a partial transfer of service effects a *pro tanto* shift in the allowance then a total transfer must lead to a total shift.

This result is reinforced by the existence of the consistent long standing executive usage. Practical administrative interpretations should not be overturned, *Lane* v. *Holderman,* 23 N.J. 304 (1957) ; *In re Glen Rock,* 25 N.J. 241 (1957), particularly on the challenge of a previously complying person. A contrary result would lead to inequities to consumers in the area from which the free allowance is withdrawn.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

JULY 28, 1960

HON. JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1960—No. 22

DEAR MR. KERVICK:

You have informed us of the following facts:

Between August 28, 1882 and October 7, 1897 six New Jersey corporations, known as New Jersey Telephone Company, Metropolitan Telephone and Telegraph Company, Domestic Telegraph and Telephone Company of Newark, New Jersey, Northeastern Telephone and Telegraph Company, Sea Shore Telephone Company and Hudson River Telephone Company were organized under the 1877 Revision of the Statutes of New Jersey, p. 1174, § 1, Telegraph Companies. Although this statute was enacted to provide for the formation of telegraph companies, it was construed to authorize the incorporation of telephone companies as well. See *Duke* v. *Central New Jersey Tel. Co.,* 53 N.J.L. 341 (Sup. Ct. 1891).

Thereafter, each of these companies, acting pursuant to New Jersey Compiled Statutes of 1910, p. 5319, § 11 (now superseded by R.S. 48:3–7) connected and consolidated with a telephone company organized under the laws of New York, i.e., either the New York and New Jersey Telephone Company or its successor by consolidation, the New York Telephone Company. The statute under which these actions were taken reads:

> "That any telegraph company chartered under the provisions of any act of this state, may connect and consolidate with any other incorporated telegraph company, whether chartered by or existing under a law of this state, or of any other state; and may upon such consolidation, by resolution of its board of directors, change its name, which change of name shall take effect on filing a copy of such resolution, certified under its corporate seal, in the office of the secretary of state of this state; provided, that neither such connection, consolidation or change of name shall affect the obligations

or debts of said company, or the process for their enforcement or lien upon its property."

In the course of making these consolidations and connections, the New Jersey corporations conveyed to the New York company all of their property, rights, privileges and franchises whatsoever and wheresoever situated, and all of the stockholders of each of the New Jersey corporations surrendered their shares of stock in these corporations and received instead stock of the New York corporation. The stock of the New Jersey corporations was cancelled on the records of those corporations and no stock has been issued by any of them since the consolidations and no stock is now outstanding. No action has ever been taken to dissolve any of the New Jersey corporations pursuant to R.S. 48:17–15 or any similar statute. However, the charters of several of the New Jersey corporations have expired by their own terms. Neither the New York Telephone Company nor any of the New Jersey companies referred to herein does any business in New Jersey.

In 1932 the former New Jersey Supreme Court decided the case of *N. Y. Telephone Co.* v. *State Board Taxes,* 10 N.J. Misc. 592 (Sup. Ct. 1932) involving the taxability of these various corporations. The court held in that case that the connections and consolidations of the various New Jersey corporations with the New York company had not dissolved the New Jersey corporations and that the New York Telephone Co. was liable to pay a New Jersey corporation franchise tax measured by its issued and outstanding capital stock. Pending an appeal from this decision, the State and the New York Telephone Co. entered into a consent judgment which provided that that company would pay a capital stock tax measured by the par value of that part of its capital stock which equalled the par value of the capital stock which had been issued by the New Jersey corporations before their connection and consolidation with the New York company. The New York Telephone Company paid the capital stock tax in accordance with this judgment until L. 1945, c. 132, p. 496, § 11 repealed the statute under which the capital stock tax had been imposed. For several years thereafter the New York Telephone Company paid $25.00 per year as the minimum amount due from a domestic corporation pursuant to the Corporation Franchise Tax Act, N.J.S.A. 54:10A–1 et seq. It has now ceased paying any New Jersey corporation taxes.

On the basis of these facts, you have asked us to advise you whether the New York Telephone Company or any of the six New Jersey corporations mentioned above are taxable in New Jersey and if so, under what statute and to what extent.

The decision of the former Supreme Court in *N. Y. Telephone Co.* v. *State Board Taxes, supra,* holds that any of the six New Jersey telephone corporations whose charters have not expired and which have not been formally dissolved continue to exist as domestic corporations and remain obligated to pay New Jersey corporation taxes to the same extent as if they had never connected and consolidated with the New York company. It is also possible to interpret the court's opinion to mean that the New York Telephone Company itself became a corporation of this State because of its consolidations and connections with the various New Jersey companies. In our view, however, such a holding would be without legal justification. The New Jersey statute (Compiled Statutes of 1910, p. 5319, § 11), pursuant to which the New Jersey companies connected and consolidated with the New York company, expressly provides that a domestic corporation "may connect and consolidate with any other incorporated telegraph company whether chartered by or existing under a law of

