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The Effect Upon State Powers of Expanded Federal Control in the Public Utility Field

HOLMES BALDRIDGE*

One hears much concerning the failure of state regulation of public utilities. In the mind of the average citizen the dominant reason for ineffective state control lies in the corrupt administration of the regulatory laws of the several states. There is no doubt but that the large expenditures necessary in conducting successful campaigns for membership on state utility commissions are drawn chiefly from utilities subject to their control. Indirectly, the same situation exists where commissioners are appointed by the governor. Too frequently the staff of the state commission is manned by individuals to whom political obligations are owed, rather than by qualified experts. Lack of public confidence is reflected in the meager appropriations and limited personnel provided the state commissions by the state legislatures. Utilities, with abundant funds available through high rates, are manned with expensive and well trained personnel. This highly technical and well trained staff must be met by a few inadequately paid employees of the state commission. In a recent telephone case in Oklahoma, involving exchange rates of a single city, the annual salary of employees who prepared the case for the commission amounted to \$20,000, while that of the company employees exceeded \$120,000.

Successful regulation requires a planned program over a period of years. The average life of an important rate case is from four to twelve years. Technical delays¹ and tortuous procedural requirements, developed by utilities during the early years of state control when the public side of rate-making was inadequately presented, are largely responsible for this condition. There are few short-cuts in rate-making. Most state commissioners are elected or appointed for terms ranging from four to six years. By the time a well planned program is under way the vagaries of politics have brought a new set of commissioners, with perhaps a different point of view. The existing plan is discarded and a new one formulated.

The untimeliness of demand for rate reduction presents another barrier to effective state regulation. Most rate complaints occur during times of general acute economic distress. Unfortunately, it is at such times that utility

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1. Passage of the Johnson Act in 1934, 48 STAT. 775, limiting jurisdiction of the lower federal courts in rate cases, will obviate many court delays.

revenues are at low ebb, and opportunity for showing an unreasonably high earning on investment is minimized. During periods of prosperity, when utility earnings are high, and ample opportunity exists for reductions, patrons are not concerned much with utility rates. With relatively few state commissioners imbued with a sense of public service, rate cases instituted upon a commission's own motion are infrequent. It is too easy to follow the line of least resistance. Most state commissions achieve only a negative control over utilities under their jurisdiction. Indiscriminate rate increases and customer abuses are minimized.

It is submitted, however, that there are more basic reasons for ineffective state control of utilities than those just mentioned; namely, jurisdictional difficulties and clumsy rate-making methods. This paper is concerned with the former. Jurisdictional difficulties in recent years have presented a barrier to effective state regulation of most utility rates. Rapid technical developments, inventions, and centralized control, resulting in the transcending of state lines and the development of nation-wide service, have raised jurisdictional problems that cannot be met successfully by state control alone. The utility business is no longer a local enterprise. It has assumed the characteristics of a national institution. A large part of the electric energy in the United States and most of the natural gas is sold in interstate commerce. The development by the American Telephone & Telegraph Company of a nation-wide communications system, controlling more than 85 per cent of the telephone facilities in the United States,² connecting local exchanges with interstate toll lines; and the rapid growth of interstate motor bus and truck lines have divested such businesses of their former essentially local characteristics. Also, the wide-spread development of holding companies and their facility for withholding vital information; their practice of draining local operating companies of revenues and then avoiding local jurisdiction on the ground that they were "not doing business" therein, has hampered state commissions in their attempts to determine both base value and operating expenses of the local operating companies.

The first maxim of effective public utility regulation is that regulatory authority must be coextensive with the subject to be regulated. This has ceased, in large measure, to be true. Attempts by the several states to regulate such enterprises are met promptly by the defense that state regulation burdens and interferes with interstate commerce. Some state regulation over the activities of interstate and foreign utility companies does not infringe the constitutional limitations of the commerce clause. It has been held that a state commission may ascertain the reasonableness of a charge for services

2. Testimony of Walter S. Gifford, president of the American Telephone & Telegraph Co., in *Hearings before Committee on Interstate & Foreign Commerce* on H. R. 8301, 73d. Cong., 2nd Sess.

rendered a local operating company by an interstate affiliate on the ground that the absence of arm's-length bargaining between the two may afford the interstate affiliate opportunity to take undue advantage of the local operating company.³ Also, a state commission may require a local operating company to demonstrate the reasonableness of services rendered by a foreign holding company.⁴ Essential as are these two aids they do not meet all of the needs. The state commission cannot determine the reasonableness of a city gate rate for electricity and gas sold by an independent interstate transmission company to a local operating company.⁵ Even in the case of interstate affiliated companies, the limited money and personnel of the average state commission preclude investigation. It is essential therefore that state commissions cooperate with federal boards having requisite jurisdiction if effective utility regulation is to be achieved.

