University of Missouri Bulletin Law Series

Volume 30 *June 1924* Article 4

1924

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Recommended Citation
James W. Simonton, *Judicial Control of the Missouri Public Service Commission*, 30 Bulletin Law Series. (1924)
Available at: https://scholarship.law.missouri.edu/ls/vol30/iss1/4

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Judicial Control of the Missouri Public Service Commission

By
JAMES W. SIMONTON.*

Introduction

The control of the relations between the public and the various public service commissions or boards is now quite general throughout the country. The movement started during the last third of the nineteenth century with the formation of the various railroad boards and railroad commissions, to which were usually given certain powers of control over relations between the public and the railroads. But the courts, under the influence of the extreme individualistic notions of the time, were so hostile to any exercise of any real power by such administrative boards that these boards were almost completely paralyzed, and, as one might say, their morale was destroyed, so that as a rule they refrained from any action which would be likely to be taken into the courts for review.[1] When one reads over the provisions of some of these acts today, one is suprised at the extent of the powers which were apparently granted to some of the commissions, though of course they are not nearly so great as the powers granted by the various acts establishing public service commissions since 1906. But after the passage of the Federal Interstate Commerce Act state courts apparently tended to a less hostile attitude, and about 1907 began a series of enactments in various states which gave drastic powers to such commissions, and under which they began to operate with effect.[2]

*This article is the thesis written by Mr. Simonton in partial fulfilment of the requirements for the degree of S. J. D. at Harvard Law School.

1. Smalley, Railroad Rate Control, 125.
2. Acts were passed in New York and Wisconsin in 1906.

In Missouri an act was passed establishing a railroad commission as early as 1875,[3] which persisted under the name of "Railroad and Warehouse Commission" until the passage of the present Public Service Commission Act in 1913.[4] This older commission, however, never seemed to have attempted a vigorous exercise of the limited powers conferred upon it and it seemed to have occasioned the judiciary very little concern. No body of law ever developed under it, such as is now so rapidly growing up under the present act and Commission created by it.

It is the purpose of this paper to discuss the judicial control exercised over the present Public Service Commission of Missouri, hereafter for convenience called the Commission, by the supreme court of the state, for since this court has the final word as to the construction of the act creating the Commission and under which it operates, the bounds within which the Commission will be left free to accomplish the designs of its creators, must in the end be largely determined by the decisions of this court.

Missouri did not follow the prevailing fashion of entrusting the control of the relations between the public and its public utilities to an administrative commission until 1913. By this time this sort of scheme of control had been successfully operated in sister states and it was past the experimental stage. At the time the act was passed it was popularly regarded as a law that would result in early benefit to the public in the form of reduced rates, for utility rates are always popularly regarded as exhorbitant. That the Commission would, within the first few years of its existence, stand between many of the utilities and financial ruin was not anticipated. The war came on with its attendant steady increase in prices, and after

3. See Laws of 1875, 112-119. This act with its subsequent amendments was abolished by the Public Service Commission Act in 1913. At first the board established was called the Railroad Commission but by a later amendment it was known as the Railroad and Warehouse Commission.

4. Laws of Missouri, 1913, 556-651. This act is found in its present form in R. S. 1919, sections 10410-10550, except for minor amendments which will be found in Laws of 1921, 583-5 and Laws of 1923, 330-331.

a time many utilities were in great financial distress because they could not meet the constantly increasing costs without increased rates. It was necessary to increase rates and the Commission reluctantly granted increases from time to time.[5] Decreases became a thing of the past, and the public found that after nearly every hearing the utility concerned was granted an increase. It thus became evident the act was favoring the soulless corporation instead of making the way of the sovereign people smooth. The situation which arose is well expressed in a recent report of the Commission:[6]

> "A storm of opposition arose against the Public Service Commission. The public was suspicious. In many instances this suspicion instead of being allayed by public officials who had appeared before the Commission in opposition to the application for increases, and who knew the facts, was intensified by the statements of such officials made at such hearings. These statements were not made as uncontradicted facts, but were made in the trial of a case with a view of preventing the Commission from increasing the rates further than was absolutely necessary. However, they were accepted by the public as uncontradicted facts.
>
> "The Commissions of all the states of the union faced this situation with courage and determination. Not a single state commission was able to pass through the period of high prices without increasing utility rates all along the line. They were compelled to do so to save many of the utilities from bankruptcy and receiverships and to save the service for the public."

