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# JUDICIAL CONTROL OF THE MISSOURI PUBLIC SERVICE COMMISSION

(Concluded)

## GENERAL REGULATION OF UTILITIES

The remaining cases in which orders of the Commission have been reviewed by the courts may be treated together under one heading, since they are not numerous. The Act deals with utilities in three groups, but most of these cases below have to do with the railroad group.

### 1. *Miscellaneous Service Charges*

The two following cases involve service charges and have some relation to the rate cases. Certain statutes passed long prior to the Act provided that railroads must provide "team tracks" on which cars might be placed while being loaded and unloaded, and further provided that if a car was so placed, and was detained beyond a certain time, the railroad might charge demurrage for the delay.<sup>113</sup> The Kansas City Southern Railway<sup>114</sup> made an ingenious attempt to get more revenue by filing with the Commission a schedule of "track storage", charges for delay in loading and unloading cars beyond a fixed period. It contended that these were charges for the use of the tracks on which the car stood while being unloaded, a sort of track rental, and therefore not inconsistent with the demurrage charges provided by the statute. The Commission permanently suspended the schedule and the supreme court affirmed this order, on the ground the statutory demurrage charges were necessarily intended to cover the whole matter. Presumably had the railroad asked the Commission to fix higher demurrage rates, then, had it desired, it could have done so under *Rhodes v. P. S. C.*<sup>115</sup>

In the next case a travelling salesman complained of the baggage storage charges (which were the same in force throughout the whole country). The railroad could charge for Sundays and holidays, and, when a salesman arrived in a town Friday evening or Saturday, he was often unable to see his customers until Monday, and had to pay storage on his baggage. The sympathetic Commission, after a hearing, made an order redressing the grievance, but on appeal the Supreme Court of Missouri found numerous fatal objections.<sup>116</sup> In the first place the order was general and affected the whole travelling public, yet the Commission had based it only on the evidence of the salesmen alone. Hence, there was no evidence to support such a general order. In addition, it was discriminatory as to interstate travellers who are subject to interstate regulations. Furthermore, if limited to salesmen, it would be a special law based on an unlawful classification, and therefore contrary to the constitution.

### 2. *Power to Stop Trains*

The orders appealed from, as to this subject, have all concerned interstate passenger trains. Perhaps the pressure of public opinion on the Commission, backed as it is by local municipal pride, and by competition with or

113. R. S. 1919, §§ 9917-19.

114. *Kansas City Southern Railway v. P. S. C.* (1915) 265 Mo. 399, 178 S. W. 55.

115. See note 70 *supra*.

116. *A. T. & S. F. Ry. Co. v. P. S. C.* (1917) (Mo.) 192 S. W. 460.

without jealousy of one or more rival municipalities, is stronger in regard to demands for new depots, new stations, and as to stopping limited trains, than as to any other matters within the jurisdiction of the Commission. Some of the demands of this character, made in the utmost earnestness are so preposterous as to be funny. Then, too, a state agency of this sort, and even the state supreme courts are apt to have some local bias. So, we frequently find a complete disagreement between state courts and federal courts as to the necessity of stopping limited interstate trains. At any rate such orders of the Commission have not withstood judicial review.

Section 51 of the Act<sup>117</sup> confers broad powers as to arranging train schedules and stopping trains where the Commission deems it for the public necessity and convenience. In *Missouri Pacific Railroad Co v. P. S. C.*<sup>118</sup> an order was entered requiring the company to stop an eastbound train regularly, and to stop on flag a westbound train at California. As to the westbound train the company appealed, and the circuit court modified the order so as to require it to stop only for the purpose of discharging passengers from St. Louis. On appeal to the supreme court the order as modified was sustained. The fact that two near-by smaller towns were flag stops for this train failed to make any great impression in the supreme court, though it was probably regarded as conclusive by the citizens of California.

In *M. K. T. Railway v. P. S. C.*<sup>119</sup> the supreme court did affirm an order of the Commission requiring an interstate train in each direction, to stop on flag at Pilot Grove, to discharge or take on certain classes of passengers, the ground of the decision being that the preponderance of the evidence supported a finding of public necessity and convenience. Pilot Grove was a town of about 1600, and aside from the trains in question, had but two trains per day each way, though on the main line of the railroad. There was no appeal to the federal Supreme Court.

In *Lusk v. P.S.C.*<sup>120</sup> the order entered by the Commission was an order directing the re-routing of two limited trains, rather than one directing stops and most of the discussion is whether the Commission has power to re-route. The act does not specifically confer such power. The majority of the judges of the Supreme Court came to the conclusion that it had power to re-route, at least to the limited extent required here, as a part of its power to arrange schedules and order stops.<sup>121</sup> Presumably the decision of the state court still stands, so far as this construction of the act goes. The state court affirmed the order of the Commission, two judges dissenting on the ground there was no power to re-route. On appeal to the federal supreme court the order was reversed as an

117. R. S. § 10460. The section provides: "the commission shall, after a hearing, . . . . . have power to make an order directing . . . . . such railroad corporation . . . . . to increase the number of its trains or of its cars or its motive power, or to change the time for starting . . . . . or to change the time schedule for the run of any train or car, or to make any other suitable order that the commission may determine reasonably necessary . . . . ."