Cooperation between state and federal boards in the utility field is not new. For years the state commissioners have sat with the Interstate Commerce Commission in interstate railroad matters. The cooperative movement had its inception in an invitation by the Honorable Thomas Cooley, first chairman of the Interstate Commerce Commission, on January 31, 1889, to the railroad commissioners of the several states to meet in Washington, D. C., in a general conference on March 5, 1889.⁶ The Interstate Commerce Commission desired the cooperation of the state commissions on certain matters of accounting and freight classification. The conference elected Judge Cooley as President and decided to meet annually. In 1901, a constitution was adopted and the name "The National Association of Railway Commissioners" was chosen. Later⁷ the name was changed to the National Association of Railroad and Utility Commissioners. The first conference went on record as favoring uniform accounting regulations and uniform freight classifications.⁸

Not much in the way of cooperative effort between the state commissions and the Interstate Commerce Commission occurred prior to the now famous *Shreveport* case⁹ in 1912, which directed carriers operating in Texas to remove

3. *Western Distributing Co. v. Public Service Comm.* 285 U.S. 119 (1932); *State Corp. Comm. v. Wichita Gas Co.*, 290 U.S. 561 (1934); *Dayton Light & Power Co. v. Public Service Comm.*, 292 U. S. 290 (1934); *Columbus Gas & Fuel Co. v. Public Service Comm.*, 292 U. S. 398 (1934).

4. *Houston v. Southwestern Bell Telephone Co.*, 259 U. S. 318 (1922); *United Fuel Co. v. Railroad Comm.*, 278 U. S. 300 (1929); *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133 (1930); *Lone Star Gas Co. v. Corp. Comm.*, 39 P. (2d) 547 (Okla. 1934).

5. *Missouri ex rel Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298 (1924); *Public Utilities Comm. of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927).

6. See I PROCEEDINGS GENERAL CONFERENCE OF RAILROAD COMMISSIONERS, March, 1889.

7. See PROCEEDINGS THIRTEENTH ANNUAL CONVENTION OF RAILROAD COMMISSIONERS, June, 1901, 66-67.

8. *Loc. cit. supra* note 6.

9. 23 I. C. C. 31 (1912).

undue discrimination found by the Interstate Commerce Commission to exist in the difference between intrastate and interstate freight rates. This decision was later sustained by the United States Supreme Court.¹⁰ The United States Supreme Court, as well as the Interstate Commerce Commission, construed the anti-discrimination clause of the third section of the Interstate Commerce Act as applicable to discrimination caused by a difference in levels between the interstate and intrastate rates. With this construction established, the Interstate Commerce Commission had the power under the 15th section of the Act to order carriers to desist from any discrimination despite the fact that the same might be caused by intrastate rates.

The state commissions, sensing the danger of such a decision to their control over intrastate freight rates attempted, through their national association, to secure an amendment to the Interstate Commerce Act prohibiting the Interstate Commerce Commission from exercising the so-called Shreveport rate power.¹¹ The Transportation Act of 1920¹² provided that the Interstate Commerce Commission might confer with state commissions with respect to persons and corporations subject to the jurisdiction of the Interstate Commerce Act. The amendment provided for the holding of joint hearings with the state commissions in matters wherein the Interstate Commerce Commission was empowered to act and where the rate-making authority of the states might be affected thereby. The Interstate Commerce Commission was authorized to avail itself of the cooperation, services, records and facilities of the state commissions. While the act was permissive only, it gave legislative sanction to the use of cooperative procedure between federal and state commissions.¹³

The more progressive of the state commissions, keenly alive to their inability to cope successfully with regulation in its interstate features without federal aid, have for years actively supported legislation which culminated in the Motor Carrier Act of 1935, the Communications Act of 1934, and the Public Utility Act of 1935. In all of these Acts full provision was made for cooperation between state and federal boards, and, in general, existing jurisdiction of state commissions was specifically reserved. The National Association of Railroad and Public Utility Commissioners composed at the present time of 46 state commissions, the District of Columbia and Hawaii, through its central office in Washington, D. C., has drawn bills and submitted the same to Congress, and has offered amendments to bills drawn elsewhere, covering

10. *Houston, East & West Texas Ry. Co. v. U. S.*, 234 U. S. 342 (1914).

11. PROCEEDINGS NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, 33rd Annual Convention, 220-221.

12. 41 STAT. 456.