Happily the Commission has now come through this period and is now able to show an increasing list of decreases granted, and it may even appeal to the popular mind in the years to come as

5. "While the primary duty of a commission is to protect the public, yet the Constitution of the United States and of the several states as well as the statutes creating the commission cast another duty upon them, and that is to exercise these powers of regulation in such a manner as not to confiscate the property of the utility or to unjustly or unfairly interfere with the use of private property. In short the law contemplates that regulation must be done with due regard for the just and legal rights of all parties, whether it be the consumer or the utility." 9th and 10th Annual Report of the P. S. C. of Mo. (1921, 1922) 2-3.
6. 9th and 10th Rep. of the P. S. C. of Mo. 5. This report contains some interesting tables showing what happened in the state during the period of rising costs.

accomplishing to a considerable degree what the populace considers its purpose, namely, to act as a regulator of these monopolies in the interest of the pocket books of the people.

After the passage of the Public Service Commission Act in 1913, hereafter for convenience called the Act, the first Commission was appointed and at once organized for business. It apparently received a warm, if not a friendly welcome from both the public utilities and from their customers, for soon began the constant stream of appeals and reviews of orders of the Commission in the courts of the state which has continued with unabated vigor to the present time, to say nothing of the more or less successful attempts to injoin the enforcement of orders of the Commission in the Federal Courts.[7] One is impressed with the fact that the orders the Commission has seen fit to enter, usually have not suited either side of the respective controversies, and displeasure has been manifested by frequent appeals and even in one case by flat defiance of such orders until obedience was actually compelled by decree of court.[8] Such defiance did not prove effective, for the courts of the state have stood behind the Commission, making such action both costly and useless. The dissatisfaction is probably complimentary to the efficiency with which the Commission has performed its duties. At any rate one can say that indolence has not been one of its faults.

Nature of the Commission and Its Jurisdiction in General.

The Commission is composed of five members who are appointed by the Governor for terms of six years each. The first Commission was composed of one railroad expert, one electrical engineer and three lawyers. On the resignation of the railroad expert a little over two years later, a lawyer was appointed in his place, and the Commission has ever since been made up of four lawyers and one civil or electrical engineer. This assures the state of a body of

7. Over sixty cases have been decided in the state and federal courts since 1914, and a considerable number are now pending.
8. See *City Water Company of Sedalia v. City of Sedalia* (1921) 288 Mo. 411, 231 S. W. 941

men trained to look at matters from all sides and most of them judicially trained as well. As to those matters which are hotly controverted the Commission much resembles a court in action, and in fact it is a court in all but name, as an examination of the Public Service Commission Reports will indicate.[9] A study of this Commission convinces one that it now has progressed far in building up a system of rules and regulations, based on the experience of the past, and that it operates much like a court though its proceedings are much more informal in all respects. Some of its hearings are in effect court proceedings though the body itself the Supreme Court declares is merely an administrative body with no judicial powers whatever. As to the latter we will refer on various occasions subsequently.

The Commission is required by the Act to maintain an office at the state capitol at Jefferson City, which shall be open for business throughout the year.[10] Its powers, and duties are set out with considerable detail throughout the Act, so extensively so, that it will be inadvisable to attempt a complete summary of them here. The Commission is given exclusive control of the relations between the public and the public utilities operating within the state, particularly as to the service furnished and the rates charged by such utilities. The vague term "public utility" is defined in the Act to include all railroads, street railroads and other common carriers; all telephone and telegraph companies; all gas, electric, water and heating concerns, with certain exceptions as to municipally owned plants furnishing service within their own boundaries.[11]