118. (1918) 273 Mo. 632, 201 S. W. 1143.

119. (1918) 277 Mo. 175, 210 S. W. 386.

120. (1918) 277 Mo. 264, 210 S. W. 72.

121. The court held that the complaint was that the trains be required to stop as they had

formerly done. The stoppage was the principal thing and the necessity of re-routing around the curve was merely incidental and came within the power of the Commission to stop trains, under section 51. The order was that the train was to stop at Caruthersville and the problem of getting it there was for the railroad to solve. The extra distance here was about ten miles. One wonders if it were fifty miles whether it would still be a mere order to stop, if in fact the particular train had stopped formerly at a particular place. The argument by which the court decides the re-routing question is merely incidental and is not impressive.

unlawful interference with interstate commerce.<sup>122</sup> The case must have caused some excitement locally while pending, and it may well be that even the state supreme court was in some measure influenced by what at times have been called "fireside equities". It seemed that the railroad had played a rather scurvy trick on a trusting community, and a bitter local rival—due to advantageous location, was reaping the benefits. The city of Caruthersville was a town of about 5,000 people located near the Mississippi River on the line of the railroad which extends from St. Louis to Memphis. The road made a big bend in order to reach the town, and about nine years previously a cut off had been constructed, on pretense it was to be used for freight only, and the citizens of the town assisted the project. But about 1913 the railroad put on two new interstate trains which stopped at Caruthersville and re-routed its best train each way through the cut-off.<sup>123</sup> The order of the Commission directed these trains to be routed through the town, though it was ten miles farther and though the cost of upkeep of the track would be greater to keep it in condition to carry fast trains. Further it appeared that the town had fourteen other daily passenger trains. The federal court, unfeeling, so far as local issues were concerned, could not see why fourteen trains were not sufficient for a town of this size under the circumstances.

The same court also failed to see why two limited night trains should be stopped at Mountain Grove, a town of about 2500 far down in the Ozarks, when the town had four other interstate trains daily.<sup>124</sup> The court said:<sup>125</sup>

"Interstate commerce is concerned with the business of States distant often from one another involving necessarily a difference in service. And such is the character of the trains in question. They are operated in long distance traffic, are instruments of such traffic, and it is a part of their efficiency that they run at night."

It might be mentioned that the order in this case had been affirmed in the state supreme court by a four to three decision.<sup>126</sup>

Presumably Missouri is not different from other states in the degree to which the local citizen is blinded to the larger aspects of interstate commerce. It is difficult for him, with his pride in his little city, to see why these heavy, well equipped limited trains should be permitted to thunder through his com-

122. (1920) 254 U. S. 535, 65 L. Ed. 389, 41 S. C. Rep. 192.

123. In the majority opinion it was said: "It further appears that under the spur and lure of a promise that it was not to lose or have interfered with its said through day train service then existing, Caruthersville caused to be procured the right of way for the cut-off mentioned and its citizens donated most of the right of way to the railroad company." (p. 280).

"...and throughout the whole case, the pregnant fact runs like a marking thread that for nine years after the cut-off was built and in use, the railroad company itself acted on the theory that the routing of these trains via Caruthersville was a practical railroad proposition, all of which must be held to evidence the fact that the railroad company on its then settled judgment deemed such running of said trains a necessary convenience of service and facility to that city and to local traffic wants."

What the courts always seem to forget in

dealing with this class of cases is that the railroads have been under duress in operating trains and therefore the fact that a train has been operated in a certain way for a long time is little evidence of more than that it was the judgment of the company that it had better bear the loss rather than to rouse sleeping dogs. Railroads are still operating a lot of trains at a loss because the public compels them to do so. Yet it cannot be said that that fact shows in their judgment that such operation is a necessary convenience. It is merely that the public insists on it, and the public is the more powerful. At any rate, Caruthersville here saw it was soon to be on a branch line and have branch line service, a thing calculated to cause any live city to show fight.

124. *St. Louis & San Francisco Railway v. P. S. C.* (1923) 261 U. S. 369, 43 S. C. Rep. 380. 125. Page 373.

126. (1921) 290 Mo. 389, 235 S. W. 131.

munity without deigning to stop. Doubtless the view of the federal supreme court is sound, for to it, the national interests are opposed in the true perspective to the local interests.