13. Sec. 13 (4) of the Transportation Act of 1920 enacted into law the Shreveport doctrine. In such cases the Interstate Commerce Commission acts independently of the state commissions.

the fields in which federal regulatory boards have recently been created. Members of state commissions have frequently appeared before Congressional committees seeking passage of such legislation.

Recently, Congress has created new federal boards and vested in them regulatory authority in the fields of motor carriers,¹⁴ wire and wireless communication,¹⁵ electric utilities,¹⁶ and holding companies.¹⁷ Jurisdiction of the federal boards is limited to interstate operations. Full cooperation with state commissions is provided. The effect upon state power of this expanded federal control in the fields of motor carriers, wire communication, electric power and holding companies will be discussed from the following viewpoints:

- (1) Desirability of joint state and federal action;
- (2) The federal aid provided, including cooperative features; and
- (3) Limitations upon federal encroachment.

THE MOTOR CARRIER ACT OF 1935

The first of recent Congressional legislation providing for cooperative federal action in fields in which the states, because of the interstate character of operations, were unable to regulate successfully, was the Motor Carrier Act of 1935.¹⁸ This Act was first in point of origin although not in actual passage. Before 1925 the states regulated the use of the highways regardless of the character of commerce moving thereon under the theory that in the exercise of their police powers, and as owners of the highways within their respective boundaries, they had jurisdiction. In 1925 the United States Supreme Court in a series of cases¹⁹ held that the states could not regulate the business of interstate motor carriers nor prevent their operation over the public highways.

Since that time state commissions of necessity have been forced to grant certificates of convenience and necessity to interstate motor carriers with few restrictions. No authority existed in a state commission to restrict competition merely because existing facilities might prove adequate. No regulation of rates and operations was possible. Some opportunity for evading the rule in the *Buck* case²⁰ was afforded by the ruling of the United States Supreme Court in *Bradley v. Public Utilities Commission*,²¹ which upheld the Ohio Commission's denial of an interstate certificate on the ground of congestion on the highways. This was useful only to densely populated states. Also, the states

14. The Motor Carrier Act of 1935, 49 STAT. 493, 49 U. S. C. A. § § 301-327.

15. 48 STAT. 1064.

16. Public Utility Holding Company Act of 1935, 49 STAT. 838, 15 U. S. C. A. 794.

17. *Ibid.*

18. *Loc. cit. supra* note 14.

19. *Buck v. Kuykendall*, 267 U.S. 307 (1925); *Michigan v. Duke*, 266 U. S. 570 (1925); *Bush v. Maloy*, 267 U. S. 317 (1925).

20. 267 U. S. 307 (1925), cited note 19, *supra*.

21. 289 U. S. 92 (1933).

might, under the guise of promoting the public health and safety, regulate the kind and nature of carriers;²² likewise the physical fitness of drivers;²³ the proper ventilation and fumigation of passenger busses;²⁴ and speed limitations.²⁵ Such regulation, however, because of lack of uniformity among the states, placed burdens upon operators. The state might also limit the size and weight of motor vehicles in the interest of both safety and the preservation of the road beds from destructive use.²⁶ Under the rule of *Kane v. New Jersey*,²⁷ a non-resident motor carrier, as a prerequisite to use of the highways could be forced to designate a state official as agent for service of process in the event of accident. Taxes could be imposed on interstate operation if for a proper purpose, reasonable in amount and not discriminatory against interstate commerce.²⁸ Recovery could be had for death resulting from negligent operation;²⁹ but indemnity bonds to insure liability of all carriers could not be required because such would burden interstate commerce.³⁰

Quite obviously federal aid was desirable from the state point of view. Accordingly, in 1925, the National Association of Railroad and Public Utility Commissioners prepared a bill which provided for regulation of passenger carriers by the joint action of state commissions in which the operation was to occur, with appeal therefrom to the Interstate Commerce Commission. Upon its introduction in Congress³¹ the bill was vigorously opposed by operators and truck manufacturers desiring its defeat. The basis of attack was the grant of power to state commissions. At each successive Congress the states insisted upon some form of control and actively supported the Motor Carrier Act of 1935.

The Motor Carrier Act of 1935, which created a Bureau of Motor Carriers under the jurisdiction of the Interstate Commerce Commission, provides for regulation by the Bureau of interstate passenger and freight common carriers, contract carriers, and brokers.³² It provides that common carriers must secure a certificate of convenience and necessity from the Interstate Commerce Commission;³³ that contract carriers must secure a permit therefrom;³⁴ and

22. *Sproles v. Binford*, 286 U. S. 374 (1932).

23. *Smith v. Alabama*, 124 U. S. 465 (1888); *Hendrick v. Maryland*, 235 U. S. 610 (1915).

24. *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U. S. 537 (1935).