9. These reports now include more than a dozen volumes, and some of the opinions would do credit to the Supreme Court itself. The subject matter often differs from that found in our law reports, but when there is occasion, the opinion of the Commission discusses the decisions of the courts of its own state as well as those of other states and applies the law in a judicial manner. There is a distinct tendency to follow its own decisions and various court decisions as precedents.
10. R. S. 1919, s. 10420.
11. See R. S. 1919, s. 10411, particularly subsection 25. The exception as to municipally owned plants was added by an amendment made in 1917. Laws of 1917, 433. The Commission regards this as an

The Act applies whether the utility is conducted by a person, partnership or corporation, or whether it is operated under a lease or by the owner. But the Act defines what shall be included in the term "public utility" and gives the Commission no power to declare other businesses to be public utilities and thus bring them within its jurisdiction.[12] If in the future new businesses come to be regarded as public utilities, the difficulty will have to be met by amendment to the Act. As the Act now stands, one may fairly say the jurisdiction of the Commission extends to all those businesses, which commonly fall within the current conception of the term public utility.

The Commission may on its own motion make all sorts of investigations into the service furnished by utilities and into the equipment and operation of such utilities, or it may proceed on complaint of one or more of the utilities themselves or on the complaint of their customers.[13] In short the evident purpose of the Act was to place within the exclusive control of the Commission, so far as the Legislature was able to do so, the whole troublesome matter of the relations between the public utilities and the public which they serve.

While the notion as to what is a public utility is fairly definite and thus the general field of the jurisdiction of the Commission under the Act is fairly easy to define, yet on the border it may not always be easy to draw the line. The Act contains a legislative direction that it is to be liberally construed so as to effectuate its purposes.[14] In determining what is a public utility within its control, the Commission has attempted to assume jurisdiction of a voluntary telephone company and of the electric plant of a brewery, which was selling its surplus current to certain residences nearby.

amendment tending to cripple the act. See 7th and 8th Ann. Rep (1919-1920) 16.

12. See R. S. 1919, ss. 10411, 10425.
13. R. S. 1919, ss. 10456, 10491, 10501.
14. R. S. 1919, s. 10538. . . . "The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

In the first case the voluntary telephone company sought to compel another telephone company to permit connections and to furnish long distance service under section 93 (3) of the Act which gave the Commission power to compel physical connection between two or more companies where such connection could be reasonably made and where it appeared that "public convenience and necessity will be subserved thereby". But the Supreme Court held that since section 17, subdiv. 2 of the Act gave the Commission jurisdiction only over those companies "affording telephone communication for hire" and was therefore limited to "those which engage in business as a commercial transaction, or for profit", that under section 93 (3) there was no power to compel a public telephone company to permit connection with such a private company as the complaining company.[15] In other words while the company might be compelled to furnish long distance service to regular subscribers, this voluntary company was not such a subscriber, nor was it a public utility, and hence not within the jurisdiction of the Commission at all. If it were a public utility within the Act then the Commission would have had power to regulate its rates and to compel it to furnish service to the public generally.

In the second case a brewing company was selling electric current to about thirty residences, the connections being made at the request of the residents and as a favor to them. The local editor was one of them, and when he began to advocate prohibition, his service was cut off, hence the complaint. The Commission ordered the service continued, but the Supreme Court reversed the order on the ground the brewing company was not a public utility.[16] The decision was clearly right for certainly the Act did not intend to prevent one from selling surplus current unless he made the

15. *Buffum Telephone Company v. P. S. C.* (1917) 272 Mo. 627, 199 S. W. 962.

16. *Danciger & Company v. P S C* (1918) 275 Mo. 483, 205 S. W. 36. The danger which the Commission was about to get itself into would be obvious. If this was a public utility, then other residents might demand service. How would the Commission proceed to compel the brewing company to get a franchise from the town to operate such a utility?

business a public utility, secured a franchise and held himself out as furnishing service to the public.