### §3. *Grade Crossings and other Railroad Crossings*

Section 50<sup>127</sup> of the Act gives the Commission power to prescribe the manner and terms of installation, operation, maintenance, apportionment of expenses, use and protection of crossings of railroads, street railroads and of public highways with such railroads, and also to alter, or abolish such crossings and to require where practicable, a separation of grades at crossings already established, and to prescribe the terms and apportion the cost of such separations between the parties concerned. Section 116<sup>128</sup> also provides the Commission may require interlocking switches to be constructed at railroad crossings, or the establishment of other protective devices and systems of signals at such crossings. In short the Commission is given broad powers of control over all these crossings in the interest of public safety. A number of its orders as to crossing devices and improvements have come before the supreme court, usually on the matter of apportionment of the cost.

The city of Moberly, after a hearing, secured an order requiring the construction of new overhead railroad bridges at the crossing of two railroads and a public street in that city.<sup>129</sup> The roads involved were the Missouri Kansas and Texas, and the Wabash. The existing bridge over the street was constructed in 1887 under a contract which provided that as to repairs and renewals the city was to bear half the cost. The city was probably hoping to escape the provisions of the contract, and if so, its hope was not in vain, for the Commission approved plans of the engineers of the railroads, and apportioned the cost, about one-fourth to the city (the cost of paving the street under the proposed bridges) and the rest to the railroads. This was approved by the supreme court regardless of protests of the railroads that the order impaired the obligation of the contract. The decision was based on the police power and involved in some measure the principle involved in the franchise contract cases above discussed. In this case the city got the advantage instead of the utility as in the franchise cases.

The chief point involved in *Chicago & Alton v. P. S. C.*,<sup>130</sup> where the order required the construction of an interlocking switch at the crossing of the above road and the Missouri, Kansas and Texas at North Jefferson, was as to the apportionment of cost. The order apportioned 28.6% to the Chicago and Alton and the rest to the "Katy". There was a contract between the roads, whereby the "Katy" had put in the crossing and it was to keep this in repair forever, and if in the future "crossing signals and gates" should be required it was to construct and maintain these. It was contended that the "Katy" was bound to bear the whole cost, but the court held an interlocking switch was not included in the language of the contract and affirmed the order.

In *P. S. C. v. Missouri Pacific Railroad*<sup>131</sup> it appeared that an order of the Commission requiring an interlocking switch at the crossing of the above railroad with the St. Louis and San Francisco, at Aurora, had been disregarded for two years. So, the Commission brought mandamus in a circuit court against both roads to enforce the order, and an alternative writ was granted

127. R. S. 1919, § 10459.

128. R. S. 1919, § 10527.

129. *Missouri, Kansas and Texas Railway v.*

*P. S. C.* (1917) 271 Mo. 270, 197 S. W. 56.

130. (1918) 275 Mo. 72, 204 S. W. 531.

131. (1919) 280 Mo. 456, 218 S. W. 310.

against both. Both appealed, but the important point on appeal was in connection with a contract between the roads, which provided that the cost of any interlocking switch needed in the future was to be borne by the Missouri Pacific. The supreme court affirmed the circuit court as to the Missouri Pacific and reversed it as to the Frisco. It said that the latter was not in default, since it was not required by the order to make any payment until thirty days after the work was begun. Hence the question of impairment of this contract was not involved. The order was reasonable and the switch must be constructed, and the railroads would have to fight out the contract point when it arose.

In *Missouri Pacific Railroad v. P. S. C.*<sup>132</sup> it was contended by the railroads that an order was unreasonable. The Frisco had petitioned for an order for an interlocking switch at its crossing with the Missouri Pacific at Tower Grove, and the latter defended on the ground that it desired in the future, when financially able, to construct a viaduct over the Frisco tracks. The Commission held that the viaduct ought to be constructed at once, and so ordered, but it apportioned 75% of the cost to the Missouri Pacific because the latter wanted a double track viaduct. The railroad complained of the apportionment, but the supreme court thought it reasonable under the circumstances.

In the remaining case we have civic pride back of a demand for a connecting interchange switch between two railroads at Macon. The Commission, lending a sympathetic ear, ordered the switch to be constructed and the railroads appealed. A circuit court affirmed the order, but the supreme court, finding that if every car load of traffic to and from the city according to highest estimates in evidence, were sent through this proposed switch at the regular charge of \$2 per car, it would produce an annual revenue of only \$1500, while the probable interest cost on the investment plus the annual upkeep would be about \$2,000 annually. Hence, the order was unreasonable.<sup>133</sup> Of course only a small per cent of the estimated traffic would have occasion to use the proposed switch.