25. For discussion of extent of state regulation over interstate motor carriers, see Kauper, *Federal Regulation of Motor Carriers* (1934) 33 MICH. L. REV. 1, 239; Note (1935) 23 GEO. L. J. 854.

26. *Morris v. Denby*, 274 U. S. 135 (1927); *Sproles v. Binford*, 286 U. S. 374 (1932).

27. 242 U. S. 160 (1916).

28. *Helson v. Kentucky*, 279 U. S. 245 (1929); *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249 (1933).

29. *Sherlock v. Alling*, 93 U. S. 99 (1876).

30. *Sprout v. South Bend*, 277 U. S. 163 (1928).

31. H. R. 10288, 71st Cong.

32. Sec. 204 (a).

33. Sec. 206 (a).

34. Sec. 209 (a).

brokers a license.³⁵ A "grandfather" clause³⁶ provides that certificates of convenience and necessity will automatically be issued common carriers who were engaged in bona fide operations prior to June 1, 1935; that thereafter a showing of convenience and necessity must be made before issuance of certificates. The last date for contract carriers is July 1, 1935.³⁷ The Act provides for control by the Federal Bureau of consolidations, mergers, and acquisitions of control;³⁸ the issuance of securities;³⁹ regulations of rates, fares, and charges;⁴⁰ the keeping of accounts, reports and records;⁴¹ and vests in the Bureau the power to prescribe sizes and weights of motor vehicles and other safety measures.⁴²

The cooperative features of the Act permit the states to participate directly in the regulation of interstate carriers. The Interstate Commerce Commission may confer or hold joint hearings with any authorities in any state with respect to any matters arising under the Act.⁴³ Further, the Federal Board may avail itself of the cooperation, services, records, and facilities of such state authorities.⁴⁴

The Act requires that matters relating to interstate service under the jurisdiction of the Federal Bureau shall be referred to joint state boards where not more than three states are involved, and permits such reference where a greater number of states are involved.⁴⁵ The specific matters required to be referred are, applications for certificates, permits and licenses; the suspension, change, or revocation of the same; applications for approval and authorization of consolidations; mergers, and acquisitions of control; complaints relating to rates, fares, and charges of motor carriers and the practices of brokers.⁴⁶

Joint board membership is to be selected by the respective states from the membership of the state commissions involved;⁴⁷ or in the absence of the same by the governor.⁴⁸ All decisions and recommendations by joint boards are determined by majority vote.⁴⁹ The Act provides for assignment of space, if any be available, in the Interstate Commerce Commission building, to the national organization of the state commissions.⁵⁰

35. Sec. 211 (a).

36. Sec. 206 (a).

37. Sec. 209 (a).

38. Sec. 213.

39. Sec. 214.

40. Sec. 216.

41. Sec. 220.

42. Sec. 225.

43. Sec. 205 (g).

44. *Ibid.*

45. Sec. 205 (b).

46. *Ibid.*

47. Sec. 205 (e)

48. *Ibid.*

49. *Ibid.*

50. Sec. 205 (g).

Complete cooperation between the Interstate Commerce Commission and the state commissions is provided in the Act. Large duties are imposed upon state commissions in the regulation of interstate motor carriers.

The Act provides for rather full protection to the state commissions insofar as their jurisdiction and powers are concerned. Fearful of usurpation of power by the Interstate Commerce Commission, as exercised under the Shreveport Doctrine in intrastate railroad rates, the state commissions sought and obtained a clause which provides that nothing in the Act shall authorize the Interstate Commerce Commission to prescribe, or in any manner regulate the rates, fares or charges for intrastate transportation or for any services connected therewith for the purpose of removing discrimination against interstate commerce, or for any other purpose.⁵¹ A further safeguard to state jurisdiction is the provision that the Act shall not be construed to affect the powers of taxation of the states; or to authorize the Interstate Commerce Commission to permit a motor carrier to do intrastate business; or to interfere in any way with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers operating on the highways.⁵²

The advantages of the Act, insofar as state commissions are concerned, are numerous. In addition to permitting state commissions to participate with the Interstate Commerce Commission in matters concerning interstate carriers, it is submitted that the effective administration of the Motor Carrier Act of 1935 will have an important influence upon regulation by state commissions of intrastate motor vehicle operations. With the regulation of interstate rates achieved under the new Act, state commissions will put more attention to the regulation of intrastate rates. Rates are now based upon what the traffic will bear. Eventually, regulation may be based upon cost plus a reasonable profit. Motor freight rates will no doubt be higher under regulation because the industry will become more stable. "Wild Cat" operators, both intrastate and interstate, will disappear. New applicants must qualify, and the field will in time be covered by operators desiring to do a continuous business at a profit. An efficiently operated interstate service will encourage state commissions to require the same with respect to intrastate operators. Uniform accounting systems will facilitate proper determination of intrastate rates for those operators doing both an interstate and intrastate business.

