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COMPULSORY UNDERGROUND WIRING—A BATTLE REJOINED IN PUBLIC UTILITY LAW

NEALE F. HOOLEY

THE MANNER in which our public utilities route their power has long been a source of controversy within our courts. Indeed, no sooner were power lines erected than litigation commenced concerning the manner in which they had been constructed and the various routing patterns that had been effected in different local areas. The earliest public utility case law in point appears to portend the eventual arrival and necessity of underground wiring. The potential problems and practical difficulties surrounding this transition in power facilities were evidenced very early in the life of compulsory underground wiring legislation, as students of New York City history are well aware. Certainly, little public utility legislation was so earnestly contested, so persistently ignored, and so voluminously litigated as the compulsory underground wiring statutes affecting that city which were enacted during the latter part of the nineteenth century.1 The legal turmoil continued even after a corporation had been formed for the specific purpose of constructing "subway" systems for miles of power conduit found within Manhattan Island when the subject of rates was brought to the bar for determination.2 The final acceptance of compulsory underground wiring in large cities might well be considered as the completion of phase one in the modern transition of power wiring. We are now faced with phase two of this physical evolution in the manner of power routing — the feasibility, practicality and authority of a municipality or less densely populated area to enact compulsory underground wiring ordinances, and the ensuing right of public utilities thereby affected to initiate rate variations which reflect the cost of such enforced relocation of existing power facilities.

That the coming years will see increased legislative activity concerning the subject of underground wiring is not open to question or

1 Assistant Counsel, Consolidated Edison Company of New York, Inc. A.B. 1953, St. Francis College (Pa.); LL.B. 1956, Villanova University.
conjecture. Certainly, public utility case law bears ample evidence of this fact. Of further import is the recent trend in New York toward immeasurably strengthened zoning provisions, the underlying considerations of which serve as a mutual foundation for compulsory underground wiring legislation. It is our purpose to present the current status in New York with respect to compulsory underground wiring legislation, hereinafter referred to as wiring ordinances, in such a manner as to successfully serve the reader as a guide to future activity in this area of the law.

Hitherto, wiring ordinances have relied heavily on the “congested area” theory in establishing their purpose and legality and, of necessity, have had definite and rather immediate geographic boundaries. Thus, ABC City might legislate locally for underground wiring within its business district, stating within the ordinance that its provisions were applicable only to that portion of the city bounded on the north by X street, on the east by Y street, and so on. The most recent legislative counterparts, however, are basically of two types: (1) those which refer to a definite but presently non-congested area, and (2) those which are considerably more inclusive in their applicable area. An example of the latter is set forth below, and will be used as a basis for discussing the modern style of wiring statute throughout this article.

In considering our subject — the validity and effect of compulsory underground wiring ordinances — we shall proceed in the following fashion: First, we shall commence with a study of the municipality’s power to enact ordinances, including the procedural requirements regulated by state law. Secondly, we shall consider the substantive limitations which must be observed by the municipality that desires to enact local laws governing the installation of power facilities. Lastly, we shall analyze the utilities’ right to reflect the cost of such facility transition in their appropriate rate schedules, with particular attention being paid to the factual interpretation of the term “rate discrimination.”

3. The court of appeals recently sustained the validity of the City of Buffalo’s zoning ordinance which contains a three year amortization clause, thus following the lead of eleven other jurisdictions: California, Colorado, Florida, Iowa, Kansas, Louisiana, Maryland, New Jersey and Texas by case law and Illinois and Virginia by statute; Harbison v. Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958). The strength of this decision is apparent in light of the fact that the offending business was initiated and carried on for twenty-nine years in a nearly identical manner and style prior to the enactment of the zoning ordinance under consideration. The case was remanded to a lower court for a final determination of damages with the instruction that the ordinance was to be enforced unless the damages determined by the court were found to be very severe, in which case the business would be allowed to continue in its present location.

A typical compulsory underground wiring ordinance of recent origin (September 24, 1958) reads:

"All utility wires and lines and electrical wires supplying current to non-residential buildings hereafter erected or to any real estate development consisting of two or more private residences which are hereafter erected shall be placed under the surface of the street and under the surface of the ground leading to said building or residences."  