#### 4. *Extensions and Additional Service*

The supreme court has held that under the Act the Commission might give a utility permission to abandon service, where service could be continued only at a disastrous loss, even though a franchise granted by a city is on condition that service is to be continuous.<sup>134</sup> It had previously held that a railroad cannot abandon any part of its line without first securing permission from the Commission.<sup>135</sup> In the latter case a railroad had purchased the rails and ties of two old lumber roads and had been operating some trains under contract with shippers along such tramways. In 1914 it decided to abandon the service, but agreed with certain shippers to continue service for two years under a contract by which it was to have a switching fee of \$7.50 per car. Soon after, one of these shippers complained to the Commission and, after a hearing, the charge was held illegal under Art. 12, Section 12 of the constitution known as

132. (1923) 297 Mo. 622, 250 S. W. 595.

133. The case is *C. B. & Q. Ry. v. P. S. C.* (1915) 266 Mo. 333, 181 S. W. 61. The above does not tell the whole story. It further appeared that the switch, if constructed would have a grade such that no more than two cars could be transferred at a time. The evidence did not in-

dicade that there would be more than a very few cars per year which it would be convenient to transfer at this point.

134. *Southwest Missouri Railway v. P. S. C.* (1919) 281 Mo. 52, 219 S. W. 380.

135. *Missouri Southern Railway v. P. S. C.* (1919) 279 Mo. 455, 214 S. W. 381.

the "short haul" clause.<sup>136</sup> The contention that these spurs were not part of the road's chartered lines was answered by holding that the spurs were operated by the company within the meaning of section 16<sup>137</sup> of the Act. As soon as this order was entered the company announced its intention to abandon the spurs, and the Commission brought mandamus to compel it to continue, and a circuit court granted a peremptory writ. Appeals from this, and from the order of the Commission holding the switching charge illegal were affirmed by the supreme court. It was held that the company must secure permission from the Commission to abandon, or if the rates are too low as to these spurs, it must apply for higher rates on its lines. The constitutional provision stands in the way of granting higher rates on these spurs than on the rest of the line.

*United Railways Company v. P. S. C.*<sup>138</sup> presented the interesting question as to whether the Commission has power to order a street car company to apply to the city for a franchise in the streets, and then to construct tracks therein. We have seen that under Art. 12, Section 20 of the constitution,<sup>139</sup> the local authorities must consent to the use of highways by railroads and street railroads. Section 49<sup>140</sup> of the Act gives the Commission power to order "any change or additions in construction" that ought to be reasonably made by railroads and street railroads. The order here was that the company apply to the city of St. Louis "within 30 days . . . for the necessary franchises, permits and authority . . . to construct all the following sections of track . . ." After getting franchises the tracks were to be laid within a certain time. The supreme court held this order void, first, on the rather puzzling ground that this is a conditional or permissive order and beyond the power of the Commission to enter. The idea seemed to be that the Commission could enter only mandatory orders and conditional orders were void. Second, it held that while section 49 clearly gave power to order additions, such as side tracks, switches, cross-overs and terminals, incidental to the operation of the main lines, this does not include power to order the utility to get a franchise for new extensions. This seems a wise and sound construction so far as power to compel the utility to procure a franchise is concerned. But the case did not settle the question whether the Commission could order extensions where the utility already had a franchise. One judge in a concurring opinion thought it could not order such extensions into new territory at all, but could only order switches etc., incidental to its existing lines. But in *Ozark Power and Water Company v. P. S. C.*<sup>141</sup>

136. *Missouri Southern Railway v. P. S. C.* (1919) 279 Mo. 484, 214 S. W. 379. This and the mandamus case above were decided at the same time. Art. 12, section 12 provides: "It shall not be lawful in this State for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance."

These spurs were only a few miles long and had grades of five and eight per cent respectively, so that only a geared logging engine could be used and it could not push over two cars up the 8% grade. Without doubt the spurs were operated at a heavy loss, which had to be borne by the rest of the line. It is a case where the short haul clause operates rather harshly.

137. R. S. 1919, § 10425 (5).

138. (1916) 270 Mo. 429, 192 S. W. 958, 198 S. W. 872.

139. See the discussion of Franchise and Contract Limitations, *supra*.

140. R. S. 1919, § 10458.

141. (1920) 287 Mo. 522, 229 S. W. 782. This seems a power which might be subject to abuse. In this case for example, while if fifty consumers took current at the high rate of fifteen cents, there seemed a possible profit on the investment, yet the town was so small, there was hardly reasonable assurance that half would continue and there is always doubt as to the future of such a village. It is probable the court was influenced by the fact agents of the company had so aroused hopes that fifteen houses had been wired before the company announced its decision not to construct the line.

an electric company was ordered to extend its lines a mile to the town of Diamond, a town of one hundred homes, on condition that at least fifty customers would obligate themselves to take current at 15 cents per kilowatt, with a minimum charge of a dollar and a half per month. Eighty citizens promptly so obligated themselves. On appeal it appeared that the company had franchises for all highways in the county. This being the case the court held there was merely the question whether the extension was reasonable under the evidence, and it held the order was reasonable, since there seemingly would be a reasonable profit on the investment, and the town was growing quite rapidly. Thus it seems that the Commission has the power to compel reasonable extensions where the utility already has the necessary franchises.