this State *or of any other state*;" the statute contains no provision which would make the New York company a corporation of this State. (Emphasis added.) Presumably, the New York Telephone Company derived its legal authority to participate in the various connections and consolidations from the statutes of the State of New York. We note that in entering into the consent judgment which terminated the appeal from the judgment which had been entered by the former Supreme Court against the New York Telephone Company, the New Jersey Board of Taxes and Assessments in effect conceded that the court had been in error in treating the New York Telephone Company as if it were a domestic corporation. The decision of the court held that the taxpayer was liable for a tax measured by all of its issued and outstanding common shares of capital stock as if it were a New Jersey corporation; the consent judgment provided that the New York Telephone Company would be taxable only on the portion of its issued and outstanding common stock equivalent to the stock which had been issued by the New Jersey telephone companies prior to their connection and consolidation. Accordingly, since the New York Telephone Company does no business and owns no property in this State, there would appear to be no basis upon which it could be subject to any New Jersey corporation tax.

As previously stated, the New Jersey corporations referred to herein were organized as telephone or telegraph companies under a New Jersey statute specifically designed only for such companies. Telephone companies in New Jersey which use or occupy public streets, highways, roads or other public places by virtue of a franchise or authority or permission from the State pay a tax pursuant to N.J.S.A. 54:31–15.15 et seq. (L. 1941, c. 20, p. 39, § 1 et seq.). None of these companies uses the public streets, highways, roads or other places of this State and they are, therefore, not subject to pay a tax under that statute. All other telephone companies "not subject to tax under chapter 31" of Title 54 are liable to pay a tax under R.S. 54:13–11 et seq. R.S. 54:13–15 imposes a license fee or franchise tax on each telephone company subject thereto computed at the rate of one-half of one per cent upon its gross receipts "from business done in this State." Since the New Jersey companies do no business in this State, they owe no tax under that statute. However, unless they are exempted from the Corporation Business Tax Act, N.J.S.A. 54:10A–1 et seq., they would be liable as domestic corporations for at least the minimum tax thereunder.

The former Supreme Court in *N. Y. Telephone Co.* v. *State Board Taxes, supra,* expressly held that R.S. 54:13–11 et seq. was not applicable to the six New Jersey telephone companies because that statute measured the tax in part by gross receipts and was therefore not intended to apply to corporations which did not have gross receipts because they were inactive. However, this holding would appear to have been overruled by the present Supreme Court *sub silentio* in the case of *In re Application of Pennsylvania and Newark R.R. Co.*, 31 N.J. 146 (1959). In the latter case the question was whether a corporation which had been incorporated under an act specifically designed for the establishment of railroad companies continued to be taxable as a railroad rather than under the General Corporation Act although it never constructed or operated a railroad line. The court held that a corporation incorporated under a special statute for the purpose of establishing railroads remained taxable only as a railroad and not under the general corporation tax despite its failure to operate as a railroad. Under the principle of that case the six New Jersey telephone companies continue to be taxable as telephone companies so long as they retain a corporate existence under Rev. of 1877, p. 1174, § 1 et seq. (now R.S. 48:17–1 et seq.) and regardless of whether or not they are active. The Corporation Business Tax

Act expressly exempts "corporations subject to a tax under the provisions of article two of chapter thirteen of Title 54 of the Revised Statutes, or to a tax assessed on the basis of gross receipts, other than the tax levied by the veterans bonus tax law, or insurance premiums collected." (N.J.S.A. 54:10-3(a)). Since the New Jersey companies continue to be "subject" to article two of chapter thirteen of Title 54, they are expressly exempt from the Corporation Business Tax Act.

You are therefore advised that on the basis of the facts which you have stated, the New York Telephone Company is not subject to taxation by New Jersey; the surviving New Jersey corporations are taxable as domestic telephone companies under R.S. 54:13-11 et seq.; but since none of the latter corporations derives gross receipts from business done in New Jersey, they do not owe any tax to the State.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

JULY 26, 1960

HON. SALVATORE A. BONTEMPO
Commissioner
Department of Conservation
and Economic Development
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1960—No. 23

DEAR COMMISSIONER BONTEMPO:

We have been asked to interpret the terms "source" and "rated capacity of the equipment" as used in N.J.S.A. 58:4A-4. By Laws of 1947, c. 375, N.J.S.A. 58:4A-1, the Division of Water Policy and Supply in the Department of Conservation was empowered to delineate areas of the State in which the diversion of subsurface and percolating waters exceeded or threatened to exceed, or otherwise threatened or impaired the natural replenishment of such waters. This power is now exercised by the Water Policy and Supply Council in the Department of Conservation and Economic Development. Laws of 1948, *c.* 448, § 101, N.J.S.A. 13:1B-50. In a delineated area no person may withdraw from any subsurface or percolating source more than 100,000 gallons of water in any day without a permit from the Water Policy and Supply Council. But N.J.S.A. 58:4A-4 provides as follows:

> "Any person, corporation, or agency of the public diverting or obtaining water at the time of the passage of this act, or at the time an area is delineated as provided in section one of this act, in excess of one hundred thousand gallons per day from subsurface or percolating water *sources*, shall have the privilege of continuing to take from the same *source*, the quantity of water which is the *rated capacity of the equipment* at that time used for