councilmen at large and eight by wards. A citizens' organization secured the signatures of a majority of the candidates for council, both Republican and Democratic, to a statement pledging them to vote to remove the city manager, in the event of their election. This was done quietly. The Republican organization gave orders to all campaign speakers and candidates to ignore "The Laub issue" (Mr. W. J. Laub being the city manager). They were to say "Laub is not an issue. We will select a man as manager who is qualified to fill the position." Nearly every Republican candidate obeyed those orders. They did not commit themselves upon the question of the present manager's fitness.

At the first council meeting in January, a thunderbolt flashed when a resolution was introduced by a Republican member supported by five of his party and the two Democratic members, demanding that Manager Laub resign. The other three Republican members vigorously opposed, but to no avail. Charges by the manager that

party leaders had caused this "ouster" move were denied by those of his party councilmen who had voted to remove him. They declared that they wanted a free hand in selecting their own manager, and that this man would be one who would confine his activities to the duties of that office and not act as dictator of council as Manager Laub had been.

The manager was finally ousted on January 17. If a new start is made to conform to the spirit and purpose of the charter to the effect that "The Chief administrator (city manager) shall be chosen solely upon the basis of his executive and administrative ability," then the city-manager form of government will have a chance to demonstrate its worth. It never had a chance under the party control existing during the last two years. The infant was strangled in the cradle when the party organization assumed control of the job. It now looks as though another baby has been born. If it is carefully nourished, it may live and grow to lusty manhood.

DEADLOCK IN PUBLIC UTILITY REGULATION

V. THE RIGHT OF CITIES TO APPEAR FOR THE PEOPLE IN PUBLIC UTILITY ACTIONS

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A promising solution of the deadlock, namely municipal action on behalf of consumers before a utility commission as before a court, was headed off by a high court decision last year. :: :: :: ::

IN the case of *Morrell vs. Brooklyn Borough Gas Co.*, the court of appeals of the state of New York recently (July 14, 1921) decided that the city of New York, as such, had no interest in an action involving the legality of gas

rates, and that it could not intervene as a party in an action against the rates. The decision has far reaching importance in that it may be applied to all public utility matters affecting all the cities of New York, and doubtless will

be seized upon as a precedent in other states where municipalities are actively striving to get reasonable rates and service for the people. The large issue is clearly and definitely raised whether a city, as such, may act collectively in behalf of its citizens in matters affecting the general welfare beyond its own property and contract rights or its specific duties as a corporate entity.

The particular action was brought by a private person against rates which were complained of as excessive and illegal. The city of New York asked permission in the supreme court of Kings County to intervene as a party plaintiff acting generally in behalf of consumers, not in regard to rates charged it as a corporation. Permission was granted, but was appealed from by the company; it was then affirmed by the next higher court; then, among other matters, the following questions were certified to the court of appeals for decision: 1. Had the city of New York any interest in this cause of action? 2. Is the city of New York a proper party so that the court at special term had power to grant its application to be joined as a party plaintiff herein?

These questions were decided in the negative and the order of the lower court was reversed. The city had been permitted to intervene particularly under section 452 of the Code of Civil Procedure, which provides that where a person not a party to the action has an interest in the subject, on his application the court must direct him to be brought in. The court of appeals however, held that the "interest" referred to is "a property interest or some duty or right devolving upon or belonging to the party to be brought in;" that the city of New York has no such "interest" in gas rates charged to consumers; that the state alone has power over such rates under the police

power. Judge Crane, speaking for the court, stated further:

We cannot see how the rights, property or duties of the city are in any way involved. A particular rule of law may affect a large number of citizens and yet give the city no such interest as permits it to intervene. Questions might arise which so affected the welfare or rights of all the inhabitants of the city as to justify the court in permitting the municipality being made a party to the proceeding, but this is not such a case.

The interest was thus narrowed down strictly to property and contractual rights of the city, as such, and to duties specifically set forth by law, excluding the broader responsibilities involving the citizens collectively, not permitting a liberal interpretation of the general powers granted to the city by statute and charter.

THE IMPORT OF THE DECISION

The purpose of this discussion is not to make a technical legal analysis and to criticize the court, but to point out the seriousness of the decision and to suggest legislative action to meet the situation. If the decision is as broad as has been claimed, it will prevent all the cities of the state of New York from participating directly in perhaps the most important municipal interests at the present time. Undoubtedly public utility rates, finance, service, and organization are uppermost at the moment among questions of municipal policy. These are matters which finally can be settled only on the basis of public opinion and require participation of the local government. A decision, therefore, which destroys the right of the cities to participate in the proceedings involving these questions goes contrary to natural political and economic development and should be clearly viewed from that standpoint.