In *Missouri Pacific Railroad v. P. S. C.*<sup>142</sup> an order requiring the continuance of a Pullman car on certain trains on a branch line from Joplin to Pleasant Hill was upheld under section 16<sup>143</sup> of the Act, which gave power as to services for the "comfort and convenience" of the public, though the court expressed the opinion that a Pullman now be considered a necessity in proper cases.

Finally in *Missouri Pacific Railroad v. P. S. C.*<sup>144</sup> the Commission entered an order requiring the railroad to continue to maintain team track scales for weighing grain at Rich Hill. A statute in force when the Act was passed required such scales at every point, where the previous years' shipment of grain had exceeded 10,000 bushels, and as this was the case at Rich Hill, the order was based on the statutory standard. This the supreme court reversed on the ground it was the duty of the Commission to find public convenience and necessity based on evidence. In other words it is not bound by this statute any more than by the rate statute.

##### 5. Approval of Bond Issues

Power to approve all bond issues made by utilities within the jurisdiction is conferred by various sections of the Act. Sections 55 to 57<sup>145</sup> confer such power as to railroads and street railroads while section 63 imposes heavy penalties for disobedience. The Union Pacific Railroad Company, a Utah corporation, having six-tenths of a mile of main line in Missouri and no interstate traffic, asked approval of a \$31,848,900 bond issue on its whole property valued at nearly three hundred millions. The Missouri property was valued at about three millions. The Commission gave its approval with its bill for \$10,962.25, being a dollar per thousand on the first million, fifty cents per thousand on the next nine million, and twenty-five cents per thousand for all over ten million as provided by section 21.<sup>146</sup> The company paid under protest, and appealed to a circuit court alleging among other things unlawful interference with interstate commerce and that the fees were unreasonable. The circuit court reversed the order and fixed the fee at \$250, but the supreme court reversed this and sustained the Commission on the ground that the company had voluntarily asked approval, and hence submitted itself to the jurisdiction of the Commission.<sup>147</sup> The federal supreme court ended the matter by quite properly holding this an unlawful interference with interstate commerce, and that the company had acted under duress, in that it had to apply

142. (1916) 269 Mo. 634, 192 S. W. 86.

143. R. S. 1919, § 10425.

144. (1918) 275 Mo. 60, 204 S. W. 395.

145. R. S. 1919, §§ 10464-10466.

146. R. S. 1919, § 10430.

147. *Union Pacific Railway Co. v. P. S. C.*  
(1916) 268 Mo. 641, 187 S. W. 827.



for permission or run the risk of heavy penalties.<sup>148</sup> In the meantime the same company issued over two million more bonds without asking permission. So, the Commission sought to enjoin the issue in a circuit court, but without success. It appealed to the supreme court, but this time the court held that only companies to which the state had granted special privileges, came within the Act, and further that the order, if entered, would be unreasonable.<sup>149</sup> The latter was the ground relied on by the circuit court in the previous case, but that order did not appear unreasonable to the supreme court.<sup>150</sup> This last decision preceded that of the federal supreme court. So, now one can safely say this particular railroad is not subject to the jurisdiction of the Commission.

In *Kansas City Railways Company v. P. S. C.*<sup>151</sup> there had been a reorganization of the company after a receivership, in the course of which the Commission approved a \$28,000,000 bond issue for which it charged fees as provided in section 21. The company claimed that the case came within a proviso of that section, that no fee should be charged for issues made for "guaranteeing, taking over, refunding, discharging or retiring any bond, etc." The court held the plan here was a purchase by the new company of the properties in the hands of the receivers, and therefore the issue was not within the proviso, a decision which is probably sustainable under the circumstances.

The only other bond case is *Joplin & Pittsburg Railway Company v. P. S. C.*<sup>152</sup> Section 57<sup>153</sup> of the Act forbids the Commission approving an issue of bonds to cover expenditures incurred more than five years prior to the application for permission. The company here had an open mortgage, made prior to the passage of the act, under which it had power to issue bonds equal to eighty per cent of the value of the improvements, on showing net earnings for the past year of over twice its interest charges. The company brought original mandamus to compel the Commission to approve the issue. The supreme court held since there was no public policy against such an issue the five-year limitation in the Act was an unlawful impairment of the contract, and granted the writ.<sup>154</sup>

### 6 Miscellaneous Cases

In *Richards v. P. S. C.*<sup>155</sup> the only question was whether a switch track claimed by Richards as private, was in fact dedicated to the public so that it was under the jurisdiction of the Commission. The Commission's order had

148. *Union Pacific Railway Co. v. P. S. C.* (1918) 248 U. S. 67, 63 L. Ed. 131, 39S. C. Rep. 24. "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity . . . The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained." Page 70.