I. MUNICIPAL ORDINANCES.

A study of municipal wiring legislation in New York must necessarily commence with the procedural provisions whereby such power is derived. The present stage of de-centralized legislative power which exists by virtue of the City Home Rule Law is the product of modern necessity and legislative convenience, having evolved to its present state in three definite steps over the last century. The importance of understanding this procedural transition is found in the fact that not only does it enable one to reconcile the leading case law dealing with the right of a municipality to enact wiring legislation, but it also illustrates the present legislative perspective in this area of the law.

A. The Power of Municipalities to Enact and Enforce Ordinances.

Though the state constitution has continuously provided not only for the organization of cities and villages, 6 but has secured certain rights and authority to the entities created, 7 the manner in which such powers are seated in a municipality has undergone vast change. Originally, the state legislature vested administrative powers individually on petitioning municipalities. 8 These legislative enactments would list in specific terms the powers granted to an individual municipality, including the police powers delegated to the common council or equivalent body of local government. Within the expressed police powers the authority to enact ordinances is found. 9

The second step in the pendulum's swing toward granting the individual municipalities greater autonomy is evidenced by the intro-

5. Id. § 7-41(b).
6. N. Y. Const. art. IX, § 9 (1894).
7. Id. § 12.
8. E.g., N. Y. Sess. Laws 1842, ch. 275, which consolidated many laws relating to the City of Albany.
9. E.g., Id. § 29.
duction of population-classification legislation within New York. Though this concept had been suggested earlier, it was not until the constitutional revision of 1894 that such legislation was enacted. This was the initial attempt at collective, as distinguished from individual, legislation in the field of municipal corporation legislation. The turn of the century brought still greater changes to the mechanics of municipal legislation, and the trend toward the granting of wider ranging and less defined powers to municipalities was further evidenced by the laws of 1913. Of more than a little significance is the attorney general’s comment concerning the latter legislation, in which he states that while previously it was thought that a municipality was granted only those powers specifically enumerated by legislative phraseology, henceforth, legislation granting authority and power to cities was to be interpreted as delegating all powers not specifically withheld.

The legislative trend reached its present status when the City Home Rule Law was enacted in 1924. Though subsequent amendments have altered its text to some degree, the basic statutory pattern has remained constant. As the caption suggests, this law provides for the establishment of local governments throughout the state without any regard, even by classification, to the individuality of the municipality. With its general application and all-inclusive phraseology, this law is the antithesis of the individually granted municipal authorizations of the mid-1800’s.

In this manner the right of a municipality to legislate locally, formerly found in express terms within the individually granted city charters, has grown both in scope and strength. It now exists as a broad, general legislating power resting with the governing body of the municipality, and is in fact a general delegation by the legislature of the state’s police power within certain geographical boundaries. This interpretation is evidenced not only by case law, but by a recent attorney-general’s opinion which stated in part:

10. 3 Lincoln, Constitutional History of N. Y. State 629, 631, 649, 650 (1906).
12. Id. 1913, ch. 247.
15. The most noteworthy alteration was the repeal of the optional city government law (N.Y. Sess. Laws 1939, ch. 765) whose title was self-explanatory of its text.
"Unless the legislature has definitely expressed its purpose to occupy an entire field of legislation, cities are empowered to enact laws for the preservation and promotion of the health, safety, and general welfare of their inhabitants." 17


The legislative change of direction in granting greater autonomy to municipalities was not without its counterpart in the field of service and utility legislation. As with the vesting of powers to municipalities, the state legislature originally chose to reserve the maximum amount of power within itself, dealing with various problems and situations by individual enactment. In this manner, as electricity and other related services were developed, separate legislation was enacted to control each situation or need as it arose. This is evidenced not only by the many laws designed to apply to specific areas of the utility field, 18 but also by the prolific amount of legislation that was explicitly directed at some problem found within an individual city or municipality. Illustrative of the latter class of statutes are the related acts of the 1880's requiring all electrical wiring within the City of New York to be placed underground. 19

Due to the relatively belated development of many of our present utility services the vast bulk of significant utility legislation appeared initially in a more generalized form than did municipal law. Indeed, both the Transportation Law 20 and the Public Service Commissions Law 21 antedated in style the municipal law of their day. Thus, just as the state's police power was gradually being transferred to municipalities, the legislature was consolidating public utility law in an effort to meet the need of state supervision and greater uniformity. We do not imply by this statement that local laws may supersede state or federal legislation, but rather that a considerable portion of the state's police power has been delegated to the municipalities who now exercise regulatory powers formerly found only within the state legislature, though the state continues to exercise extensive administrative control over the public utility field. That this co-existence of state and local authority was intended by the legislators is apparent from the