While these two cases do not mark the boundary of the jurisdiction they serve as guides. Presumably the Supreme Court construes the Act to apply only to those concerns which are furnishing certain specified kinds of service to the public for profit. In most cases there will be no difficulty, but cases may arise in which there may be a troublesome question of fact, as to whether the concerns in question do hold themselves out as furnishing service to the public for profit.

The first two cases which came before the Supreme Court which involved the then new Public Service Commission Act are particularly important because the opinions indicated the attitude of the court towards this new body, and the court was in a position to either make or mar it. As stated heretofore, the control given the Commission over the relations between the utilities and the public was such that both parties were compelled to bring their grievances before the Commission and submit to its order, unless they could have such order reversed or modified by judicial review as provided by the Act. The first case which came before the supreme court was an attempt to cut in on this exclusive jurisdiction of the Commission by a resort to original writ of mandamus in the Supreme Court. Had the attempt succeeded it would undoubtedly have had a very serious effect on the Commission and its activities, for the case arose at the very beginning of its activities, and the exhibition of a hostile attitude by the court at that time would have been discouraging and would probably have made the Commission too timid thereafter to be a very effective agency. In *Kansas City v. Kansas City Gas Company*,[17] the city sought, by original writ of mandamus, to compel the Kansas City Gas Company to furnish an adequate supply of gas to its customers within the city, a matter which, among other questions, involved the

17. (1914) 254 Mo. 515, 163 S. W. 854. The Act took effect April 15, 1913 and this opinion was handed down Feb. 10, 1914. It was the first case involving the construction of the Act which came before the Supreme Court.

determination as to whether the Company was under duty to furnish an adequate supply of gas, since it was furnishing natural gas only, and its sources of supply were failing. The court was asked to appoint a commissioner to take evidence and report his conclusions to the court. But the court, while asserting its discretionary power to grant the writ of mandamus in extraordinary cases, refused to thus cut in on the jurisdiction of the Commission, and held the matter was one which the city must bring before the Commission if it desired relief. The court further expressed the opinion that the Commission with its corps of experts was much better fitted to deal with such questions than any commissioner the court might appoint.[18] While up to this time the attitude of the court had not yet been expressed judicially, yet it is not probable it would have granted such a writ in such a case. But this court did more than merely refuse to grant the writ. It seized on the occasion to express clearly and forcibly its attitude towards this new agency. The opinion was written by Judge Lamm who was one of the ablest and most influential justices who have graced the bench of the

18. "The complaint made and the remedy invoked in this proceeding, taken in connection with the Public Utilities Act we have outlined, raises the question heretofore stated, viz.; Whether we should assume jurisdiction and issue an absolute writ on this original proceeding *in the first instance?* As to that we say:

We are of opinion that to do so would be to approach that new and important statute with a frosty and questioning judicial countenance.

Would be to run counter to the wise public policy evidenced by that statute . . . . . .

Would be to assume that this court is better equipped with ways and means to make the investigation necessary to any just solution of the problem presented than is the Utilities Commission. Would be to substitute our absolute writ of mandamus, inflexible, unreasoning, and ill suited to compelling a general course of conduct and a "long series of continuous acts" for the flexible, sensible and speedy remedies prescribed by the Public Utilities Act,. . . . . .

We are not willing to take any such position. The commission is better equipped with experts, technical knowledge, and other efficient aids to a neutral and full investigation than would be any commissioner appointed by the court." *Kansas City v. Kansas City Gas Co.* (1914) 254 Mo. 515, 540, 163 S. W. 854.

state, and the fact that the Act has from the start been liberally and progressively interpreted, may be due in no small degree to the fact that he wrote the first two opinions in which the Act was interpreted. His refreshing, forceful epigramatic style, the fame of which has spread all over the country, gave added weight to these two opinions.[19] In the first case he said:[20]

"That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the over-lord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surely reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and the unjust *willy nilly*.

That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a high remedial one filling a manifest want, is worthy of a hopeful future, and on well settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at—all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it, 'shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities'. . . .

