614-23. The old rule in determining valuation was known as Section 614-24, as follows:

"The commission shall have the right to investigate and determine the value of all the property including the value of its physical property of every public utility within its jurisdiction actually used and useful for the service and convenience of the public whenever it deems the ascertainment of such value necessary in order to properly carry into effect any of the provisions of this act."

This section was repealed in 1913 by the act creating the Public Utilities Commission and abolishing the Public Service Commission, of which act the present Section 499-9 was a part. It will be noted that, when this act containing Section 499-9 was passed repealing Section 614-24, there was no repeal of Section 614-23, which section

is still in the law and which provides in part that whenever the Commission is of the opinion that any rate, charge, etc., is unjust—

“The Commission shall, with due regard among other things, to the value of all of the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount, (exclusive of any tax or annual charge(actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate,” etc.

so that the Commission is, at the present time, controlled by all three Sections, 499-8, 499-9 and 614-23.

Section 499-8 provides that the Commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state used and useful for the service and convenience of the public.

Section 499-9 provides the method for the making of the inventory required in determining such value. The generally accepted rule is that the Legislature has vested in it the rate-making power for public utilities within this state which it exercises through the Public Utilities Commission, and the Commission must, in arriving at a rate, insure to the utility a reasonable return on the value of the property used and useful in the public service as of the time of the fixing of such rates.

We quote from the syllabus of *Lima Telephone and Telegraph Co. vs. The Public Utilities Commission*, 98 O. S. 110:

“1. The making of rates to be paid to a public utility is a legislative function to be exercised by the Legislature or subordinate body to which the power has been delegated; and where the steps prescribed by the Legislature have been followed an order of such body will not be reversed by this court unless it appears from the record of the proceedings that it is unreasonable or unlawful.

2. Section 499-8 et seq., General Code, prescribe the steps to be taken by the Public Utilities Commission in the valuation of the property of a public utility for the purpose of determining the justice of rates or fixing the same.

3. By the provisions of Section 614-23, General Code, the Public Utilities Commission in fixing reasonable rates to be charged by a public utility, is required to have due regard to the value of all the property of the utility used or useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount actually paid to any political subdivision of the state or county as the consideration of such franchise or right; and exclusive of any value added thereto by reason of monopoly or merger, and to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and of all such other matters as may be proper, according to the facts in each case.”

The Commission has been given a very large discretionary power as appears from the last sentence in Section 499-8, as follows:

“The Commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state.”

and also as it is restated in the last sentence of Section 499-9, which is left unchanged in the proposed House Bill No. 383, as follows:

“Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper;”

The only ground upon which the jurisdiction of the federal courts can be invoked by a utility in a rate-making or valuation proceeding is on the question of confiscation. We quote paragraph 2 of the syllabus in *McCardle vs. Indianapolis Water Company*, 272 U. S. 400, as follows:

“Upon the question whether or not a rate fixed for a public utility is confiscatory it must be determined whether the rate complained of is yielding, and will yield, over and above the amounts necessary to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service, and is a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future.”

On page 410 of this opinion Justice Sutherland uses the following language:

“The decision of this court in *Synth vs. Ames*, 169 U. S. 466, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418, declares that to ascertain value ‘the present as compared with the original cost of construction’ is, among other things, matters for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure. The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand.”

and again on page 411 we find the following:

“Undoubtedly, the reasonable cost of a system of waterworks, well planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices. And, as indicated by the report of the Commission, it is true that, if the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property.”

It is clear from the foregoing that the Commission, in determining valuation, should not rely on reproduction cost alone or on original cost or on the amount of capital actually expended, but must take all these items, together with others, into its consideration in determining the fair value of the property of the utility dedicated to the public service at any given time. Any method provided for determining the valuation, the operation of which would not result in confiscation, would be constitutional in the light of the clear wording of the sections and decisions cited above.

While the proposed amendment requires that the inventory disclose, insofar as possible, the original cost and the capital expenditure, yet the section, considered in the light of the other provisions of law relative to the fixing of just and reasonable rates and charges, does not, in any way, attempt to determine what, if any, weight shall be given to these factors by the Commission in reaching its conclusion. As I have before stated, the authorities are uniform that these factors may, in proper cases, be material and the mere requirement that the Commission have before it, for the purposes of its deliberations, evidence bearing upon these factors, is not in any way a violation of any constitutional provision, nor is it at variance with any of the expressions of the Supreme Court in the McCardle case. The Commission still has the power and the duty to reach in each case a proper valuation for rate-making purposes, and, in so doing, must, of course, give proper consideration to all factors material thereto. Whether or not the conclusion of the Commission, in arriving at valuation, is such as to result in confiscation is a question of fact to be determined by the circumstances of each particular case, but, assuming that confiscation were proven in some instance, the validity of the finding of the Commission would be involved and not the validity of the statute here under consideration.

In view of what has been said, I am of the opinion that House Bill No. 383, if enacted into law, would not be unconstitutional.

Respectfully,

GILBERT BETTMAN,
Attorney General.

237.

APPROVAL, ABSTRACT OF TITLE TO LAND OF LEONARD SILER, IN
MERCER COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted an abstract certified to by Homer J. Hinders, abstracter of Celina, Ohio, under date of October 3, 1928, and request my opinion as to the status of title of the following described premises as disclosed by the abstract:

“Situate in the county of Mercer, in the State of Ohio, in the township of Jefferson and bounded and described as follows, to wit: Lots number (82) eighty-two and eighty-three (83) in the Hawkins allotment west of the village of Celina as shown on a recorded plat of said allotment, made by Martin Lutz, civil engineer, and recorded in plat book number (2) two at page (70) seventy.”