17. ATT'Y GEN. 124 (1950).
18. Regulation of Telegraph Companies, N.Y. Sess. Laws 1848, ch. 265, and subsequent amendments thereto too numerous to cite.
19. N.Y. Sess. Laws 1884, ch. 534; Id. 1885, ch. 499; Id. 1886, ch. 503; Id. 1887, ch. 716. It is to be noted that in accordance with the classification system of municipal legislation then in vogue, some of these laws were made applicable to cities with populations in excess of 500,000, though only one other city within the state has ever grown to that size and that not until thirty-six years later. (Buffalo passed the 500,000 mark in 1920).
21. Id. 1907, ch. 429.
context of the laws themselves, as well as from the standard interpretation these acts receive.

For this reason we conclude that cities and municipalities do have the legislative authority under the powers granted by the City Home Rule Law to enact ordinances relating to the regulation of the local activities of concerns engaged in the production, supply and transportation of electricity.

C. The Procedural Aspect of Municipal Ordinances.

Lastly, let us consider at closer range the significance of the term ordinance, distinguishing it from a local law with which it is often confused. This distinction is necessitated by the phraseology of the Home Rule Law which differentiates between the procedural rules relative to the passage of a municipal ordinance and those pertinent to the enactment of a local law. An ordinance may be termed as a municipality's enactment of its police power. A local law, however, is a municipal enactment springing from the legislature's delegation of this power. Thus, the latter is distinguished from the ordinance in that the local law is the establishment of the means or manner by which an ordinance may be enacted.

The procedural significance of this distinction is that while the Home Rule Law provides for a public hearing prior to the enactment of a local law, no such requirement exists relative to ordinances. Hence, the latter may be enacted at a mere public meeting, or such other session of municipal government that the particular city charter requires without any prior public hearing on the issue. It is submitted that this is a major procedural defect in the existing law, in that it gives birth to legislation whose effect and implications are worthy of public notice if not state control. It seems that the amount of faulty compulsory wiring legislation that will receive the attention of the courts in the following years could be greatly reduced by corrective legislation in this area of the law.

II.

MUNICIPAL LEGISLATIVE POWER IN THE PUBLIC UTILITY FIELD.

A. The Municipality's Right to Regulate the Installation of Electrical Facilities.

Having reviewed the legislative and historical development of the individual municipality's right to regulate conduct relative to the health, safety and general welfare of the public within existing geographic boundaries, let us now study the effect of such local legislation on service facilities with particular attention being paid to electrical power installations.

A basic premise in municipal law is that the grantor of a franchise may regulate the use of the right that it has granted.27 This ability to regulate a franchise previously granted is interpreted by the courts to be an understood condition relative to the original granting of the right.28 Indeed, it is to be noted that a municipality may require the modification of existing electrical facilities in conformance with recent local legislation though such facilities were installed in accordance with the demands of ordinances existing at the time of their construction.29 In this manner it may be seen that the law adheres to the maxim that service corporations acquire no rights superior to those of the public interest.30 This argument proceeds on the contention that when a public service company lays power lines it does so with the risk that the interests of the inhabitants may force the local municipality to exercise regulatory powers requiring the relocation of these facilities at a later date.31

The municipality's right to exercise its regulatory powers is subject to limitation, however. Such limitation, regarding wiring ordinances, may be said to be based generally on the interpretation given the term "reasonable" in the light of the particular facts surrounding each individual situation. Nor is the term "reasonable" subject to mere factual interpretation; an ordinance may be "unreason-

27. People v. Braun, 100 Misc. 343, 166 N.Y.S. 708 (Niagara County Ct. 1917).
31. Ibid. Should the service company have entered into a written agreement with a private land owner, however, thereby obtaining an easement, the latter does not have a similar right of demanding relocation of the facilities in question. Buell v. Utica Gas and Elec. Co., 259 N.Y. 443, 182 N.E. 77 (1932).
able”, in the court’s application of the word, should it attempt to derogate powers vested in utilities by pertinent state legislation. Thus, the attempt to prevent an electrical power company from laying installations benefiting community B within the bounds of community A was unsuccessful. The court held, primarily, that this was not a reasonable exercise of the municipality’s delegated police power, though this holding is in fact based on the finding that the local ordinance in question conflicted with existing state legislation. It must be noted, however, that the companion case to the above illustration sustained the validity of local legislation requiring the underground installation of the planned power facilities.

