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## Administrative Law-Writ of Prohibition Held to Lie against Public Service Commission

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means that any doctor performing an abortion without parental consent is incurring the risk of civil liability.

Another factor which would operate to keep a physician from performing abortions on at least younger minors is the Missouri statutory provision requiring the patient's informed consent to an abortion.<sup>50</sup> This provision was upheld in *Planned Parenthood*, the Court saying, ". . . it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences."<sup>51</sup> The physician might well decide that the younger minor is incapable of giving this informed consent and would refuse to perform the abortion to avoid criminal responsibility.<sup>52</sup>

In short, the Court in *Planned Parenthood* refused to issue guidelines in the area of third party consent provisions, thus paving the way for continuing litigation on this subject. While spousal rights are limited, the Court might uphold a requirement that the physician use reasonable means to notify the spouse of his wife's impending abortion. The Court again declined to extend the full panoply of constitutional rights to minors. As long as the parents have no final veto, legislation which ensures the parents' participation will probably pass constitutional muster. In other words, the Court limited its holding to the particular facts of the case, forcing legislatures to attempt to predict whether or not proposed legislation in this field will withstand constitutional challenge.

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## ADMINISTRATIVE LAW—WRIT OF PROHIBITION HELD TO LIE AGAINST PUBLIC SERVICE COMMISSION

*State ex rel. Toedebusch Transfer, Inc. v. Public Service Commission*<sup>1</sup>

The Public Service Commission<sup>2</sup> (hereinafter referred to as PSC), without hearing relator's protests, issued fifty-one certificates of convenience and necessity authorizing certain motor carriers to operate vehicles licensed for a certain weight. Before such certificates were effective, re-

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50. § 188.020(2), RSMo (1975 Supp.).

51. 96 S. Ct. at 2840.

52. § 188.065, RSMo (1975 Supp.), provides that any physician who does not comply with the informed consent provisions may have his license revoked. Section 188.075 makes non-compliance with § 188.020 a misdemeanor.

1. 520 S.W.2d 38 (Mo. En Banc 1975).

2. The PSC primarily regulates the operation of utility companies, railroads, trucks, and buses within the State of Missouri. § 386.250, RSMo 1969. The law

lators, a group of common carriers, filed a petition for a writ of prohibition in the Missouri Court of Appeals, Kansas City District. Relators contended that the PSC did not have jurisdiction to take such action under section 390.030.2, RSMO 1969, as amended in 1971,<sup>3</sup> because: (1) there was no statutory authority for licensing of vehicles in that specific weight class; and (2) section 390.030.2 was in violation of the state and federal constitutions. The PSC contended that prohibition would not lie because exclusive original jurisdiction was vested in the PSC and an exclusive method of judicial review was provided in section 386.510, RSMO 1969.<sup>4</sup> The court of appeals granted the writ of prohibition.<sup>5</sup> The dissent questioned whether prohibition would lie, and the case was transferred to the Missouri Supreme Court. The court held that a writ of prohibition would lie to determine the jurisdiction of the PSC, but found section 390.030 constitutional and refused to grant the writ of prohibition.<sup>6</sup>

A writ of prohibition is an order issued to a tribunal<sup>7</sup> commanding it to cease proceedings on a matter found to be outside its jurisdiction.<sup>8</sup> Missouri follows the traditional rule that prohibition is an extraordinary measure to be used only in cases where there is clearly no other adequate legal remedy.<sup>9</sup> Administrative agencies are subject to writs of prohibition under

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governing the PSC is considered to be a complete scheme for the regulation of public service corporations under its jurisdiction. *State ex rel. Kansas City Transit, Inc. v. PSC*, 406 S.W.2d 5, 10 (Mo. En Banc 1966); *State ex rel. PSC v. Missouri S. R.R.*, 279 Mo. 455, 464, 214 S.W. 381, 384 (1919). *See generally* Davis, *The Missouri Public Service Commission*, 42 U.M.K.C.L. REV. 279 (1974).

3. The 1971 amendment directed the PSC to issue certificates authorizing operations of vehicles licensed for a gross weight of 9000 pounds to any carrier operating vehicles licensed for a gross weight of 6000 pounds on Jan. 1, 1971.

4. Section 386.510, RSMO 1969, provides in part:

No court in this state, except the circuit courts to the extent herein specified and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties.

5. Case No. KCD 26478 (Mo. App., D.K.C., May 6, 1974).

6. 520 S.W.2d at 49.

7. "Tribunal" is used to denote a court, board, corporation, official, or other person or aggregation of persons, exercising or purporting or attempting to exercise judicial or quasi-judicial powers. 63 AM. JUR. 2D. *Prohibition* § 2, n.6 (1972).

8. *See State ex rel. Taylor v. Nangle*, 360 Mo. 122, 227 S.W.2d 655, *cert. denied*, 340 U.S. 824 (1950); *State ex rel. Allen v. Yeaman*, 440 S.W.2d 138 (K.C. Mo. App. 1969); 63 AM. JUR. 2D. *Prohibition* § 2, n.6 (1972).