149. *P. S. C. v. Union Pacific Railway Co.* (1917) 271 Mo. 258, 197 S. W. 39. As to the first point the court said: "The purpose of section 54 was to embody in the form of positive law the general legal principle that the right to control corporations owing duties to the public was an incident to the grant to them of special privileges by the state asserting such authority." This seems to form the basis for the future limitation of the jurisdiction of the Commission as to corporate securities. Probably some day a difficult case will

arise where the corporation has some small portion of its property within the jurisdiction of the Commission.

150. While the Act provides for fees to be paid the Commission for its services, the sum total of these fees do not pay half the expenses of the Commission. In the ten years up to 1922 the average deficit has been over \$82,000 per year. See 9th and 10th Ann. Rep. 51.

151. (1917) 273 Mo. 173, 201 S. W. 74.

152. (1921) 289 Mo. 452, 233 S. W. 388, 833.

153. R. S. 1919, § 10466.

154. Blair, J., dissented on the ground that the Commission had no power to approve this issue of bonds at all, but the company had the right to issue them without such permission. The majority opinion is to the effect the approval must be given by the Commission, and the Company must have such approval.

155. (1922) 293 Mo. 625, 239 S. W. 838.

recognized it as a public switch. The supreme court sustained the order on the ground there was sufficient evidence of an implied dedication to the public to sustain the order. A circuit court had reversed the order of the Commission.

Section 64<sup>156</sup> of the Act provides that "Whenever the Commission shall be of the opinion that a common carrier, railroad corporation or street railroad corporation is failing or omitting, or about to fail or omit to do anything required of it by law or by order or decision of the Commission . . . it shall direct the general counsel of the commission to commence an action or proceeding in any circuit court . . . by way of mandamus or injunction." The commission entered an *ex parte* order by which it directed suit to be begun against the Missouri Pacific Railroad, to compel it to furnish cars for shipment of ties between certain points on application. Judge Garesche of the St. Louis circuit court, where the suit was started, issued a restraining order, and ordered the company to appear in ten days and show cause. The Company applied for a writ of prohibition in the supreme court.<sup>157</sup> This court granted the writ, holding (contrary to the Company's contention) that no hearing before the Commission can be required under section 64;<sup>158</sup> but it also held that the remedy in section 64 is exclusive, and a circuit court, in such proceeding, cannot issue restraining orders or temporary injunctions, but the case must be heard on its merits as promptly as may be.<sup>159</sup>

In *State ex rel. Electric Company of Missouri v. Atkinson*,<sup>160</sup> the Commission granted to the Western Power and Light Company, a permission to operate a light and power business in Maplewood, though the Electric Company of Missouri was already operating there. The circumstances were unusual in that the latter company had very high rates, bought all its current, and did only a small part of its total business in Maplewood. The other company offered very much lower rates and the Commission decided to grant it permission, notwithstanding it would result in competing companies operating in the same city. This order the supreme court affirmed, though it asserted the usual policy was to substitute regulated monopoly for competition, but here the record justified the Commission.

Other cases of little importance for our purposes, in which the Commission was concerned, are given in the footnote.<sup>161</sup>

### 7. Evidence and Procedure

Section 24 provides:<sup>162</sup>

"All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. And in all investigations, inquiries or hearings the commission or a commissioner shall not be bound by technical rules of evidence. No formality in any

156. R. S. 1919, § 10473.

157. *Missouri Pacific Railroad v. Garesche* (1918) 274 Mo. 74, 202 S. W. 400.

158. This contention seems foolish since the act merely gives the Commission discretion to decide when suit shall be started. The merits must necessarily be litigated in the circuit court.

159. This conclusion is based on construction of the whole section. It provides how the suit shall be started, how long the defendant shall have to answer, what form the judgment shall be, and further provides the court shall proceed immediately without formality or technical pleadings.

160. (1918) 275 Mo. 325, 204 S. W. 897.

The opinion of the court indicates such an order can be justified only under very unusual circumstances.

161. *Myron Green Cafeterias Co. v. Kansas City* (1921) 293 Mo. 519, 240 S. W. 132; *P. S. C. v. Roach* (1914) 256 Mo. 669, 165 S. W. 703; *C. M. & St. P. Ry. v. P. S. C.* (1916) 269 Mo. 63, 189 S. W. 377; *Missouri Valley Realty Co. v. Cupples Light, Heat and Power Co.*, (1917) (Mo.) 199 S. W. 151; *Kirksville v. Hines* (1920) 285 Mo. 233, 225 S. W. 950; *Hull v. Chicago Great Western Ry. Co.* (1916) (Mo. App.) 185 S. W. 1155.