The concepts of reasonableness and wiring regulation do not always coincide, though it is to be readily recognized that such companionship is to be demanded if the ordinance is to successfully weather litigation directed at its constitutionality. Past experience has taught current legislators that their efforts will appear in the strongest light when the area sought to be regulated is considered to be congested, as this term is popularly understood in civic discussions. It would appear that a basic legal equation for the evaluation of a wiring ordinance’s validity might be arranged in the following manner:

\[
\text{Congested Area} + \text{Reasonable Regulation} = \text{Valid Legislation.}
\]

Summing up, it may be said that cities and municipalities have the power to enact ordinances regulating the installation of utility facilities, including electrical power equipment. Such enactments, however, are subject to the usual constitutional requirements, viz, in order to satisfy the requirement of due process, they must not be arbitrary in effect, they must be clear in meaning, they must present a reasonable regulation, and they must be directly related to the public interest.


Both the state and federal constitutions limit the legislating authority that New York municipalities currently enjoy. As defined

33. Long Island Lighting Co. v. Shields, 299 N.Y. 562, 85 N.E.2d 791 (1949). This case is the companion case of Long Island Lighting Co. v. Old Brookville, supra, note 32, Shields having been the Mayor of the Village of Old Brookville at the time of the litigation. This decision, handed down shortly after the Old Brookville one, held that the ordinance prohibiting overhead power (high tension) lines was reasonable in light of the fact that the lines were not yet built and there was no prohibition against installing the facilities by the alternate method available (subsurface).
34. See notes 32 and 33, supra.
35. U. S. Const. amend. XIV, § 1; N. Y. Const. art. I. § 6 (1894).
by the Supreme Court, the requirement of due process demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the end sought to be attained.\textsuperscript{36} Further, should a statute require the performance of an act in such vague terms that men of common intelligence must necessarily guess at its meaning and differ as to its interpretation, the due process provisions of the respective constitutions would again be violated.\textsuperscript{37} It might be well to note at this point of our discussion the well-settled principle of law that legislation may be declared unconstitutional due to its operative effect, though on its face the law is apparently valid.\textsuperscript{38} Let us now examine municipal wiring ordinances in the light of these restrictions with reference not only to stare decisis, but also to the current trend in this area of legislation as exemplified by the sample ordinance quoted in the introductory segment of this article.

Financial Considerations.

While the cost that the affected utility must bear as a result of a wiring ordinance's enaction is not necessarily a controlling factor, nevertheless, the courts view such potential expenditure with considerable interest\textsuperscript{39} wherever the validity of the ordinance is challenged on the ground that it is unfair or unreasonable and cannot be justified in a particular situation. In these instances the court understands it to be a duty to determine whether the expenditure required is reasonable in the light of all the surrounding circumstances.\textsuperscript{40} This point is of particular interest in New York as a direct result of the Home Rule Law, inasmuch as the approval of one such ordinance has a direct bearing on the advent of similar legislation throughout the state. Thus, not only must the local economics of the instance at hand be considered, but the expense necessitated by the enactment of similar local legislation by other communities must be reviewed. It is not too hard to envision a situation where practical necessity would demand a ruling of invalidity for the aforementioned reason, though locally the benefits of the ordinance might merit a better fate.

\textsuperscript{39} In re Boston Edison Co., 79 P.U.R. (n.s.) 1 (1949).
\textsuperscript{40} Nashville, Chattanooga & St. L. Ry. v. Walters, 294 U.S. 405 (1935).
Franchise Regulation.

We have noted earlier the demand for reasonableness where a municipality seeks to regulate a franchise right that it has granted. We have also noted the relation between reasonableness and physical congestion of the area defined by the subject ordinance. However, where the legislation does not limit its application to admittedly congested areas of the municipality in question, and by this we mean areas that are considered congested at the time of the legislative enactment's promulgation, such an ordinance exceeds the hitherto defined limitations of the term reasonable and may be found to have little or no relation to existing necessity. Considering the municipal enactment that we have cited as an illustration of the modern trend in wiring ordinances, it will be noted that this is an obvious example of potential legislating; no physical boundaries are described. Rather, this statute intends to apply to all areas and corners of the city without regard to use, zoning, congestion or public necessity. It is a watered-down version of a 100% underground stipulation that has been diluted in the hope of achieving constitutionally what has heretofore been considered an illegal purpose. Concededly, the relationship between reasonableness and congestion will have to be either re-evaluated or cast aside if we are to enjoy a general relocation of electrical facilities. The exact change the future holds is open to conjecture, but it is submitted that those ordinances defining by established bounds (i.e., streets and the like) the area made subject to power facility relocation stand a better chance of receiving the approval of the courts.