As a matter of fact, in the develop-

ment of rate regulation and other public utility matters, the cities have become very important and essential factors. While fixing rates is primarily a legislative function of the state, it concerns, of course, the people of particular communities, and whatever the technical legal view, it affects intimately the local government, which is closer to the needs of the people, and is inevitably looked upon as the proper guardian and promoter of public rights. The local governments have practically been compelled to act for the public in all vital public utility matters; to lead in bringing about proper reduction in rates, to prevent undue increases, to obtain desirable service, etc. What is more natural than to expect locally elected officials to act directly for consumers when these constitute practically 100 per cent of the city's population? Why not look to the government close at hand for protection? Is not the municipal government the natural collective representative in matters that affect seriously the great majority of people?

Moreover, while state commissions have been created to fix and maintain reasonable rates and thus to represent the public, as a matter of fact, these bodies have not performed their function in a satisfactory manner.¹ The reason for this failure is due in large measure to the fact that (1) the commissions are state appointed and are, therefore, not directly responsible or immediately responsive to local needs, and (2) they are *quasi judicial* bodies and are thus required not only to represent the public interest but to safeguard private investors. With this judicial responsibility coupled

with other difficulties, the commissions have become to a great extent informal courts, presumably specialized, to hear public utility matters. In the hearings the companies are invariably represented by counsel to present directly the interest of the investors. Similarly, the practice has become established extensively for counsel of the cities to appear in behalf of the public solely to promote the interest of consumers without judicial responsibility. This practice is reasonable and necessary. If the commissions are, in fact, courts to weigh evidence judicially between conflicting parties, the side of the consumers ought to be represented actively just as that of the companies. Such representation can practically be obtained only if the cities as such appear in the common interest of consumers.

CHANGE THE LAW

It is this practical and almost inevitable situation which has brought about the activity of the cities in public utility proceedings and litigation. If this is now prevented, the reasonable and necessary course is to change the law. While the commissions serve an essential purpose, this does not exclude on fundamental grounds the appearance of the cities to defend and promote the interests of the citizens. The latter function is altogether different from the commissions'. The cities appear as litigants on behalf of the people, seek definite results without judicial responsibility to private investors, are concerned solely with the interest of the public, just as counsel for the companies represent exclusively the rights of the corporations, leaving judicial responsibility and final decisions to the commissions, subject to appeal to the courts.

The special point here is that the law

¹ See the writer's "Deadlock in Public Utility Regulation," NATIONAL MUNICIPAL REVIEW, September, October, November, 1921, and January, 1922.

should be amended if necessary to give the cities the right to represent consumers collectively in all public utility matters. To a layman, however—who has followed the development of public utility law with great professional interest—it is not clear why the court was perforce compelled to exclude the city from such representation. The identity of interest between a municipality and its inhabitants has been recognized repeatedly; thus in the case of *International Railway Co. vs. Rann* (224 N. Y. 83, 89), Judge Pound stated that “as a legal conception the [municipal] corporation is an entity distinct from its inhabitants, but it remains a local community; a body of persons; the sum total of its inhabitants and the proper custodian and guardian of their collective rights.” These words express most clearly the situation and apply completely to the large issue in question. Further under the charter of the city of New York, the city was given express authority over the grant of franchises, particularly to secure efficiency of public service at reasonable rates; and the corporation counsel was given the power to institute actions in law or equity to maintain the rights of the city and “of the people thereof.” Why not include the right to obtain reasonable rates and service in these general powers? Likewise in the so-called home rule bill, there is the broad

grant of power to the cities of the state to promote the general welfare of their inhabitants; why exclude questions of public utility rates and service affecting the great majority of the people?

There is also the further technical argument that the very grant by the municipality permitting the use of the streets by a corporation carried with it a fundamental restriction upon rates and other acts of a public service corporation. The city is the trustee of the streets, and the grant could be given only for a public purpose. This itself recognizes the public character of the service, establishing the right to reasonable rates and proper service, making unlawful private profits above a fair return, even if no special restrictions upon rates are included in the franchise. Would it not be reasonable, therefore, to infer an inherent duty of the municipality to see that the public interest in the grant is properly carried out, so that the public privilege is not, in fact, made the vehicle of excessive profits to private investors, or is otherwise used in disregard of the public service? Why not view this as a proper duty of the municipal authority? Why limit the recognized legal interest to mere financial, contractual or proprietary claims of the city itself, viewed merely as a separate corporate entity? Why exclude the broader interest of the people who constitute the city?