162. R. S. 1919, § 10433.

proceeding nor in the manner of taking testimony . . . shall invalidate any order, decision, rule or regulation made, approved or affirmed by the commission."

The Commission has made its own rules. No case has yet arisen involving the competency of evidence admitted in a hearing. As above stated, in order to secure a review, a motion for a rehearing before the commission must be made, and in this motion the applicant must set out the ground or grounds of his objections to the order, and a failure to state such objections constitutes a waiver of them.<sup>163</sup> In other words only those grounds so stated can be urged on review in the court.

Perhaps the following provision prevents some objections to evidence that might otherwise be made: Section 109 provides:<sup>164</sup>

"A full and complete record of all proceedings before the commission or any commissioner on any formal hearing had, and all testimony shall be taken down by a reporter appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced and all information secured by the commission on its own initiative and considered by it in rendering its order or decision, and of the pleadings, record and proceedings in the cause, shall constitute the record of the commission." . . .

Thus the certification of the Commission to its record would include the assertion that in such record was all the evidence and information on which it acted, a thing which might be difficult to assert in some cases, but after such certification, the court can assume it is true. At any rate there has been no difficulty so far. There is some discussion of procedure in *M. K. & T. Ry. v. P. S. C.*<sup>165</sup> the Pilot Grove train stop case, discussed above.

### 8. Orders Affirmed and Reversed

Forty-three cases have involved the validity of orders entered after hearings. Thirty-one have been affirmed by the state supreme court and twelve reversed.<sup>166</sup> Four affirmed by the state supreme court have been reversed by the federal supreme court.<sup>167</sup> In addition, the enforcement of rate orders have been enjoined temporarily by the federal courts in five cases, one injunction being subsequently dissolved by the supreme court.

Of the twelve cases reversed by the state court, the *Buffum Telephone Company* case and the *Danciger & Company* case were cases where the ground of reversal was that the companies involved were not public utilities. Perhaps the Commission should have come to this conclusion in the first place. In *Mo. So. Ry. v. P. S. C.* the first passenger rate case, in the *Southwest Missouri*

163. *Lusk v. P. S. C.* (1918) 277 Mo. 264, 272-3, 210 S. W. 72; *Mo. Pac. Ry. v. P. S. C.* (1916) 269 Mo. 634, 192 S. W. 86.

164. R. S. 1919, § 10520.

165. (1918) 277 Mo. l. c. 192, 210 S. W. 386.

166. *Buffum Telephone Company v. P. S. C.*, note 15 *supra*; *Danciger & Company v. P. S. C.*, note 16; *Lusk v. Atkinson*, note 50; *Wabash Railway Company v. P. S. C.*, note 51; *Mo. So. Railway Co. v. P. S. C.*, note 68; *Southwest Mo.*

*Railway v. P. S. C.*, note 84; *Southwest Bell Tel. Company v. P. S. C.*, note 98; *A. T. & S. F. Ry. v. P. S. C.*, note 116; *Mo. Pac. Ry. Co. v. P. S. C.*, note 118; *C. B. & Q. Ry. Co. v. P. S. C.*, note 48; *Joplin & Pittsburg Railway Company v. P. S. C.*, note 152.

167. *Southwest Bell Telephone Company v. P. S. C.*, note 93; *Lusk v. P. S. C.*, note 122; *St. L. & S. F. Ry. Co. v. P. S. C.*, note 124; *Union Pac. Ry. Co. v. P. S. C.*, note 147.

*Railways* case, and in *Missouri Pacific Railway v. P. S. C.* the Commission considered it had no power to modify the respective state statutes which stood in the way of granting relief. In these three cases its course was quite proper, as the question of construction was only for the court.<sup>168</sup> In the *Joplin Pittsburg Railway Company* bond issue case, the question as to whether the language of the Act should prevail over the contract provision in the prior mortgage was a very difficult one, and one feels like commending the Commission for adhering to the language of the Act, rather than finding that such language impaired the obligation of the contract where the question was difficult to say the least.<sup>169</sup> One cannot say the same in *United Railways Company v. P. S. C.* where it undertook to have the company secure a franchise from a city. This decision was an overconstruction of the Act. The interchange track order in *C. B. & Q. Ry. v. P. S. C.* is probably only equalled in unreasonableness by one of the orders enjoined by the federal courts. As to the train stop orders, one of which was reversed by the state court, and two others by the federal supreme court,<sup>170</sup> one can only say the record of the Commission is at its worst in this type of cases. One might class with these cases the *Wabash Railway* case,<sup>171</sup> where the construction of a station was ordered, and the *A. T. & S. F. Ry.* case<sup>172</sup> where the order was to relieve the travelling salesmen of excessive storage charges over Sunday. The charge for fees in the *Union Pacific Railway* bond case was in strict accord with the language of the Act.<sup>173</sup> There seemed no construction of the language on which a lesser charge could be made. For this order the Commission can be justified. As to the *Southwest Bell Telephone* case the order showed the tendency shown in all rate orders to undervalue the property. This is due largely to the fact that the Commission relied chiefly on reproduction cost or actual cost before the war in making valuations. This same tendency existed during the long periods of rising costs following the war, as to most of the utility Commissions throughout the country. Since the supreme court decision in this case, there will probably be little further difficulty in Missouri on this account.<sup>174</sup>