Required Relocation.

Inasmuch as electrical power companies make continuous and thorough inspections of their physical facilities, providing replacement items whenever required, the reasonableness of any ordinance which requires the relocation of such facilities must be founded on positive public benefit derived from such legislation. A standard utility argument against the validity of wiring ordinances which do not limit themselves and their application to areas of admitted congestion is that apart from the allegedly prohibitive cost of such relocation, there is no substantial benefit of positive value accruing to the public from such a venture. Turning to our sample ordinance, we see that this contention finds solid support. The terms of the ordinance provide for the installation of underground wiring in a piecemeal, as land is
improved, fashion. In this manner, neighboring realty might have different types of electrical power service for an indefinite period, with little real benefit resulting to either owner. Indeed, not only would the appearance of this sectional changeover be vine-like and slightly incongruous, but the cost of such a haphazard conversion would be many times that of converting the whole community at one time.  

**Aesthetic Considerations.**

Aesthetic reasons themselves, unrelated to the requirements of the public health, safety or welfare will not justify the exercise of a municipality's police power. While the police power is broad in scope and its legitimate area of application is both general and comprehensive, it is nevertheless fundamental that the exercise of this power must be limited to the attainment of legitimate objectives. Such power, therefore, is not to be viewed as an unlimited source of legislation. Rather, its exercise terminates precisely where the reason for its existence ends. The police power is not designed for increasing or even preserving the economic value of property, and the courts are guided by the consideration of the purpose behind a statute in determining its validity.

**Public Safety.**

Let us now weigh the contention that the public safety is increased by the enactment of underground wiring ordinances in non-congested areas. In non-congested areas the accident prevention argument of wiring legislation's proponents receives little support, if any, from the record of past litigation. In fact, the above-ground installation's accessibility for repair and maintenance combined with the tremendous number of excavation accidents constantly occurring would seem to indicate that the public safety, as such, receives no greater benefit from the installation of underground electrical facilities, except where building and population congestion demand such action. The initial thought that many accidents involving surface mounted power facilities could be avoided should such installations be maintained underground suffers from one glaring weakness. Underground facilities breed their own particular brand of accidents based on a constantly recurring

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41. Presently, only those cities in New York with populations in excess of 500,000 have the authority to legislate for complete underground wiring, N.Y. Sess. Laws 1884, ch. 534; Id. 1885, ch. 499.
principle, lack of notice of the injury-causing condition, be it the power facility itself or a temporary physical state related to the latter.

It might be well to distinguish at this point the Village of Old Brookville decision, noted earlier in this paper, from the common factual basis for a wiring ordinance. In the majority of instances including the cited municipal ordinance quoted within our introduction, power lines are presently in existence within the area sought to be directly affected by the legislation. In the Brookville case a different situation prevailed. There, a lighting company sought to lay hitherto non-existent power facilities within the municipality, such lines moreover being exclusively for the benefit of other communities. Further, the line in question was a high tension facility as distinguished from local feeder lines and service facilities that make up the greater portion of elevated power installations in most municipalities. Thus, in the Brookville case the argument for public safety, though not sufficient of itself to support the final decision of the court, did contain some merit when viewed in the light of the existing facts, namely, that the power line under debate was not in existence presently, but was to be constructed in the future; therefore no relocation of facilities was demanded. Rather, the municipality was petitioning the court to enforce an ordinance relative to new power installations. As the power facility was for the use of neighboring consumers outside of the municipal litigant's boundaries, it was not unreasonable to demand that the power line be installed below ground since the proposed single cable would not feed any other facility within that municipality. So, while it may be argued that public safety was a contributing factor in requiring underground installation of the subject high tension cable, it was not the sole, nor even the most important, foundation for such a decision. Moreover, the court's opinion limits itself clearly to the facts of the litigated issues.

