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Municipal Corporations-Public Utilities-Public Service Commission

MUNICIPAL CORPORATIONS—PUBLIC UTILITIES—PUBLIC SERVICE COMMISSION—The city of Logansport has for some thirty years owned and operated an electric light plant. Said plant was paid for originally with funds raised by taxation, and was later enlarged and extended in part with funds raised by taxation, and in part with surplus earnings of the plant. The Public Service Commission of Indiana ordered a reduction of the city's rates of charges to the public for electric current. The city brought an action to enjoin and set aside the operation of said order on the following grounds, as stated by the four paragraphs of the complaint: (1) Right to manage the plant and fix the rates to be charged is vested in the city by virtue of its inherent power as an independent body politic or by the right of local self-government, and such rates cannot be controlled by the Legislature or by any commission appointed by it. (2) The law creating the Public Service Commission of Indiana does not apply to municipally owned public utilities, and the commission has no right thereunder to fix the rates in question. (3) Rates fixed by the commission are inadequate and confiscatory, and are therefore unlawful and unconstitutional since they do not provide a fair return upon the fair value of the property (that to which a privately owned utility is entitled), but provide only sufficient revenue to pay operating and maintenance charges. (4) Rates are insufficient because they do not yield a sum sufficient to compensate the city for the taxes which the plant would pay if it were privately owned.

The city appealed from a judgment sustaining demurrers to the four paragraphs of the complaint. *Held,* judgment reversed, with directions to overrule the demurrer to the third paragraph only. *City of Logansport v. Public Service Commission,* Supreme Court of Indiana, July 1, 1931, 177 N. E. 249.

The decision is beyond criticism. The demurrer to the first paragraph of the complaint was correctly sustained because municipal corporations have no inherent right of self-government which is beyond the legislative control of the state, but are political subdivisions of the state, exercising delegated powers. *City of Tulsa v. Oklahoma Natural Gas Co.,* 4 Fed. (2d) 399, 269 U. S. 527; *Carter County v. Sinton,* 120 U. S. 517, 30 L. Ed. 701; *City of Pawhuska v. Pawhuska Oil & Gas Co.,* 250 U. S. 394, 63 L. Ed. 1054. The action of the court on the other demurrers was obviously correct in view of the statutes hereinafter discussed.

The decision definitely expresses the necessary result of the Public Service Acts of Indiana. Said acts read as follows: "The term 'public utility' as used in this act, shall mean and embrace * * * every city or town that now or hereafter may own, operate, manage, or control * * * any plant or equipment within the state * * * for the protection, transmission, delivery or furnishing of heat, light * * * or power * * * either directly or indirectly to or for the public." Burns' 1926, sec. 12672. Plainer language could not be used. Municipal corpora-

tions, such as the appellant, are expressly placed under the regulation of the Public Service Commission, and therefore subject to the obligations of public callings on the same basis as privately owned concerns.

Some of the statutes establishing public utility commissions have expressly excluded municipally owned utilities from the jurisdiction of said commissions. *Humphrey v. Pratt,* 93 Kan. 413, 144 Pac. 197; *Springfield Gas & Electric Co. v. Springfield,* 257 U. S. 66, 66 L. Ed. 131. Others, as those of Indiana, have expressly included them. *Wisconsin Traction, Light, Heat & Power Co. v. Menasha,* 157 Wis. 1, 145 N. W. 231. The purpose of this article is to consider the efficacy of the latter action.

The argument that is invariably presented to justify such inclusion is the theory that while a municipality is engaged in a *proprietary* business, such as furnishing electricity to consumers, it is exercising not public, but *private* powers, and is therefore to be treated *quoad hoc* as a private corporation. Learned text-writers have stated that the "division of the powers of a municipal corporation into two classes, one public, and the other private" is considered as being "well established." Dillon, *Municipal Corporations,* 5th ed., sec. 110. But the above author also candidly admits that such division is a product of "judicial legislation."