THE COMMUNICATIONS ACT OF 1934

Prior to the passage of the Communications Act of 1934,⁵³ regulation of interstate operations of telephone and telegraph companies was vested in the Interstate Commerce Commission.⁵⁴ That Commission was given jurisdiction

51. Sec. 216 (e).

52. Sec. 202 (e).

53. 48 STAT. 1064.

54. 36 STAT. 539.

in 1910. Aside from promulgating certain orders, rules, and regulations with respect to uniform telephone accounting⁵⁵ and depreciation rates⁵⁶ the Interstate Commerce Commission had never attempted seriously to regulate interstate telephone and telegraph communication companies.

Approximately eighty-five per cent of the telephone business in the United States is controlled by the American Telephone & Telegraph Company.⁵⁷ That company controls 22 operating companies,⁵⁸ including the Long Lines Department. It also controls the Western Electric Company which is the manufacturing and supply department of the Bell System. This exercise by the American Telephone & Telegraph Company of both horizontal and vertical control over a nation-wide telephone system created regulatory problems that could not be handled successfully by the state commissions. The magnitude of the problem involved in determining the reasonableness of telephone rates of the far-flung Bell Telephone System, rather than lack of technical jurisdiction, is responsible for ineffective state regulation of telephone rates. Factors requiring consideration, such as reasonableness of the license contracts, reasonableness of Western Electric Company prices for telephonic apparatus and supplies, and fair toll divisions and revenue allocations require a study of the Bell System as a unit.

The state commissions have jurisdiction to inquire into reasonableness of the license contracts through which local operating companies of the Bell System pay the American Telephone & Telegraph Company 1½ per cent of the gross revenues, because such license fees are for services rendered by an affiliated company.⁵⁹ The magnitude of the task involved in investigating the American Telephone & Telegraph Company and the Bell Telephone Laboratories, Inc., is beyond the financial and personnel limitations of the state

55. Accounting Rules for Telephone Cos., 203 I. C. C. 13 (1934) (taken over by Federal Communications Commission for completion); accounting of New York Telephone Co., 188 I. C. C. 83 (1932).

56. Depreciation charges of Telephone Cos., 118 I. C. C. 295 (1926); depreciation charges of Telephone Cos., 177 I. C. C. 351 (1931) (taken over by Federal Communications Commission for completion).

57. *Loc. cit. supra* note 2.

58. New England Telephone & Telegraph Co., Southern New England Telephone Co., New York Telephone Co., New Jersey Telephone Co., Bell Telephone Company of Pa., Diamond State Telephone Co., Chesapeake & Potomac Telephone Co., Chesapeake & Potomac Telephone Co. of Baltimore City, Chesapeake & Potomac Telephone Company of Va., Chesapeake & Potomac Telephone Co. of West Virginia, Southern Bell Telephone & Telegraph Co., Ohio Bell Telephone Co., Cincinnati & Suburban Bell Telephone Co., Michigan Bell Telephone Co., Indiana Bell Telephone Co., Wisconsin Telephone Co., Illinois Bell Telephone Co., Northwestern Bell Telephone Co., Southwestern Bell Telephone Co., Mountain States Telephone & Telegraph Co., Pacific Telephone & Telegraph Co.

59. *Houston v. Southwestern Bell Telephone Co.*, 259 U. S. 318 (1922); *United Fuel Co. v. Railroad Comm.*, 278 U. S. 300 (1929); *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133 (1930); *Lone Star Gas Co. v. Corp. Comm.*, 39 P. (2d) 547 (Okla. 1934).

commissions. Allocation of toll revenues to exchange in order to compensate exchange for the handling of toll calls is within the power of state regulatory control but due to its magnitude is not capable of being accomplished satisfactorily by the state commissions. A proper separation of intrastate and interstate toll business raises questions which may be solved finally by the cooperation of a federal board.

The state commissions are unable to determine the fairness of Western Electric prices for telephone apparatus and equipment sold to the operating companies in the Bell System, because of the expense involved, despite the fact that they have jurisdiction so to do under the theory that such constitutes a service rendered by an affiliated company.⁶⁰ The result has been that state commissions have been forced to accept company values in determining rate base of local exchanges. Generally speaking there are three methods of determining base value of telephone exchange properties; namely, original cost less depreciation, trended reproduction cost less depreciation, and reproduction cost new less depreciation. A determination of all the above depends largely upon the prices charged by the Western Electric Company for its telephone equipment, appliances, and supplies. Original cost depends upon the amount actually paid by the operating company to the Western Electric Company during the period of construction. Trended reproduction cost depends upon the price paid the Western Electric Company during the period of construction with the application of price trends made up entirely by the Western Electric Company. Determination of reproduction cost depends entirely upon Western Electric prices current as of the date of the inquiry. It is apparent that any attempt to determine value of local exchange properties for rate-making purposes depends directly upon ability to determine the fairness of Western Electric prices.