C. Legislation Must Be Clear in Meaning.

To say that an ordinance is sufficiently clear as to enable men of common intelligence to interpret it in a generally uniform manner is to recognize a measure of clarity and certainty in its text. The provisions for municipal legislation in the City Home Rule Law are directly responsible for much litigation on this point due to the comparative autonomy that New York municipalities enjoy. As each individual ordinance must be examined by itself to determine whether

46. See notes 32 and 33, supra.
its phraseology is sufficiently definitive to meet the demands of constitutional interpretation, we cannot generalize in this area. Nor is it our intention to belabor the subject of statutory construction. Rather, we will examine the sample ordinance quoted earlier in an effort to illustrate the lack of explicitness so often found in local legislation, and with an aim to determine the minimum demands of clarity in wiring ordinances.

The cited ordinance limits its application to wires "supplying current" to specific realty. This phrase may be interpreted in a variety of ways. In a technical sense, which facilities "supply" current to a particular user? How far must we trace the particles of electricity into the distribution system? While the authors of the ordinance state that it was their intention to affect merely the poles and wiring fronting and connecting the lead-in facilities,47 this interpretation cannot be said to be either obvious or exclusive from the text of the statute. It is suggested that wiring ordinance authors would promote the validity of their efforts by (1) including therein a definition of terms used within the ordinance, and (2) relating the application of the ordinance to definite and fixed boundaries.

The terminology found within our sample wiring ordinance provides an excellent opportunity for us to illustrate the need not only for a definition of terms within the legislation, but for the use of proper language within the statute's provisions, both of which will insure clarity as well as promote reasonableness.

The author of the instant legislation intended to include "all realty developments . . . calling for the erection of two or more houses or buildings . . . and) . . . all commercial and office buildings".48 The draftsman, using the phraseology "non-residential buildings . . . or . . . any real estate development consisting of two or more private residences . . .",49 attempted to bring single-building apartment houses within the application of the section. The use of the term "residence", however, is such as to apparently cause the law's application to a single family structure which is converted to contain one or more additional apartment residences.

Nor is the question as to the law's effect on multiple dwellings the only one raised by the sample legislation's text. The term "development" is also subject to considerable discussion. How proximate must construction points be to come within the application of this

47. Interviews with leaders of civic redevelopment in the City of New Rochelle, N. Y., October 1958.
48. Ibid.
49. Ibid.
ordinance? Is a distinction to be drawn between the instance where adjoining land owners commission the same builder to construct their homes and that where the builder or realty group construct the homes before selling the home and land as a parcel? Further, the phrase "hereafter erected" is subject to considerable debate as to its meaning. While the author of the ordinance intended application of the statute's provisions to "new real estate developments and to the re-development of existing city streets", the draftsman interprets his enacted terminology to apply to existing city streets wherein the required construction is initiated.

The confusion presented by the various interpretations to which the sample ordinance is subject is illustrative of the semantical chaos which seems to result when legislation fails to contain a definition of terms used therein, and attempts to be potentially all-inclusive in nature. The emphasis in the past has been on congestion as supporting reasonableness in wiring legislation. Only two cities in New York are authorized to compel underground wiring throughout their geographic areas, the standard for such authorization being a population of 500,000. With this in mind, the contention is repeated that despite the current trend away from requiring congestion to support wiring ordinances, the concept of fixed and definite boundaries, rather than potentially all-inclusive application, will continue to be understood as implied in the interpretation of reasonableness relative to wiring legislation.

III.

RATE DISCRIMINATION AS APPLIED TO MUNICIPAL WIRING ORDINANCES.

To understand properly the meaning of the term "discrimination" as it is popularly applied to public utility rate controversies, it is first necessary to consider the duties owed the public by the servicing companies. In this regard it may be said that the existing law requires the latter to treat all customers alike insofar as they are objectively similar. Rate distinctions are permitted only where a reasonable basis for subjecting customers to different rates is found to exist. It might be mentioned, however, that where such a distinction between customers exists, a rate differentiation is demanded since treating cus-

50. Ibid.
51. Ibid.
52. I.e., New York and Buffalo; see note 41, supra.
omers of different groups alike would be unfair to one of these groups. This approved diversity of treatment may rest on a significant difference in the service offered, or on some other condition relative to servicing the respective customers. Our purpose at this point is to determine whether the enactment of a wiring ordinance in and of itself provides the affected utilities with sufficient cause to justify a rate increase within that municipality reflecting the additional relocation expenditure forced upon the utility. This question is of basic importance, as the validity of a subsequent rate increase can be expected to be the subject of intense litigation immediately following the court's approval of a wiring ordinance affecting presently non-congested areas.