The decisions giving rise to such a theory have almost exclusively dealt with questions as to the liability of a municipality in tort for acts of its officials or agents. 34 *Yale Law Journal* 1-45, 129-143, 229-258. Should the same theory be adhered to in determining whether a municipally owned utility is to be subjected to public calling obligations? In *Pasadena v. Railroad Commission,* 192 Pac. 25, 1 A. L. R. 1425, it was held that a Public Utilities Act placing "Every private corporation * * * mining, operating, managing, or controlling, any commercial * * * plant * * * for the production, generation, transmission, delivery or furnishing of heat, light, water or power" under the control and regulation of the Railroad Commission did *not* apply to a municipal corporation so operating. The court used the following language: "It is not true that a city is a private corporation when carrying on a municipally owned public utility. * * * No decision so holds. * * * The burden of the arguments consist of efforts to find reasons for holding it liable to the same extent as a private corporation engaged in the same service, notwithstanding the fact the city carries on the business as a municipal corporation." The use clearly shows a decided tendency against any application of the theory to such situations.

Edwin M. Borchard, who has made a very extensive study of this problem, makes this statement: "The fact is that all functions performed by a municipality are for the public benefit, otherwise they could hardly be undertaken with public funds or by public officers." 34 *Yale Law Journal,* 136.

The case of *Springfield Gas and Electric Co. v. Springfield* (*supra*) must be considered. It was therein held that "leaving free in the matter of charges a municipality engaged in producing and selling electricity to private consumers, while making the rates of private electric companies subject to the approval of the state public utilities commission, does not deny to the private corporations the equal protection of the laws." The

true situation was that the city was charging such low rates that it was drawing customers away from the private company, plaintiff.

Justice Holmes in the opinion used the following language, "The municipal corporation is allowed to go into business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to the public body, and must be used for public ends. * * * *Whatever the value of the distinction* between the private and public functions of the municipality, the duty of its governing board in this respect, * * * is public. * * * The plaintiff's argument * * * attempts * * * to overwork the *delicate* distinctions between the private and public capacities of municipal corporations." (Italics added.) The italicized words seem to indicate that the Supreme Court has considerable doubt as to the propriety of the distinction. At least the court did not deem the situation at hand a suitable one in which to apply any such "delicate" distinction.

The above decision has been criticized by some. The following is an example. "The Springfield case, however, serves to check the process of judicial evolution by which this distinction has been established. Its result may or may not be favorable to the policy of municipal ownership. On its face it would seem to give a strong impetus thereto, but it may be doubted whether in complaints to the municipal authorities or in resorts to the ballot box, the municipal residents will find any such adequate protection from abuses in the public utility service rendered by his city as that accorded the consumers of privately owned utilities through the administrative boards established by the public utilities acts." Overton: Regulation of Municipally Owned Public Utilities, 2 *Cornell Law Quarterly* 191.

Despite such expressions of doubt the fact remains that the taxpayers eventually bear the burdens of municipal activity in event of loss or deficit. It is reasonably to be assumed that a taxpayer would more readily consent to a necessary increase in prices of electricity consumed by him than to a direct increase in his taxes. Why should not the city be permitted to regulate its rates as it sees fit in view of attending conditions? The Springfield case (*supra*) held that "a city council has no such interest in a municipally owned electric plant as to make it incompetent to fix the rates." If profits are made, the public is benefitted, and taxes may consequently be reduced. The consumers would indirectly carry the burden.

As regards the adequacy of the remedy by way of the ballot-box for abuses in service rendered, it is hardly just to say that a public spirited citizenry cannot maintain efficient officers in control of the municipality who will see that relief is obtained.

The reason for regulation of private companies is the protection of the public from the dangers of unsocial activities by them. This reason does not apply to municipally owned plants because the public does not need in this same way to protect itself against itself.

If the other view is adopted, as by Indiana, the fact necessarily follows that privately owned utilities will be well pleased, and will rest assured that municipally owned concerns are subject to the same public calling obligations as imposed upon them. The Acts are in this regard aligned upon the side of the private owner of public utilities. Of the two results,

the former would seem more desirable, and more in keeping with the true concepts of municipal powers. The decision of the case in question is correct, but the Public Service Commission Act is wrong in this respect, and should be amended. P. J. D.