A determination of fair Western Electric prices is also important in determining certain important operating expenses of local Bell System exchanges. Maintenance and supply expenses of local telephone exchanges are based entirely upon Western Electric changes therefor. Depreciation, a major expense item, is based upon original cost and salvage value, both of which are determined by the Western Electric Company. The investment in Western Electric Company property in 1935 was quite large. It cannot be investigated completely by a state commission whenever the rates of a local telephone exchange are involved. A coordinating Federal Board in the field of telephone regulation was necessary if adequate regulation of exchange rates was to be

60. *Western Distributing Co. v. Public Service Comm.*, 285 U. S. 119 (1932); *State Corp. Comm. v. Wichita Gas Co.*, 290 U. S. 561 (1934); *Dayton Light & Power Co. v. Public Service Comm.*, 292 U. S. 290 (1934); *Columbus Gas & Fuel Co. v. Public Service Comm.*, 292 U. S. 398 (1934); *Houston v. Southwestern Bell Telephone Co.*, 259 U. S. 318 (1922), *United Fuel Co. v. Railroad Comm.*, 278 U. S. 300 (1929); *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133 (1930); *Lone Star Gas Co. v. Corp. Comm.*, 39 P. (2d) 547 (Okla. 1934).

accomplished. The Communications Act of 1934 vested in the Federal Communications Commission, among other things, jurisdiction over all operations of telephone companies interstate in nature.⁶¹ The Act, in all its features, contemplates and provides for close cooperation between the Federal Board and the state commissions. It contains the same cooperative provision authorizing joint hearings and joint conferences that appear in the Interstate Commerce Commission Act.⁶² Joint boards composed of state commission representatives may be created similar to those for which provision is made in the Motor Carrier Act of 1935 to which matters affecting more than one state may be referred.⁶³

The limitations placed upon the Federal Board are sufficiently definite to insure state control in all matters capable of solution by the states. The Act provides that the Federal Communications Commission, before prescribing any requirements relating to records, accounts or memoranda, shall notify each state commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views.⁶⁴ Such views and recommendations must be received and considered by the Federal Board. No Shreveport cases are possible under the Communications Act of 1934, because exchange rates are entirely excluded from the jurisdiction of the Federal Communications Commission.⁶⁵

The Act provides that it shall not be construed to apply or give jurisdiction to the Federal Communications Commission with respect to charges, classifications, practices, services, facilities or regulations, for or in connection with wire telephone exchange service. Even though a portion of exchange service may constitute interstate commerce, the Federal Communications Commission has no jurisdiction where such exchange is subject to regulation by a state commission or by local governmental authority.

The Federal Communications Commission is in a position to render invaluable aid to the state commissions. It is in a position to determine the reasonableness of such matters as license fees, toll allocations, Western Electric prices, and the effect of monopolistic practices. At the present time that Commission, pursuant to Congressional mandate,⁶⁶ is engaged in such studies.

PUBLIC UTILITY ACT OF 1935

1. *Federal Power Act*

The decision of the United States Supreme Court in the *Kansas Natural Gas* case⁶⁷ and the *Attleboro Electric Light* case,⁶⁸ holding that state commis-

61. 48 STAT. 1064.

62. Sec. 410 (b).

63. Sec. 410 (a).

64. Sec. 220 (i).

65. Sec. 221 (b).

66. PUBLIC RESOLUTION No. 8, 74th Cong. (S. J. RES. 46).

67. *State of Mo. v. Kansas Natural Gas Co.*, 265 U. S. 298 (1924).