A. Discrimination — A Factual Interpretation.

Much of the litigation concerning discriminatory rate schedules has arisen from erroneously projected classifications within the rate schedules themselves, rather than from direct attempts to circumvent the law. This statement finds ready support from the fact that rate determinations are often limited to the facts of a particular situation. The repetition of certain circumstances, however, enables us to trace the reasoning of both commissions and courts and to form certain basic conclusions therefrom.

One of the more lucid descriptions of rate discrimination may be found in these words:

"Discrimination exists if two customers, or classes of customers, are charged the same price for different services, or different prices for similar services." It has been held that a utility may neither give an undue preference to any customer, nor subject a customer to an unreasonable disadvantage or prejudice. Thus, rates need not be uniform to be legal, though where a difference exists such must be based on reasonable and current distinctions in the services offered. Moreover, while

the uses to which the service is put by different consumers are not of themselves a sufficient distinction to support a difference in rates, nevertheless, where the difference in the service extended consists in the actual supplying of such service, rather than what occurs after the utility item is employed by the customer, a difference in rates is permissible.

One further point is significant in defining rate discrimination in this field. The premise that rate differences are prohibited only where they are unjustified refers not only to situations where a rate schedule shows discriminatory practice on its face, but to the extension of uniform rates for dissimilar services. In the latter instance excessive rates are being charged to the aggrieved class of consumers while the remaining class of customers are benefiting through the application of an unfair, albeit uniform, rate schedule.

In considering the rationale necessary to support a reasonable distinction in customer classification, the Public Service Law provides some definite standards: quantity used, time when used, purpose for which used, duration of use, and any other reasonable consideration. The underlying factor in all of these terms as well as in all the other various tests applied by the commission and the courts is the allocation of costs. In fact, allocation of the cost of providing the services extended has been openly considered as the most reasonable guide to proper rates. However, while the standard of cost allocation is widely endorsed in determining the reasonableness of utility rates and the proper differences therein, it is not unlimited in its application. Along with other apparently reasonable distinctions this rationale supporting rate differences is least successful when applied to rates offered consumers among whom there is no apparent physical, geographical or technical difference. Thus, while a utility may legitimately pass on the cost of local taxes to consumers within the particular taxing municipality, and is allowed rate differences

63. Re Adirondack Power and Light Corp., 27 St. Dep't Rep. 585 (1922).
64. Id. § 65 (Supp. 1958).
65. Id. § 65(5); see Ten Ten Lincoln Place v. Consolidated Edison, 190 Misc. 173, 73 N.Y.S.2d 2 (Sup. Ct. 1947), aff'd, 273 App. Div. 903, 77 N.Y.S.2d 168 (2d Dep't 1948).
based upon the diversity of population in different areas, rate distinctions among customers within an individual municipality are very hard to justify in the absence of obvious and controlling factors. Indeed, when similar consumers are located side by side it is almost impossible to show a true and definite distinction in respective cost allocation of services offered. Moreover, public policy would appear to be against an artificial delineation of an otherwise homogeneous class of customers.

B. Existing Precedent Applied to Wiring Ordinances.

Let us define the scope of our discussion at the outset. Municipal ordinances relating in application to congested areas, as defined by specific boundaries, will not be the subject of projected contentions, though they will be used as a foundation for our discussion. This statement is made in the light of existing precedent which appears constant and established in this area of the law. In relation to wiring ordinances affecting admittedly congested areas of a municipality, two principles of rate scheduling have evolved: (1) the consumers directly benefiting from the installation of sub-surface power facilities may not be subjected to higher rates than their intra-municipal neighbors whose service continues to be of the elevated variety; (2) a complete municipality may be re-rated to reflect the expense of power facility relocation effected within that municipality. The conclusions are based on the following rationale:

1. The whole city or municipality is in fact benefiting from the underground location of power facilities within a congested area, thus making it unfair to burden only those tapping their service directly therefrom with an increased rate schedule.

2. The cost of sub-surface power facility construction must be assessed among all parties serviced by power transmitted through such conduit, though the latter be situated a mile or more from where the underground facilities are re-surfaced.

