Public Service Commission—Whether Mutual Telephone Company Not Doing a Public Business or Collecting Tolls is Under Supervision of.

A mutual telephone company that does not conduct a commercial business or collect tolls, but which has a connection with a larger system that is a public utility, is not a public utility and is not subject to the supervision and regulation of the Public Service Commission under Chapter 52 of the Laws of 1913.

Public Service Commission,
Capitol Building,
Helena, Montana.

Gentlemen:

I have your letter asking for my opinion on the question whether or not farmers' mutual telephone companies become public utilities within the provisions of Chapter 52, Laws of 1913, because such companies connect their rural systems to the lines of other telephone companies, whose public utility character is established. Your letter follows:

> "The Commission desires your opinion as to its jurisdiction over rural telephone lines that do not conduct a commercial business, each and every subscriber being a stockholder, and no other tolls or charges being assessed against anyone.
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> "The said rural telephone line, however, has connection with a large system which is, in every sense of the word, a public utility, and pays to the connecting line a stipulated rate per month, per person. We have heretofore taken the position that a rural company not catering to the public, but simply for the convenience of its own stockholders, is not a public utility within the scope of Chapter 52, Session Laws of 1913. The question has been raised, however, that the fact of being connected with the system of another company, which is a public utility, may bring the former within our jurisdiction, although we are of the opinion that it does not, inasmuch as there are no tariffs, rates, or charges assessed, and no one can become a patron of the rural line without first becoming a stockholder.
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> "We would be pleased to have you look into this matter, and advise us at your convenience."

Section 1 of Chapter 52, Laws of 1913, makes it the duty of the Public Service Commission to "supervise and regulate the public utilities hereinafter named." Section 3 reads as follows:

> "Section 3. The term 'Public Utility,' within the meaning of this Act shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate or control any plant or equipment, or any part of a plant or equipment within the State for the production, delivery or furnishing for or to other persons, firms, associations, or corporations, private or municipal, heat, street railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage service whether within the limits of municipalities, towns, and villages, or elsewhere; telegraph or telephone service, and the Public Service Commission is hereby invested with full power of

supervision, regulation and control of such utilities, subject to the provisions of this Act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village."

It is to be noted that by these sections jurisdiction is given to the Commission only when the telephone service is being furnished "for or to other persons, firms, associations or corporations." And the immediate question is whether a mutual telephone company, by connecting with a line furnishing service to the public generally and therefore a public. utility, the mutual line paying for the service so much per member, and through which connection the public generally have access to the members of the mutual company, becomes a public utility within the above statute.

The mutual company does not by this arrangement furnish service "for other persons." All that is accomplished by the connection is an additional service, to the members of the mutual company furnished by the company connected with and for which it is paid. Neither is service furnished by the mutual company to those who, through the connected company, reach the mutual members. That service is, again, furnished by the connected company which charges such persons for that service. The company doing a general business merely delivers messages to the mutual company's lines at the connecting point, and receives pay therefor, the lines of the mutual company doing the rest. Mutual company members also pay the connected company so much per month for the service rendered. At both ends the connected company furnishes the general service and receives pay therefor.

This view is supported by authority. In State v. Elkhorn Telephone Co., 183 N. W. 562, the court, in holding that a farmers' telephone line constructed by the farmers and owned by them, and which connected by a switchboard with a telephone line doing a general, public business, was not a common carrier and required to admit anyone who might apply to the service of the line, used the following language:

"(1) It is the contention of the attorneys for the state that the rural telephone line in question, having become connected with the Norfolk telephone system, has necessarily become an integral part thereof and, therefore, has become a common carrier. It is argued that the farmers on the rural line send messages to whomsoever they please, and hold themselves out as ready to accept and deliver all messages that may come to the rural line from subscribers at Norfolk and in fact, from any part of the country over long distance.

"The legislature defined common carriers, so far as that term is applicable here, to be—'telegraph and telephone companies * * * engaged in the transmission of messages * * * for hire.' Rev. St. 1913, Section 6124."

"As pointed out in 10 C. J. 41, Section 10: 'The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.'

"It is quite apparent that the farmers, when they constructed the rural line in question, had no idea of rendering service to the public. Their sole purpose was to procure telephone service for themselves. It was to that purpose, and that purpose only, that they dedicated their property. To now subject that property to another purpose than that for which it was given, or intended to be used, would be to take from them the right and the use of the property which has not been voluntarily yielded up."

While the requirement that the service be furnished "for hire" is not specifically included in the definition public utility given in Section 3, above quoted, this is necessarily inferred from the Act as a whole and especially the provisions relating to rates for service furnished, and the reasoning in the above case is applicable.

In State Public Utilities Commission ex rel. Mason County Telephone Co. v. Bethany Mutual Telephone Assn. (Ill.) 110 N. E. 334, Ann. Cas. 1917B 495, the court said:

"To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public, or even a large part of it, but they must not be confined to specified, privileged persons."

To the same effect are:

State Pub. Util. Com. v. Okar Valley Mut. Tel. Assn., 118 N. E. 760;

State ex rel. Buffum Tel. Co. v. Pub. Ser. Com. (Mo.) 199 S. W. 962, L. R. A. 1919 C, 820.

It is therefore my opinion that a mutual telephone company that does not itself conduct a commercial business or furnish service to others or collect tolls, but which has a connection with a larger system which is a public utility, by which its members are furnished the service of the larger system, is not a public utility, or subject to the supervision and regulation of the Public Service Commission under Chapter 52 of the Laws of 1913.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.