68. *Public Utilities Comm. of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927).

sions had no jurisdiction to regulate wholesale electric rates where the local purchasing company was not an affiliate of the interstate transmission company, and where there was no evidence of fraud, forecast the inevitable federal regulation of electric companies selling energy interstate at wholesale. Inability of state commissions to determine the reasonableness of the city gate rate precluded a determination of fair distribution rates since the largest item of expense incurred by the local distributing company was the cost of energy transported to its lines. This situation was remedied by recent decisions of the United States Supreme Court in cases where the interstate transmission company was an affiliated company.⁶⁹ Absence of arms'-length bargaining in such instances afforded the interstate company opportunity to take undue advantage of the local distributing company. The state commissions were therefore permitted to determine the reasonableness of the cost of energy at the city gate. They may inquire into reasonableness of the city gate rate charge even though it necessitates an exhaustive study of the books, records, accounts and value of the interstate company.⁷⁰

The Federal Power Commission, in its report to Congress in 1928,⁷¹ recommended that federal legislation be enacted providing for regulation of rates for interstate electric service, which would recognize state jurisdiction over local rates in instances where energy was transported interstate direct to local consumers,⁷² and confer primary jurisdiction upon states acting jointly in wholesale transactions similar to those involved in the *Atleboro Electric* case.

The first bill to reorganize the Federal Power Commission provided for federal regulation of interstate power companies.⁷³ Upon final passage the regulatory features were eliminated to permit the reorganized commission an opportunity to make recommendations.⁷⁴ The new commission conferred with representatives of state commissions relative to legislation for control of interstate power companies. The result was Parts 2 and 3 of Title II of The Public Utility Holding Company Act of 1935,⁷⁵ known by the short title of Federal Power Act.

This Act vests jurisdiction in the Federal Power Commission over all facilities for the interstate transmission and sale at wholesale of electric

69. *Western Distributing Co. v. Public Service Comm.*, 285 U. S. 119 (1932); *State Corp. Comm. v. Wichita Gas Co.*, 290 U. S. 561 (1934); *Dayton Light & Power Co. v. Public Service Comm.*, 292 U. S. 290 (1934); *Columbus Gas & Fuel Co. v. Public Service Comm.*, 292 U. S. 398 (1934).

70. *Western Distributing Co. v. Public Service Comm.*, 285 U. S. 119 (1932).

71. ANNUAL REPORT, FEDERAL POWER COMMISSION, 1928, 13.

72. *Pa. Gas Co. v. Public Service Comm.*, 252 U. S. 23 (1920).

73. H. R. 11408, 71st Cong.

74. 46 STAT. 797.

75. 49 STAT. 838; 15 U. S. C. A. 794.

energy⁷⁶ with certain definite limitations. Jurisdiction is denied the Federal Power Commission over facilities used for the generation of electric energy; over facilities used in local distribution; and over facilities for the transmission of electric energy consumed wholly by the transmitter.⁷⁷ The Federal Board has no jurisdiction over consumer sales. The term "sale of electric energy at wholesale" is defined as "a sale of electric energy to any person for resale".⁷⁸ The Federal Board is barred from interfering with intrastate rates. State commissions retain control of rates to local consumers where delivery is made direct to the consumer through interstate lines. The Federal Power Commission is given power to require physical inter-connection between interstate transmission lines where adequate service requires the same; but it can not compel enlargement of generating facilities for such purpose;⁷⁹ nor can it compel a utility to sell or exchange electric energy where such would impair its ability to render adequate service to its customers.⁸⁰

The Act provides for full control in the Federal Power Commission over the disposition of property, consolidations, and purchase of securities of interstate companies;⁸¹ issuance of securities and assumption of liabilities;⁸² the fixing of rates and charges;⁸³ the determination of cost of production or transmission;⁸⁴ the ascertainment of cost of property;⁸⁵ the supervision of accounts, records and memoranda;⁸⁶ and the depreciation rates.⁸⁷ The Federal Power Commission may institute upon its own motion,⁸⁸ or upon complaints of any person, state, municipality or state commission,⁸⁹ investigations with respect to matters under its jurisdiction.

Full cooperation with state commissions is provided. The Federal Power Commission may refer any matter arising under the Act to a board to be composed of a member or members (as determined by it) from the state or states affected.⁹⁰ Such boards are to be vested with the same authority as the Federal Power Commission, and shall be subject to the same duties and liabilities as though the commission itself acted.⁹¹ The Federal Power Commission may confer with any state commission regarding the relationship between rate

76. Sec. 201 (b).

77. *Ibid.*

78. Sec. 201 (d).

79. Sec. 202 (b).

80. *Ibid.*

81. Sec. 203.

82. Sec. 204.

83. Sec. 205.

84. Sec. 206.

85. Sec. 208.

86. Sec. 301.

87. Sec. 302.

88. Sec. 307.

89. Sec. 306.

90. Sec. 209 (a).

91. *Ibid.*

structures, accounts, charges, practices, classifications and regulations of utilities subject to the jurisdiction of the state and federal commissions.⁹² Joint hearings with state commissions are authorized.⁹³ The Federal Commission is authorized to make available to state commissions any information or reports it may have which would aid the state commissions.⁹⁴ Upon request from a State the trained experts of the Federal Board are to be made available as witnesses to the state commissions where such arrangement can be effected without prejudice to the efficient and proper conduct of the affairs of the Federal Board.⁹⁵

No Shreveport doctrine is possible under the Act. The declaration of policy provides that federal regulation shall extend only to those matters not subject to regulation by the states.⁹⁶

As intimated heretofore the chief advantage of the Act from the viewpoint of the states is the opportunity afforded for determination of proper city gate rates for non-affiliated interstate electric transmission companies.⁹⁷ Such determination is essential to effective state regulation of local distribution rates.