72. See note 70, supra.
73. Ibid.
3. As mentioned earlier, the authorities are loath to approve rate differences within a city or other sectionalized area in the absence of a definite and clear factual distinction between customers.\textsuperscript{74}

Let us now apply these propositions to the trend in modern wiring legislation — ordinances requiring underground installation of power facilities, either in a defined but presently non-congested area, or in a potentially all-inclusive fashion.

Utility companies are allowed a fair return for their lighting system,\textsuperscript{75} and the courts have recognized the fact that there is no definite formula which indicates the maximum ratio of administrative cost to the rate charged.\textsuperscript{76} Further, the determination of rate areas and classifications is admittedly an administrative function that should not be disturbed save for abuse of discretion or lack of evidence as to the existence of allegedly differentiating factors.\textsuperscript{77} Bearing this in mind, it would appear that future wiring legislation affecting non-congested areas will not alter existing precedent regarding pertinent rate revisions. All consumers within an enacting municipality’s bounds, as distinguished from those directly served from the sub-surface facilities, will bear the cost of such relocation of power installations within the enactment-enforcing municipality. This practice is dictated by the very effort of avoiding discrimination, much like passing the cost of locally imposed license fees and taxes on to the customers located within the limits of the taxing community. To do otherwise, and pass the peculiarly local expenses on to the customers of neighboring communities not imposing similar restrictions or requirements on the servicing company would be to charge the latter group with benefits accruing to another municipality. Such practice would force the hitherto non-legislating communities to enact similar ordinances in order to gain equality of treatment.

Lastly, as such rate differentiation would be based on a municipal or other definite and sectionalized grouping of customers, the public policy against permitting cost allocation schedules to become the sole basis for substantiating different rates within an otherwise homogeneous class of consumers would not be applicable. The customers affected by such a change of rates would be readily ascertainable by basic and apparent municipal boundary lines. As residents of a

\textsuperscript{74} See note 71, supra.
\textsuperscript{75} Village of Boonville v. Maltbie, 272 N.Y. 40, 4 N.E.2d 209 (1936).
community enacting such an ordinance they would be receiving a benefit not enjoyed by similar customers whose local government had not passed such legislation.

These contentions are supported by the findings of a California Public Utilities Commission hearing, which approved the petition of the Southern California Edison Company and authorized a special underground rate schedule submitted by the applicant utility.\(^78\) The surcharge approved is applicable to those accounts in municipalities serviced by sub-surface power distribution systems required by lawfully exercised legislative action, as distinguished from systems installed for the utility's convenience.\(^79\) It is submitted, then, that the current practices and precedent regarding the approval of power company rate revisions which reflect the financial burden of local legislation will continue to be observed by the courts in the oncoming age of wiring ordinances not specifically related or limited in application to congested areas.

IV.

CONCLUSION.

It has been our aim in the foregoing pages to acquaint the reader with the current status of both the problems and effects of compulsory underground wiring statutes within New York State. Due to the particular provisions of the City Home Rule Law it may well be that some of the topics discussed are local only to New York and those other jurisdictions where comparable legislation has evolved. However, this does not limit the application of our study to jurisdictions with similar procedures concerning municipal legislation, because wiring ordinances which bear no relation to congestion found within the area they affect are of national significance. Moreover, the unique position New York State enjoys as a conservative leader in law and legislation, as well as that of a giant in the commercial and financial field, makes activity within the Empire State certain of observance and possibly of emulation elsewhere. Two things seem certain. More and more cities and municipalities throughout our country are going to legislate in an attempt to enforce wiring ordinances unrelated to area congestion. In addition, the city of tomorrow will receive all of its power through sub-surface installations, regardless of what molecular combination may be the powerizing factor.

\(^{78}\) California P.U.C. Decision No. 54384 (Jan. 1957).

\(^{79}\) Id.
Between today and tomorrow then, legislating will and must proceed until the proper combination of terms is found that will enforce complete underground wiring in both a practical, as well as constitutional, manner. This combination does not exist within New York today, save for our two largest cities where population congestion supports the necessity and constitutionality of such statutes. Admittedly, the attitude of the courts will have more than a little to do in deciding the time when congestion and related terms cease to play an important role in determining the validity of an ordinance enforcing underground wiring, as well as the resultant rate litigation, and general all-inclusive wiring ordinances become standard sections in municipal codes. We offer this article not as determinative in forecasting such a future date, but in the vein of briefly summarizing the historical development of the New York law, procedural and substantive, on the subject and in presenting some problems and effects of compulsory underground wiring ordinances.