9. §§ 530.010-.090, RSMO 1969; *Knisley v. State*, 448 S.W.2d 890 (Mo. 1970); *State ex rel. Ross Const. Co. v. Skinker*, 341 Mo. 28, 32, 106 S.W.2d 409, 411 (1937); *State ex rel. Elam v. Henson*, 217 S.W. 17 (Mo. En Banc 1919); MO. SUP. CT. R. 84.22 provides:

No original remedial writ, except habeas corpus, will be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.

*See generally* Note, *The Writ of Prohibition in Missouri*, 72 WASH. U.L.Q. 511 (1972).

judicial decisions<sup>10</sup> and the Missouri Administrative Procedure Act.<sup>11</sup> Review of PSC decisions is not governed by the Act<sup>12</sup> because there is a prescribed review procedure under section 386.510.<sup>13</sup> It grants jurisdiction to review in the circuit court only after the protesting party exhausts all avenues of administrative review. It also provides that review cases shall be priority over other civil suits,<sup>14</sup> and that decisions of the PSC may be stayed at the discretion of the court.<sup>15</sup>

In interpreting these provisions, courts have established two basic principles. First, exclusive original jurisdiction of all subject matter included in the PSC Law<sup>16</sup> and the Missouri Bus and Truck Law<sup>17</sup> is vested in the PSC.<sup>18</sup> In *State ex rel. Cirese v. Ridge*<sup>19</sup> the Missouri Supreme Court rejected the argument that concurrent jurisdiction existed in the PSC and the circuit court and held that "matters within the jurisdiction of the commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy."<sup>20</sup> Second, the exclusive method for judicial review of PSC decisions on subject matter within its jurisdiction is the review procedure under section 386.510.<sup>21</sup> In *Union*

10. *State ex rel. Brewen-Clark Syrup Co. v. Mo. Workman Compensation Comm'n*, 320 Mo. 893, 898, 8 S.W.2d 897, 899 (En Banc 1928); *State ex rel. Atkins v. Mo. Bd. of Accountancy*, 351 S.W.2d 483, 489 (K.C. Mo. App. 1961).

11. § 536.150, RSMO 1969.

12. The Missouri Administrative Procedure Act provides in part:

Any person . . . shall be entitled to judicial review thereof, as provided in section 536.100 to 536.140, unless some other provision for judicial review is provided by statute. . . .

§ 536.100, RSMO 1969.

13. § 536.100, RSMO 1969. See Sporleder, *Judicial Review of Orders and Decisions of the Missouri Public Service Commission*, 28 J. MO. BAR 376 (1972); Davis, *supra* note 2, at 295-302.

14. §§ 386.520-530, RSMO 1969.

15. § 386.520, RSMO 1969.

16. Ch. 386, RSMO 1969.

17. Ch. 390, RSMO 1969.

18. *State ex rel. PSC v. Blair*, 347 Mo. 220, 228-31, 146 S.W.2d 865, 868-70 (En Banc 1940); *State ex rel. PSC v. Mulloy*, 333 Mo. 282, 287-88, 62 S.W.2d 730, 731-32 (En Banc 1933); *Speas v. Kansas City*, 329 Mo. 184, 198, 44 S.W.2d 108, 114 (1931); *Katz Drug Co. v. K.C. Power & Light Co.*, 303 S.W.2d 672, 679 (K.C. Mo. App. 1957).

19. 345 Mo. 1096, 138 S.W.2d 1012 (En Banc 1940).

20. *Id.* at 1101, 138 S.W.2d at 1015.

21. *State ex rel. State Tax Comm'n v. Luten*, 459 S.W.2d 375, 378 (Mo. En Banc 1970) (dictum); *State ex rel. Spanish Lake Services Inc. v. Luten*, 500 S.W.2d 46, 48-49 (Mo. App., D. St. L. 1973).

Direct judicial review of administrative bodies that are judicial or quasi-judicial in nature is guaranteed by the Missouri constitution. MO. CONST. art. V, § 22. The legislature has the power to provide the method for such review, including the designation of courts which have the jurisdiction to review particular proceedings. *Warnecke v. State Tax Comm'n*, 340 S.W.2d 615, 618 (Mo. 1960); *Ward v. PSC*, 341 Mo. 227, 234, 108 S.W.2d 136, 139 (1937).

When courts review decisions of the PSC under section 386.510, the scope of review is limited to whether the decision is authorized by law and supported by

*Electric Company v. Clark*<sup>22</sup> the Missouri Supreme Court dismissed a suit for a declaratory judgment which sought to invalidate an order of the PSC and declared: "[T]he procedure provided for in § 386.510 is exclusive and jurisdictional."