2. *Public Utility Holding Company Act of 1935*

Title I of The Public Utility Holding Company Act of 1935,⁹⁸ provides for regulation of holding companies by the Securities and Exchange Commission. The primary purpose of the Act is directed toward the protection of investors. The concern here, however, is with those provisions relating to holding company services rendered operating subsidiaries. Inability of state commissions to cope with holding company abuses has long been a bar to successful utility regulation. Under the legal fiction that they were not "doing business" in the state in which they owned local operating companies, holding companies have evaded state regulation and have withheld valuable information necessary to a determination of reasonable utility rates of operating companies. Such expenses as the cost of rendering managerial, engineering, legal, and financial services; the cost of materials, supplies, and construction have harrassed state commissions in their attempts to determine honest utility values. Judicial decisions⁹⁹ requiring a showing of the reasonableness of charges for services rendered by holding companies to operating companies

92. Sec. 209 (b).

93. *Ibid.*

94. Sec. 209 (c).

95. *Ibid.*

96. Sec. 201 (a).

97. A similar bill conferring jurisdiction in the Federal Power Commission over interstate natural gas transmission companies is now pending in Congress (H. R. 11662).

98. 49 STAT. 838; 15 U. S. C. A. 794.

99. *Houston v. Southwestern Bell Telephone Co.*, 259 U. S. 318 (1922); *United Fuel Co. v. Railroad Comm.*, 278 U. S. 300 (1929); *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133 (1930); *Lone Star Gas Co. v. Corp. Comm.*, 39 P. (2d) 547 (Okla. 1934).

have not proved very helpful because few holding companies keep accurate records which are available for state commission inspection. Management fees based upon an arbitrary percentage of gross revenues have been a favorite device of holding companies for siphoning profits from local operating companies. The purchase by holding companies of construction materials in large quantities at substantial cash discounts, and resale of the same to operating companies at list or catalogue prices has had the effect of unreasonably inflating the value of local operating company properties. Indiscriminate borrowing by holding companies from local operating companies without responsibility for repayment either of principal or interest is another common abuse beyond the control of the ordinary state commission.

The Act of 1935 attempts to cure most of these abuses. The simplification of holding companies provided in the Act,¹⁰⁰ limiting their existence to those essential or necessary to the operation of an integrated public utility system will relieve local operating companies of the onerous burden of supporting a vast super-structure of unnecessary holding companies. Operating expenses of the local company may thereby be substantially reduced.

Subjection of intercompany loans to the strict scrutiny of the Securities and Exchange Commission¹⁰¹ will eliminate indiscriminate borrowing. The provision requiring approval by this Commission of service, sales, and construction contracts¹⁰² will permit the operating companies rather than the holding companies to enjoy the benefit of large scale purchasing power at substantial discounts. This will reduce the original cost of operating company properties. Requirements in the Act for the keeping, by holding companies, of accounts, cost accounting procedure, correspondence, memoranda, papers, books, and all other records with respect to all transactions in such manner as the Commission shall prescribe¹⁰³ will enable state commissions to determine with accuracy all expenses incurred by operating companies in their dealings with holding companies, and their reasonableness. The Act further prohibits holding companies from making campaign contributions, and prevents lobbying either with Congress or with the Federal Power Commission unless full disclosures with respect to intent are made.¹⁰⁴ This restriction will have a tendency to cut down the influence holding companies have exerted in the past upon legislation directed toward improving the utility industry.

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100. Sec. 11 (a).
 101. Sec. 12 (a).
 102. Sec. 13.
 103. Sec. 15.
 104. Sec. 12 (b).

CONCLUSION

It is submitted that the recent federal legislation vesting in federal boards authority to deal with matters beyond the jurisdiction or resources of state commissions in the fields of motor carriers, telephone communication, electric power, and holding companies, presents a real challenge to the state commissions. With the aid of these federal boards, state commissions are now in a position to secure information which will permit an effective regulation of public utility rates in the various states. Unless the state commissions take advantage of this federal aid and achieve success in the field of utility regulation, the responsibility of regulation will in time either be vested entirely in federal boards, or municipal or governmental ownership and operation will result.