"He who reads that act and does not see a complete rounded scheme for dealing with the business of public utilities at every spot where the

19. It has long been observed that a great book written in exceptionally attractive style attains far greater influence than perhaps an equally great book written in a crabbed, unattractive style. Examples of the former are Montesquieu's Spirit of the Laws and Sir Henry Maine's, Ancient Law. Contrast with them Austin's Jurisprudence Determined. Even a dry matter of fact court is not proof against an attractive and forceful literary style.
20. Pages 534-541.

shoe pinches the public or the utility, reads it to little purpose. He who reads it and does not see that the yearning of the lawmaker was to have the courts trust the commission in the first instance to solve such business problems, as those presented in this case, reads it to still less purpose. We cheerfully bow to the evident intent of the lawmaker, shining on every page of his act as expressive of the will of the people in constitutional form".

The above language coming from the court in the first case which involved a construction of the Act, was significant as to the court's attitude towards the Commission, and indicated the latter was to have an opportunity to prove whether or not it could make itself a reliable and trusted agency.

The second opinion of the court was even more significant, and this time the case involved a serious question of construction of the act which will be taken up more in detail subsequently. Long prior to 1913 Missouri had passed an act fixing the maximum passenger rates for intrastate traffic at two cents per mile.[21] A small intrastate railroad petitioned the Commission to have a higher rate fixed than that permitted under the statute, which petition the Commission dismissed on the ground it had only administrative powers and could not thus amend an existing statute. The railroad then brought mandamus in the Supreme Court to compel the Commission to hear the matter on its merits, and again Judge Lamm handed down one of his inimitable opinions, all the justices concurring, in which it was held that the Commission had power under the Act, to fix a maximum fare higher than that permitted by the prior statute in question.[22] In this opinion the court per Judge Lamm again took a liberal view and said:[23]

21. R. S. 1919 s. 10047. This act was passed in 1907. The Public Service Commission Act did not mention it nor did the Act expressly confer any power on the Commission to grant a higher rate than provided by this statute.
22. *Missouri Southern Railway v. P S C* (1914) 259 Mo. 704, 168 S. W. 1156. This opinion was handed down July 2, 1914, five months after that in *Kansas City v. Kansas City Gas Co., supra.* This was the second time that the construction of the Act had come before the court.
23. Pages 713-714.

"It was declared in that case (Kansas City v. Kansas City Gas Company, supra) that the proper judicial attitude toward the statute was not a frosty or questioning one—*contra*, it was an attitude running on all fours with the wise public policy evidenced by it. It is, I think, in the dry light of such doctrine the problem presented to us in the instant case must be solved."

"When the ground on which a new judgment is to rest is new and unexplored, as here, it is well enough for courts to sound at every step and look to the past as well as the future to get the right point of view and to see if, peradventure, the ground is solid; but after that has been said and everything else has been said that well can be said on the wisdom of judicial caution and circumspection where the situation is new, it should be allowed as a good and acceptable doctrine that the courts should not adhere to theories, however fond and familiar, when the lawmaker (within constitutional limitations) has exploded them by a new statute. Indeed in that behalf it is much the same as a philosopher has said of custom: "A forward retention of custom is as turbulent a thing as an innovation, and they that reverence too much old times are but a scorn to the new" (Bacon—of Innovations). It is a lovely poetical concept and likewise a comfortable and wholesome judicial concept that: 'The thoughts of men are widened with the process of the sun'.

As will appear hereafter when this case is taken up again, a strong argument can be made on the other side, an argument which probably would have appealed to a Missouri court of a generation ago as unanswerable. Portions of these two opinions have subsequently been quoted by the court as expressing the spirit which ought to be observed in dealing with the Act.[24]

(To Be Continued.)

24. See *P S C v. Missouri Southern Railway* (1919) 279 Mo. 455, 464-6, 214 S. W. 381; *City Water Company v. Sedalia* (1921) 288 Mo. 411, 419-20, 231 S. W. 942; *Rhodes v. P S C* (1917) 270 Mo. 547, 558-563, 194 S. W. 287.