*State ex rel. Public Service Commission v. Blair*<sup>24</sup> provides an exception to these two principles. The court refused to apply the principles when it found the subject matter of the PSC action to be clearly outside its jurisdiction.<sup>25</sup> It emphasized, however, that the statutory review procedure was exclusive if the decision of the PSC was within "the performance of its duties."<sup>26</sup> The court also declared that if the statute was unclear, the PSC had the power to determine its own jurisdiction in the first instance.<sup>27</sup>

The supreme court in *Toedebusch* cited the result in *Blair* as ". . . some authority for the position that the exclusionary provisions of § 386.510 . . . is [sic] not an *absolute* exclusion of the jurisdiction of the courts."<sup>28</sup> Comparing the facts of *Blair* and *Toedebusch*, the court noted that both challenged the jurisdiction of the PSC, sought a construction of section 390.030, and contained no PSC hearing to review. The court concluded that appeal through the statutory procedure in *Toedebusch* was an inadequate remedy because of the expense of appealing fifty-one cases and the impact of these priority cases upon the docket of the chosen court and other litigants in that court.<sup>29</sup>

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competent and substantial evidence upon the whole record. *State ex rel. Chicago R.I. & Pac. R.R. v. PSC*, 312 S.W.2d 791, 791 (Mo. En Banc 1958); *State ex rel. Centropolis v. PSC*, 472 S.W.2d 24, 25-26 (K.C. Mo. App. 1971). See Davis, *supra* note 2, at 295-302; Sporleder, *supra* note 13.

In circumstances where there is a conflict of regulatory power between the PSC and another government entity, it may be possible indirectly to secure judicial review of PSC orders by collateral attack on the claim that the regulatory activity invades the jurisdiction of the PSC. See *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973); Wilson, *State and Local Government—Control of Intercity High Voltage Transmission Lines*, 39 MO. L. REV. 658 (1974).

22. 511 S.W.2d 822 (Mo. 1974).

23. *Id.* at 825.

24. 347 Mo. 220, 146 S.W.2d 865 (En Banc 1941). A group of truckers, without requesting a hearing before the PSC, petitioned the circuit court for a declaratory judgment to determine whether their operations came within the jurisdiction of the Commission under the Bus and Truck Act of 1931 and for an injunction to prohibit the PSC and others from arresting them for violations of the Act. The PSC then petitioned the Missouri Supreme Court to prohibit the circuit court judge from proceeding further in the suit. The court not only refused to grant prohibition, but went on to interpret the statute in a manner which exempted the truckers from its provisions.

25. *Id.* at 230, 146 S.W.2d at 870.

26. *Id.*

27. *Id.* at 236, 146 S.W.2d at 874.

28. 520 S.W.2d at 49 (emphasis in original).

29. The court rejected a strong dissent in the court of appeals contending primarily that the statutory review procedure provided a speedy and adequate remedy. The dissent distinguished *Blair* as a situation in which there was a complete absence of jurisdiction in the PSC, whereas in *Toedebusch* the PSC unquestionably had jurisdiction of a matter pending before it. It also maintained that the cost

It could be argued that *Toedebusch* means that any challenge to the jurisdiction of the PSC which would result in a large number of appeals is a basis for the protesting party to disregard the statutory review procedure and petition for prohibition. However, such an argument will probably be rejected because the impact of *Toedebusch* is limited by several factors. First, the court placed a caveat on its decision: "In saying [that prohibition will lie] we do not wish to pave the way for frequent suits of this nature."<sup>30</sup> Second, prohibition will only lie when the relator contends that the PSC is acting beyond its jurisdiction.<sup>31</sup> Third, the relators in *Toedebusch* challenged the constitutionality of the directing statute, not a finding of the PSC.<sup>32</sup> Fourth, in both *Toedebusch* and *Blair* no PSC hearing had occurred for the circuit court to review.

An issue not discussed by the court was the availability of consolidation of claims in circuit court to avoid problems of multiple litigation. The Missouri Supreme Court Rules grant courts the discretionary power to consolidate actions involving common questions of law or fact.<sup>33</sup> In *Toedebusch*, the suits in circuit court would have involved identical factual situations with common questions of law—*i.e.*, the constitutionality of the directing statute and the proper jurisdiction of the PSC. This commentator could find no reason why consolidation would not be appropriate.

Prohibition is an extraordinary measure to be used only in cases where there is clearly no other adequate legal remedy. The Missouri Supreme Court in *Toedebusch* declared that prohibition would lie to solve problems of multiple litigation because the expense and impact on the circuit court of the statutory method make it an inadequate remedy. However, such method is not inadequate because the appeals thereunder could be consolidated in the circuit court and thus avoid any excessive expense or adverse impact. The court may have been motivated to ignore such consolidation by a general dissatisfaction with the statutory review procedure or a desire to make a decision on the merits of the challenge. Nevertheless, the court has needlessly entrenched an exception to the exclusive method of review provided by section 386.510.

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of litigation was not a sufficient cause for the use of prohibition and consolidation was available to avoid problems of multiple litigation. Case No. KCD 26478 (Mo. App., D.K.C. May 6, 1974) (Pritchard, J., dissenting).

30. 520 S.W.2d at 49.

31. By definition, prohibition is a remedy restricted to cases where there is an act in excess of jurisdiction. See notes 10-12 *supra*.

32. In many cases there will be no constitutional ground to attack the authorizing statute and the challenge will be to the findings of fact by the PSC.

33. See MO. SUP. CT. R. 66.01(b):

When civil actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the civil actions; it may order all the civil actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

State *ex rel.* Allen v. Yeaman, 440 S.W.2d 138 (K.C. Mo. App. 1969).