As to the reversals by the federal supreme court the *Southwest Bell Telephone* case, the most important, has been sufficiently discussed. Two others were the train stop orders affecting interstate trains, and the fourth case was the *Union Pacific* bond fee case.

Two of the orders involved in the federal injunction cases, if we are to take the statements in the opinions of the court, are undoubtedly bad orders, one of them particularly so.<sup>175</sup> Perhaps the court was justified in the other

168. Such a Commission is not to be expected to seemingly assume the power to abrogate state statutes. The action of the Commission in these cases was proper.

169. The Act in so many words gave power to approve bond issues for betterments only when made within five years. Here was an application for an issue for betterments many of which were over five years past, but the company was within the terms of its mortgage made before the Act went into effect. No one but the supreme court can know whether or not the obligation of such a contract could be impaired by the Act. The Commission followed the language of the Act. This was proper for it should not assume to declare a portion of the Act void as to this mortgage.

170. These cases are *Mo. Pac. Ry. v. P. S. C.*, note 118; *Lusk v. P. S. C.*, note 122, and *St. L. & S. F. Ry. Co. v. P. S. C.*, note 124.

171. Note 51.

172. Note 116.

173. Notes 146 and 147. The Act was specific as to the fees to be charged. Under its language it seemed either the full fee was to be charged or nothing. The fault was of the legislature. It was not the business of the Commission to attempt by construction to find a way to correct the Act. That was for the Supreme Court, but it seemingly saw no way to do it.

174. See cases cited in note 101.

175. The order in *Joplin & Pittsburg Ry. Co. v. P. S. C.*, note 108, seems indefensible.

two cases but it is not so clear. *Landon v. P. S. C.*<sup>176</sup> did indirectly involve some orders of the Commission and these were enjoined by the federal court, but the injunction was dissolved by the federal supreme court. So, the orders stood. Whether they were reasonable or unreasonable did not appear.

Of the reversals above we may say that at least five of the orders were proper orders for the Commission to enter. If anything it has been too ready to attempt to extend the Act to cover a wide area. It should in matters of construction stick pretty close to the language, where that seems clear, and permit the supreme court to make the extensions. The rest of the reversed orders should not be excused, but some of them involved difficult questions of law on which courts might well differ. About half of the orders named were clearly not to be commended or excused.

### 9. Conclusions

The most striking thing to be noted is the attitude of the supreme court toward the Act and toward the Commission. As to the Act the supreme court has from the first insisted on liberal construction to enable it to be effectively administered, and on the whole, one can find little to criticize in its construction so far. As to the Commission, the court at first adopted a policy of watchful waiting. It seemingly desired to see if this new agency was worthy of confidence,—if it could be trusted with such important powers. It seems that the Commission has won the confidence of the court, and it is not too much to say that it has deserved such confidence.

Perhaps the Commission is the most active agency in the state. It has exhibited great energy and in its operations has probably come closer to the people in general than any other state agency. There are very few people in the state whose pocket books have not been affected by its activities, and they are well aware of it, too. The evidence at its hearings having almost always been taken locally and reports were always fully published in local papers.

Within the space of ten years the Commission has built up a system of handling the great volume of business coming before it. It is authorized by the Act to make rules for procedure at hearings. It has orderly and regular procedure at such hearings, and all interested parties have full opportunity to be heard. It publishes its important orders together with its opinions, and these now make up twelve good sized volumes. Many of these opinions contain long discussions of the law citing decisions of the Commission, of the state courts, and of other state and federal courts. In short its procedure and its opinions are very like those of a court. In fact it is a court, and not purely an administrative body as the supreme court insists, at least while engaged in formal hearings. At other times it acts as an administrative body.

A tendency to be swayed by local pressure and local opinion has been more or less marked. Probably it is less susceptible to such influences than the circuit courts of the state. It must be remembered that nearly all its formal hearings involve matters likely to arouse such pressure in some locality, while only a few cases which come before the local courts are of such character.

On the whole, while its record is far from perfect, it has proved itself a very energetic and earnest body, and has made a success to a reasonable degree at least. It certainly represents a vast improvement over the state of affairs that prevailed prior to its creation.

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176. Note 106. Some orders of the Commission were incidentally involved in this case.

There was no consideration of them on their merits.